crime justice and society

volume 2

legal security

commission of enquiry into the administration
of justice on criminal and penal matters in québec

crime, justice and society

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COMMISSION OF ENQUIRY INTO THE ADMINISTRATION OF JUSTICE ON CRIMINAL AND PENAL MATTERS IN QUEBEC

THE COMMISSION

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Social Welfare Court
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* His Honor Judge Jacques CODERRE

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** resigned to run as candidate in the federal election of June 25, 1968.
* resigned following appointment as judge during the enquiry.

GOVERNMENT OF QUEBEC

COMMISSION OF ENQUIRY INTO THE ADMINISTRATION OF JUSTICE ON CRIMINAL AND PENAL MATTERS IN QUEBEC

To his Excellency

THE LIEUTENANT-GOVERNOR IN COUNCIL

WE, THE COMMISSIONERS,
FORMED INTO A COMMISSION OF ENQUIRY
INTO THE ADMINISTRATION OF JUSTICE
ON CRIMINAL AND PENAL MATTERS
HAVE THE HONOUR
TO PRESENT TO YOUR EXCELLENCY
THE SECOND PART OF OUR REPORT
WHICH DEALS WITH
LEGAL SECURITY IN CRIMINAL AND PENAL MATTERS.

CRIME, JUSTICE AND SOCIETY

LEGAL SECURITY

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INTRODUCTION

THE DEMAND (1-2)

1. Of all the subjects dealt with in the different briefs presented to the Commission, none arises more often than legal assistance. This, in itself, would be justification for a special report. In addition to this, as explained in the general introduction (Volume 1, paragraph 33-34) the Commission quickly came to the conclusion that the equality of citizens before the law was the first step in the modernization and humanization of the administration of justice.

For these two reasons the second volume of the Report is devoted to legal security.

2. The different briefs presented to the Commission show both common denominators and serious differences in the approach to the subject of legal assistance.

All the organizations, which have studied the subject, stressed the importance of placing all citizens on an equal footing when dealing with the administration of justice. Most of the briefs use the term *legal assistance* or *judicial assistance,* the suitability of which has already been questioned in the general introduction.

The divergence of views is shown more clearly in the evaluation of the needs of Quebec citizens, and the degree to which the voluntary services of lawyers have responded to these needs. The various briefs also differ with regard to the priority to be established in the principles and the methods of application.

1 — THE RECOMMENDATIONS SUBMITTED (3)

3. The following are the recommendations and comments dealing specifically with legal security which formed part of the various briefs presented to the Commission.

ASSOCIATION DES SERVICES DE RÉHABILITATION SOCIALE

This service (legal security) does not exist in most of the regions which we represent.

Those who wish to avail themselves of the services of a lawyer, and who have not the means, are therefore, deprived of one of their most important rights — that of being represented. Realizing the complexity of judicial procedures, we know that it is difficult for a person to appear before a court and present a sound defence without the aid of a lawyer. In these circumstances, those who are brought before the court often find themselves helpless during the trial, not knowing what is going on around them, and preferring sometimes to plead guilty in order to shorten the traumatic experience resulting from their appearance in court. To make up for the lack of resources available to the social service agencies, the Association for Services of Social Rehabilitation, makes the following recommendation :

— *"That an efficient system of legal aid be established to serve the different regions of the Province".*

THE JOHN HOWARD SOCIETY OF QUEBEC

The John Howard Society is firmly of the belief that no person should be denied the provision of counsel. This is a particularly important matter for those less fortunate members of society who may have little education and less awareness of the importance of legal representation. As the accused, within 24 hours of arrest, has to decide whether to plead guilty or not guilty, whether to elect trial before magistrate, a judge or a jury ; the importance of full awareness of his best interests can only be assured by the proper availability of legal counsel to all. In order that this should be possible, proper financial support to obtain the required professional personnel should be made immediately available.

FÉDÉRATION DES TRAVAILLEURS DU QUÉBEC

The system of legal aid which is in effect at the present time, does not meet the minimum requirements of a true system of legal security, which must include the right of all citizens to be equal before justice. It will be sufficient for us to mention some of the weaknesses of the legal aid which cannot be eliminated as long as the actual structure of the present system is unchanged.

- There are no organizations in existence which turn the accused who have need of assistance over to lawyers.
- 60% of the accused appearing before a judge do so without the help of a lawyer.
- A personnel consisting of two or three lawyers is definitely insufficient to assure the coordination of a service of assistance.
- The chosen lawyer often turns the legal aid case over to a junior in his office.

- No one takes the trouble to prepare the case for the defence.
- Quite often the lawyer does not have the necessary competence to defend the kind of case for which he is responsible.
- A budget of $150,000 a year to guarantee the equality of citizens before justice is absolutely ridiculous.

We urge you to recommend the *introduction of a judicial system which will definitely assure all citizens equality before justice.*

This system must guarantee :

1) That all accused appearing in court will be represented by a lawyer.
2) The lawyer will have time to study thoroughly the file before the appearance.
3) That the accused will have free choice of his lawyer.
4) That the cost of the court and the lawyer will be paid from public funds.
5) That the nature of the offence being dealt with must not, in any case, limit the criteria of admissibility ; it will, however, be necessary to establish precise standards with regard to the revenue of the client.
6) That all citizens who come under any Act concerning public aid, have the automatic right to legal security.
7) That the welfare services should also have the right to refer to the legal aid all those individuals who have recourse to their service.
8) That every individual who earns less than $5,000 a year should not be called upon to prove his financial incapacity in order to be represented in court.

ASSOCIATION DES AUMÔNIERS DU QUÉBEC EN CRIMINOLOGIE

Without going into the technical details of the form which this legal aid could take, we would like to refer to experiences here and there in the Province of Quebec, where in serious cases, the judge, because of the absence of legal aid has designated a lawyer, and without cost, to those individuals who have no one to defend them. We, like many others, are in agreement with the principle of legal aid, because the indigent, without any knowledge of even the elementary procedures of justice, is in an unfavourable position before the court, and is often exposed to a very serious denial of justice. All citizens are equal before the law. This statement should be true in every sense. Otherwise there is recourse to disgraceful procedures which include telling an accused to plead guilty while assuring him that it will be possible to negotiate a less severe sentence from the judge. Such procedures are obviously contrary to ethics, to law and to moral justice.

We therefore recommend that *there be organized throughout Quebec legal aid for all needy persons.*

FÉDÉRATION DES ÉTUDIANTS EN DROIT QUÉBECOIS

1) Because of the large number of legal aid cases as shown by the experience of the legal aid office of Montreal.

2) Because justice is a need as fundamental as health and education.

3) Because of the right of every person to have his case heard fairly and publicly before a court in which he will be assured of all the necessary guarantees with regard to his defence, and the promotion of his rights and obligations (Article 10 and 11 of the Universal Declaration of the Rights of Man, General Assembly of the United Nations, 10 December 1948).

4) Because of the essential equality of all men before the law, and their right, without distinction, to an equal protection of the law (Article 1-B of the Canadian Declaration of the Rights of Man, approved August 10, 1960).

5) Because of the increase in legal and extra-legal costs.

6) Because the conjunction of these two realities conflicts with the principle of equality of citizens before the law.

7) Because of the extent of the problem which exists in Quebec.

8) Because of the inability of the Bar alone and a few praiseworthy efforts by others, to assure that all those individuals involved with justice without distinction of class or revenue, have the services of a lawyer.

It is proposed that Quebec

a) *establish a legal aid service in every judicial district in the Province ;*

b) through this service, help less fortunate individuals and groups ;

c) assign to this service permanent lawyers in a sufficient number to satisfy the needs of the local population ;

d) see to it that this service works in close collaboration with the organisms devoted to the task of helping families or the individual ;

e) make certain that each office of legal aid includes in its personnel at least one social worker, who will devote full time to the humane aspects which invariably enter into the legal aid cases ;

f) through this service assure free consultation to any individual who has need of legal advice ;

g) employ for this service an adequate clerical personnel, as well as (or according to the case) a statistician(s) and a researcher(s) on a full time basis ;

h) pay its legal and clerical personnel salaries which will be competitive with the offices of lawyers and companies ;

i) extend the work of legal assistance to the Social Welfare court ;

j) engage law students for this service in the same manner that the ordinary legal office does.

It is also proposed in this system :

i) that the lawyer endeavour to make arrangements with the creditors of the client so that the matter can be negotiated out of court ;

ii) that the service give the client the possibility of choosing as his representative, either a lawyer of the service, or a private practitioner ;

a) the private practitioner, if he accepts the case, will be remunerated at the rate established by the lawyers' tariffs, whether it be in a civil case, or in a criminal one ;

b) the practitioner will not be permitted to refuse the case unless he has a valid motive.

iii) that the procedures be made "in forma pauperis" ;

iv) that the service undertake the procedures of execution of judgment and of appeal of certain judgments when the circumstance warrants it ;

v) that the service benefit from the collaboration of all the juridical world, notably the judges, the Chamber of Notaries and the various police forces ;

vi) that every legal aid bureau sees to it that at least one of its lawyers is in court every day for the purpose of assisting those who, because of lack of means, would not be adequately represented before the courts, thus running the risk of losing their rights.

CLUB FLEUR DE LYS DU QUÉBEC

The present system of legal aid is wholly inadequate and leaves the door open to intolerable abuse in our society which presumes itself to be modern. There is no organized and developed legal aid service in criminal and penal matters in the Province of Quebec. It is true that in certain extremely serious cases, as for example, murder, rape, etc., the court can designate a legal office to defend the accused.

For several years in the districts of Montreal and Quebec, almost superhuman efforts have been made to enable those who find themselves involved with justice, whether it be on penal or criminal matters, to be able to benefit from the free services (or almost so) of a lawyer. From all indications it appears necessary for the state to organize a full legal aid system in criminal and penal matters. To achieve this, we would suggest that the prosecution make available to the defence, on written or verbal request, a free copy of the transcript of the stenographer's notes taken at the preliminary enquiry, and at the inquest of the coroner, according to the case.

That the cost of subpœnæs and issuing warrants, the transport and period of waiting of witnesses of the defence be charged to the State.

That the cost of experts' reports and the fees for experts be charged to the State and that, for all cases before the criminal assizes, for which the possible sentence is imprisonment for life, when it is necessary to assure for the accused a full and entire defence. In all other cases when the accused is too poor to assume his defence and to repay his lawyer's fees.

That the State remunerate the lawyer who undertakes to defend the accused who has not the means to pay, whether it be because of insufficient revenue or because he is not working, or because he has a family to take care of, thus being

unable to meet unexpected and additional expenses, such as those involved in a case in court. It is also important that the system of legal aid respect in every possible way, the freedom of the individual to choose his own lawyer.

The lawyers interested in the practice of criminal and penal law could give their names annually to those in charge in each district of the service of legal aid. Those having need of a legal aid service would be free to choose their lawyer from the group of those have offered their services to the legal aid office. Moreover, the same procedure should be followed in civil matters. The Bar would fix the tariff to be paid lawyers as is done in the Superior Court. A memorandum of the costs would be prepared by the lawyer and certified by the Clerk of the Peace, or a Deputy Clerk, before being sent to the organism in charge of the legal aid service. There would be a fixed tariff to be paid to a lawyer for an appearance. Also for each period in court; there would be an hourly rate for investigations and the trial, with a maximum per day.

We believe that the best test (to establish indigency) as it is necessary to start somewhere, would be that established by the Minister of Revenue for the Province of Quebec, with regard to the income tax which the individual is called upon to pay. Those who are on relief at the time they are involved with the administration of justice, should also benefit from this service. The lawyer on his part, would give his time without charge, for the preparation of the case, the questioning of witnesses, the visits to prison, the visits of the clients to his office, the study of all the laws and jurisprudence, etc.

The advantages of this system would be that the younger lawyers would become interested in the dignified practice of criminal law, and it would permit the interested lawyer to be certain that his fees are not paid by money secured criminally.

CONFÉRENCE DE LA SOCIÉTÉ ST-VINCENT-DE-PAUL

The male, female and student sections of the Conference of the Society of St. Vincent de Paul of the Diocese of Quebec, gathered in full assembly at the Laval Centre of Quebec December 3, 1967, have unanimously adopted the following resolutions, leaving it to the Central Council of Quebec to send copies to all those who should receive them.

WHEREAS the real purpose of justice is... "the life, honour and fortune" of individuals, or better, "the respect of the rights of the individual";

WHEREAS, one of the essential attributes of justice is... its availability to everybody independent of all other considerations, whether they be those of pecuniary, or a particular nature;

WHEREAS the recent developments in the domain of legislation have contributed to reduce in an appreciable manner, the great division which exists on the one hand between reality, and on the other the availability to everyone of civil, penal or criminal justice;

WHEREAS, moreover, the members of the Order of the Bar - those in Quebec in particular - have in the past contributed greatly to make up the deficiency to assure a true system of legal aid which would effectively carry on the defence of the rights of those who are financially deprived... quite a number of them going so far as to consider their services as charity and to pay out of their own pocket the legal expenditures and costs involved;

WHEREAS, however, in the domain of legal aid, the actual needs of those who are deprived of financial resources - and this is the case for the majority - are out of all proportion to what is available at the present time, whether it be from those in private enterprise, or from society;

WHEREAS with regard to our Conferences, hardly a week passes, not even a day, when our members deplore the sad and unhappy consequences of so few being able to have access to our Quebec justice;

WHEREAS the Bar of the Province, as in the case of the Bars in the metropolitan centres and other areas, are fully aware of this defect which brands our justice, and they earnestly hope that it will disappear, have recently begun energetic action in the right direction;

WHEREAS this society in good cause believes that legal aid should not continue to be considered by the organization and its members as an obligation of pity but a duty of justice and charity for the entire society;

WHEREAS this same society, for the purpose of assuring the well being of the individual has, moreover, found it appropriate to introduce various systems of aid, without having yet, however - in the domain where the stake is nothing other than "the life, honour and fortune of the individual", or, "the respect of the rights of the individual" - laid the foundation of a system of aid truly adapted to the needs of our period;

FOR THESE REASONS the aforesaid sections of the Society of St. Vincent de Paul congratulate the Bar of the Province and the other organisms associated with it most warmly, for the great interest they have shown in the serious problem of the availability of justice to all, and they earnestly urge the governmental authorities concerned to give immediate consideration to finding a solution.

BARREAU DE HULL

Legal aid is an institution which must stem from a social measure adopted by the Provincial Government which has the responsibility of respecting the rights of all citizens. The members of the Bar are those who must assume the responsibility of seeing to it that this social measure is applied without discrimination, but it is not fair that only the members of the Bar undertake all the costs. The Bar of Hull has taken the first steps to establish a local organization. A committee has been formed and application has been made for a charter for a non-profit company for this purpose. Sub-committees are now working to establish the general rules of the said corporation, as well as the tariff of reasonable fees.

The corporation includes as ordinary members, all the practicing members of the Bar and as associate members, all individuals physically or morally desirous of participating in the application for legal aid. The directors of this corporation would be the members of the Bar who should also be members of the legal aid committee of the Bar of Hull. An administrator, in addition to his regular duties, should receive the requests for aid. Following this he would study the case to determine whether or not the applicant should benefit from the service. Finally he would refer the case to a practicing lawyer, who would assume responsibility for the case in accordance with the tariffs and conditions established by the corporation.

Those individuals not having the necessary funds might however, be able to pay part of the cost. They would be called upon to pay an amount which is considered reasonable.

CONFÉDÉRATION DES SYNDICATS NATIONAUX

... It is necessary to agree that even if there is no objection to respect of the principle which says that every accused should have the free choice of a lawyer, such a declaration remains theoretical in most cases : those of individuals unable to meet the costs of penal procedures.

Almost from the end of the last century, the legal philosophies of the Western world, have unceasingly praised the merits of one of the characteristics of the juridical systems of this hemisphere, the rule of law. One of the facets of this principle, as described by the English jurist, Dicey, requires that all be equal before the law. This declaration is more of an ideal to attain than a reality, more of a philosophy of rights rather than a positive right.

But if there is justification for quoting philosophy, why not realize that this aspect of the principle of equality if observed in the breach in Quebec, at least with regard to the possibility of the less fortunate being able to put up a full defence because they cannot pay the cost of a lawyer.

It's not a matter of negating the aid given by the various legal aid offices of the Province of Quebec : it is really a matter of honestly facing up to a deficiency and of being able to distinguish between charity and distributive justice.

Since the beginning of the century, the State has recognized and assumed its responsibilities in many domains : old age, family allowances, the handicapped, widows, education, and hospital insurance ... it is time that serious thought be given to legal assistance. Not to mention other countries, many provinces have established such services, and that of Ontario, for one, seems to give satisfactory results. In Quebec there is more and more talk about this. The solutions put forward by the government, by the opposition, by the consulting committee on justice and even the various organisms of the Bar seem to us to be only palliatives. It is necessary to establish a system in law. Mention should be made in passing, of the excellent study made by Mr. Bernard Grenier on this subject, a study published in the juridical review Themis in 1966, No 1 p. 365 under the title "La Justice Accueillante à Tous".

It is appropriate therefore, to end this chapter by expressing the hope that in the shortest possible delay the authorities will name a committee, formed not only of jurists but also of economists and sociologists, authorized to enquire into the real needs of the population of Quebec in this area, and to *recommend as a result, a system of legal aid which will answer all the present needs.*

SOCIÉTÉ D'ORIENTATION ET DE RÉHABILITATION SOCIALE

Considering :

1. that the accused who is arrested is not considered guilty until after establishment of proof of his guilt and the verdict of the judge ;

2. that the accused generally speaking is not familiar with the operation of the court and the judicial procedures ;

3. that certain officers of justice, police, lawyers, sheriffs, in endeavouring to close their files, often persuade the accused to plead guilty under the pretext that he would secure an advantage thereby and that he won't antagonize the court ;

4. that those who are accustomed to being in court and are better off economically, and those who cooperate with the investigating officers, are able to communicate much sooner with their lawyer ;

5. that there is serious prejudice against the accused who is detained or who is kept under bail, and whose guilt has not been proved ;

We recommend

1. that there be a lawyer continually available to the accused, who could use his services free of charge,

2. the formation of a well-organized defender service on a provincial basis, so that all accused can benefit by the protection granted by the law, and take full advantage of their rights before the court.

2 — THE EXTENT OF THE NEED (4)

4. None of the briefs submitted had any criticisms of the Quebec Bar ; even those which recommended a system diametrically opposed to that which is in effect at the present time, had great appreciation and admiration for the benevolent services offered by lawyers in the different judicial districts. However, most of these comments underlined the fact that *this formula does not suffice,* even though the Quebec Government has increased its monetary contributions considerably in the course of recent years [1].

Although the briefs were unanimous in recommending a system of legal security on a much broader base, it was not possible to secure an exact image of what Quebec public opinion was asking Some praised the merits of the permanent public defender, while others preferred that the accused citizen have the opportunity to use a private practitioner.

The Commission has been impressed with the recurring thought in all the memoranda : "To give everyone equal access to the administration of justice".

All the organizations were in agreement in expressing the hope that the State include the field of justice in its social responsibilities. In other words, public opinion definitely preferred, as a general principle, that society assume the responsibility of an overall service of legal security, with regard to its less fortunate citizens.

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[1] The amounts spent by the Minister of Justice for the office of legal aid :

1965-66	$ 12,000	
1966-67	$ 55,000	$125,000 Montreal
1967-68	$140,000	$ 15,000 Quebec
1968-69	$200,000	

Public opinion is, that partial efforts no longer respond to the needs, and that the State cannot delay a direct intervention much longer. It is evident that the public is unable to measure the full extent of the needs. Even a commission of enquiry could not do this unless it devoted to this one subject, all the time granted to it for an evaluation of many diverse problems. It is therefore, fortunate, that we have been able to take advantage of a detailed enquiry which supplied us with authoritative facts.

This enquiry made by Mr. Jean T. Loranger covered *10 years of activities of the Legal Aid Bureau of the Bar of Montreal*. We are publishing it as an Annex [1] to our own study on legal security. Thanks to it, we have been able to reduce to a very few points, the investigation into the local legal aid needs and the *economic* evaluation of the various formulas.

I—THE BASIC THEORIES

[1] The Annex referred to will only be found in full in the original French text.

I — THE BASIC THEORIES

A — THE GENERAL PHILOSOPHY (5-10)

1 — UNIVERSAL DECLARATION OF THE RIGHTS OF MAN (5)

5. Legal security finds its theoretical basis, and its full justification in the Universal Declaration of the Rights of Man :

> *Every individual, as long as he is a member of society, has the right to social security ; he is entitled to enjoy economic, social and cultural rights, indispensible to his dignity and to the full development of his character* [1].

The subsequent Canadian texts have extended this universal declaration by adding to it cogent explanations. However, our country has not yet known either in its legislation, nor its jurisprudence the spectacular interpretations that the Supreme Court of the United States has given to the Universal Declaration of the Rights of Man and to the American Constitution.

In our country other sectors of social security have made much more progress than legal security.

2 — THE QUEBEC EVOLUTION (6-8)

6. The concept of social security has developed considerably during the past 20 years, and to be convinced of this, one has only to look at the reports of different Quebec Enquiry Commissions. We quote first of all, from a study made in 1955 by the Royal Commission enquiring into the Constitutional Problems (Tremblay Report) :

> Measures of social readaptation and prevention must ultimately be integrated into a system of *social security* which assures a sufficient guarantee of stability in the enjoyment of the good things in life, the good inherent in the human person, and the benefits of *order and justice* in any given milieu . . .
>
> Except for those measures of security, the cost of which is shared with Ottawa, the Government of Quebec, by its system of welfare, only wishes to play a supplementary role and look after the needs of certain categories of indigents and families. Its philosophy is based on charity, and combines the traditional concepts of aid, mutual aid and insurance. The Province has undertaken,

[1] *Universal Declaration of the Rights of Man,* Article 22, December 10, 1948.

with success, the readaptation of some groups of the population, either by a bold programme of colonization, or by the vigorous reorganization of its teaching techniques, or finally by encouraging the movements of *self-help* such as co-operatives of all kinds. Certain measures, such as the Apprentice Act, have even resulted in a fruitful cooperation of different social classes for the well-being of an entire sector of production and consumption.

It is only accidentally, and by its collaboration with the formulas of security of Ottawa regarding old age assistance, pensions to the blind, aid to invalids, etc., that the Quebec Government adheres to the new concept of the redistribution of revenue [1].

7. More recently than that, the Parent Report indicated extremely detailed responsibilities which the State should undertake, principally on educational matters :

> It can then be stated that for spiritual and humanistic reasons, just as much as for reasons of efficiency, modern society, by its dual nature of being industrial and democratic, depends more than previously on general education and increased schooling. It is within this perspective that we have said that the school system insofar as it is a system - must in modern societies follow a threefold purpose :
>
> — *make available to everybody* without distinction of belief, racial origin, culture, social level, age, sex, health or mental abilities, an education of good quality and answering the different needs ;
>
> — allow everyone to follow his studies in that field which responds best to his taste and his interest, to the highest level that he is able to attain, and to thus benefit from everything which can contribute to his *full development ;*
>
> — to prepare youth to be able to live in this society, that is to say, to gain their living by useful work, to intelligently assume all their social responsibilities in full equality and liberty, and to offer to adults the greatest possible opportunities for *self-improvement.*
>
> These three objectives summarize the challenge to our school system, and what it must do if our society is to continue to progress [2].

And the Parent Report concludes "that the State must assume an increasing responsibility in education. Charged with the welfare of civilian society, it becomes necessary to realize the objectives which we are endeavouring to attain today in an educational system" [3].

Thus the Report awakens the State to its responsibilities in research, and using it for the common good. It led society to accept and even to

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1 GONZALVE POULIN, O.F.M., *Royal Commission Enquiring into Constitutional Problems,* 1955, Annex 2 : Social aid in the Province of Quebec (1608-1951) pp. 193-4, (the italics are our own).

2 *Report of the Royal Commission of Enquiry into Education in the Province of Quebec,* Third part, Vol. 4, par. 5.

3 Ibidem, par. 6.

demand greater government action in the matter of education. In responding to this wish the State recognized that it was its responsibility to guarantee citizens the respect of their rights. The report ranked education amongst these rights.

8. Even more recently, the first part of the Castonguay Report calls upon Quebec to give thought to its broader terms the special responsibilities in matters of social security.

> Insurance companies have also played an important role in social protection, but they have never been able from the point of view of the assured, to fully adapt themselves to the *requirements of social security.* Insurance companies, whether they be mutuals or capital share companies, whether their purpose be service or profit, or both, are well organized enterprises following strict rules of solvency, and basing their operations on actuarial calculations. Even if these insurance companies are often managed much more efficiently than public services, it is nevertheless true that they offer more advantageous conditions to "good risks" that is to say, to people who by reason of their age, their health, their position, would be less likely to require benefits. The little man and those people with modest or uncertain revenues, find it difficult to pay the premiums or make their payments continuously. This is why insurance companies are unable to give a full protection to the entire population and even at best, they could never do more than add supplementary benefits in the way of social security to those individuals who wishing to have additional protection, are able to finance it themselves.
>
> The common characteristic of the four mechanisms described above (charity and private philanthropy, mutual organizations, group insurance, personal insurance) is to offer an optional and selective protection ; they cannot satisfy all the demands of social development, but up to a certain point they play an extremely important role . . . *The impetus given to this evolution always stems from the principle that society must look after the needs of those of its members who are, for one reason or another, unable to maintain a satisfactory standard of living.* The obvious common needs are universal, but they are not necessarily uniform. They are universal in the sense that the problems of subsistence of individual and families are forever present, but they are not uniform if they are looked at from the point of view of any given society, in which the needs of all the individuals forming that society are not necessarily identical. In this way, *a system of social security becomes a specific instrument answering the particular needs of a given society and reflecting its socio-economic situation, in the same manner that do its cultural preoccupations and its appreciation of values* [1].

Thus the entire social development appears finally as a fundamental right for which the State must guarantee respect. It is within this perspective that legal security should be envisaged : an intervention by the State to assure the respect of its citizens, and of the full enjoyment of their rights.

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1 *Report of the Commission of Enquiry into Health and Social Welfare,* Vol. 1 : Sickness-Insurance pp. 12-13.

9. It can be seen that the concept of social security as it exists today in Quebec and Canada, includes a number of domains which were not necessarily thought of by those who wrote the Universal Declaration of the Rights of Man, twenty years ago.

It is important to realize, however, that justice is far behind education, health and welfare, when it comes to obtaining public funds to eliminate economic disparities between different groups of citizens.

Undoubtedly there are many reasons for this situation. The principal one remains, however, that the public and the political leaders prefer to help the sick or the adolescents, rather than those accused of crimes. In the scale of social priorities, *legal security* is systematically in an unfavourable position, because its purpose is basically to help those people who have possibly caused harm to society and its members.

Notwithstanding this, some Canadian provinces have, for a number of years, interested themselves in this problem. They have endeavoured, in various ways, to establish a service of legal security which would place all citizens on an equal footing before the law.

10. As examples, mention should be made of the initiatives taken by Ontario and Alberta. Here we have two entirely different attitudes to the same problem — that of the insecurity of indigents when they are dealing with the administration of justice.

Ontario has had an overall legal aid system for two years under whose terms any indigent can today choose his own lawyer who will be remunerated from public funds.

Alberta has preferred to use the American formula of the public defender :

> In spite of the above we are aware that free legal aid is available, officially or otherwise, from coast to coast in Canada under a number of schemes. The majority of these endeavours operate from the nucleus of either a Law Society or Bar Association that assigns or allocates cases to lawyers, who volunteer to represent the accused on a charity basis with no pay. However, the schemes are in the main technically lacking in comprehensiveness and are somewhat eleemosynary. On the other hand, during March of this year, J.W. Anderson, of the attorney general's department in Alberta, announced that the popularity of the "public defender" project inaugurated in Edmonton in September of 1964 was such that it was to be expanded to cover the entire province. This latter system, with public defenders paid by tax monies, expresses the basic principle of equality before the law, not as a charitable provision, but as an inalienable right accruing to all accused who for financial reasons are unable to retain legal services [1].

[1] STEPHEN CUMAS, *Trial Ward and the Social Worker's Role*, in *Fourth Colloquy of Research into Delinquence and Criminality*, 1964, pp. 377-378.

This quotation indicates :

a) that the concept of social security has expanded recently to most definitely include the field of justice, and,
b) that Quebec must today take into consideration the fact that other Canadian provinces have already assumed their social responsibilities in this area.

B — NEW POSITIVE ASPECTS (11-18)

1 — THE SOCIAL INVESTMENT (11-12)

11. In the course of recent years, the concept of social security has thus evolved so that it includes more and more positive elements :

— on the one hand there is more and more demand for preventive measures which can be used even before a citizen finds himself in a state of insecurity ;
— on the other hand, efforts to measure the returns from expenditures on social aid are being made with increasing success.

In other words, instead of opposing, as in the past, expenditures for social security *and worthwhile projects,* the endeavour is to consider expenditures for social security as an *investment* subject to the same criteria of return as for commercial or industrial ventures. Even the fight against crime is now being thought about in this way :

> The cost of crimes to nations in all stages of development is a matter of rising concern.
>
> Because of its effect on the economy, and on plans for national development, there is need for more precise measurements of the factors which enter into it, and attention to methodological considerations for estimating it more accurately. Such indices as crime rates, social indicators and creation of social profiles are suggested as worthwhile, with thereafter the assignment of priorities on some kind of a cost-benefit analysis. This relatively new conception in the social defence field can make more precise and effective the allocation of limited resources. The quantification of social defence elements, the projection of likely benefits as against likely social and economic costs, may well merit amplification [1].

From this point of view, confirmed by a study made at the request of the Advisory Council of the Administration of Justice, "the investment of the State endeavours to assure, in addition to the maintenance of the beneficiary, the improvement of this productive capacity, and on this basis, he is included in an overall perspective of development" [2].

[1] BENEDICT S. ALPER, *The Prevention of Delinquency in the Context of National Development*, December 1966. This is a work submitted by Professor Alper of Boston, to the Advisory Committee of the United Nations, which was studying the prevention of delinquency and the treatment of prisoners.
[2] JULES BRIERE, MARC GIGUERE, HUBERT REID, *L'assistance judiciaire au Québec*, p. 3.

Thus *criminality* itself becomes a waste of the vital forces of society to an even greater extent than an attack from a foreign enemy. In fighting it, the concern is not only with the value of the *object stolen,* but whether the *thief* is, or is not

— a juvenile who has cost the State thousands of dollars to educate ;
— an adult who has ceased to produce in order to live henceforward in prison as a burden on the State.

12. We find an excellent example of this new outlook in the work of a Boston organization.

> The Action for Boston Community Development, Inc. (ABCD), is a city-wide defender service that not only provides the traditional representation at trial but also has law-student training programs. It is a central legal services program that provides counsel for post-conviction criminal proceedings and for a bail experiment and staffs neighbourhood law offices offering a combination of legal-social services and preventive law. It is a unified, comprehensive approach to the representation of indigents in a large, urban area [1].

It can be seen that society is finally beginning to understand that it is in its own *monetary* and *social* interest to fight against criminality in a different manner. To an even greater extent it should endeavour to restrict the use of degrading punishments and to include as part of the defence of the indigent, social work in areas of prevention and education so as to reduce reasons for discontent amongst the less favoured classes, and to increase the rate of rehabilitation.

The cost of criminality is such in investments lost by society, that in itself it is sufficient reason to make the greatest effort to keep all productive elements as free as possible. Concretely this means that :

a) the individual is of too great a cost to society for the latter to deprive itself so willingly of his usefulness ;
b) there is danger of mass criminality costing society so much that it is *economically sound* to guarantee to the less favoured groups full respect of their rights.

Here we find justification for the principal elements of legal security even without reference to the fundamental rights of the individual. The same reasoning justifies the investments in education.

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[1] *The Legal Aid Briefcase,* February 1968, vol XXVI, no 3, p. 115. There are now five major components to the unified legal services program in Boston. The first, the only one sponsored by NDP funds, is the Model Defender Project. It includes both trial defence and law school participation in all the nine district courts in Suffolk County. Its staff consists of a chief criminal attorney, eight trial attorneys, two investigators, and one secretary and its district-court service will be gradually phased into the MDC statewide public defender system, which now provides Superior Court service in the county. The Model Defender Project also includes participation of the four law schools in the area. Boston University is assigning thirty law students to the Roxbury District Court, the second busiest in the county. Under a rule of the Supreme Judicial Court, the studen may directly represent indigents under the supervision of a law school professor. Student representation is limited to the district court, a court of limited criminal jurisdiction that has the authority to confine a person up to two and one half years. Students handle cases on their own, but the attorney-supervisor is present not only during the trial but also during the interviewing of the defendant and witnesses. After a case has been assigned, the students are given at least one week to prepare it for trial. After receipt of the charge, they research the legal aspects of the case and conduct a background factual investigation. As long as the student does not jeopardize the rights of the accused, he is given a free hand in the conduct and presentation of the case. The district court judge is sympathetic to the program and imposes the same standards of conduct and performance upon the students as he does for attorneys.

The student program is designed to develop responsibility on the part of the students and at the same time to provide competent legal representation for those facing possible imprisonment. The program was well received, but the close attorney supervision has required that an assistant be provided for the attorney-supervisor. The effectiveness of the program can be measured by the recent modification of the Supreme Judicial Court rule to authorize student assistance for the prosecution of cases in the district court. Boston University has also inaugurated an advanced clinical criminal practice course that will be required for students participating in the program.

Members of the Harvard Voluntary Defenders, a student-run organization, are assigned to appear in the other Suffolk County district courts in a similar program. Harvard is also offering four new criminal practice courses. The second component, central services, is responsible for the overall supervision of the entire unified legal services program. It coordinates the various agencies and operates the bail program. The third component, the United Prison Association of Massachusetts, provides post-conviction services pursuant to a contract with ABCD. This component consists of the volunteer attorney who acts as a coordinator in administering a panel of approximately seventy uncompensated lawyers who handle cases throughout the state.

The fourth component, that of the neighbourhood law offices, implements most directly the unified legal services concept in the "gray area" target districts of Roxbury, Charlestown, and South End. For comparison, there is also a law office in South Boston. The purpose of this neighbourhood program is to bring the underprivileged into closer touch with the law, to provide legal advice and preventive service, to represent clients in court when necessary, and to refer them to the appropriate agencies when their problems so dictate. With the exception of the South Boston office, these neighbourhood law offices are located in multiservice centers that provide a wide array of social welfare assistance. The neighbourhood law offices component is operated by the Boston Legal Aid Society under contract with ABCD. Close coordination of services has developed between the "civil" attorneys in the neighbourhood offices and the "criminal" attorneys appearing in the district courts of the four neighbourhoods.

The fifth component, that of research and evaluation, is primarily furnished by the staff of the ABCD. Support of this component also comes from the United States Department of Health, Education and Welfare ; in addition, Harvard University, Boston University, and Boston College have conducted evaluative research on segments of the program.

13. The concept of social security has evolved in so radical a manner, that it is necessary, as recommended in our general introduction, to replace the term *legal assistance* by that of *legal security*.

All the evidence presented to the Commission indicates that security is a right to which all citizens are entitled and that it is no longer acceptable for legal security to be considered as some kind of service given in the name of compassion, slightly tinged with contempt. Today we consider that a child has a right to education, and nobody thinks of utilizing the expression *school aid*. So, in striving for legal *security* rather than *aid*, justice will be integrated into the much broader field of social security, and it will become the duty of the State to assure that the rights of all citizens are protected.

By legal security, far more is meant than merely the defence of indigents before the courts. In the programme of legal security the Commission includes, for example, the information needed by citizens to know their rights.

> ...a system conceived from the point of view of true *social security* endeavours to assure to everyone a minimum of *juridical security in the face of a need for juridical information which has assumed sufficient proportions to have become a social risk*. This objective can be realized by prevention, and by the development of juridical knowledge essential to the life of society...
>
> Nobody would question that the dissemination of juridical information is an essential need in our society. Even the nature of law (contrainte social souveraine) makes it necessary for everybody to have some knowledge of it, at least of its most important elements.
>
> This need becomes even more imperative as modern law becomes more and more complex. This holds equally for the deficiencies in the procedures in carrying out the law. The *overall result is a vacuum in which only the lawyers can understand each other, so that they exercise a monopoly of juridical information, one of the basic needs in human activity* [1].

14. The responsibilities of the State in matters of legal security do not imply that the government must necessarily always intervene in a direct manner. However, in a society such as ours, it is important to be aware of the social insecurities which exist, not only at the level of individuals, but of entire groups.

1. In analyzing the different methods of assuring legal security in our society, it is essential to take into consideration what the intermediate groups and the general public are ready to accept and what they are demanding [1]. While the legal security of a society remains a government responsibility, it could be made available in the form of a state organism, of private enterprise, or of a combination of the two.

2. The legal security made available by the State is not directed only to individuals, but also to groups on whom it exercises with others, an uplifting social action.

15. If the desire is, through some form of assistance, to eliminate *legal insecurity* amongst the less favoured strata of society, one of the essentials is to establish legal offices in the poorest neighbourhoods. It is important to realize how closely interwoven are the availability of justice, and legal security. Unless the indigent can have easy access to a legal office, and to the services of a lawyer, it is not true legal security for him...

> The offices will differ from traditional legal aid in their accessibility. They will differ perhaps in degree from traditional legal aid in their close identification and involvement with the complexes of social services in the neighbourhood. Commonly, these offices are regarded as being physically part of or close to the community service program, or community action programs in the terminology of the Economic Opportunity Act. They offer the opportunity and the challenge to lawyers for the poor of working collaboratively with other social services people, educating them as sources of clientele (because surely the Canons will have to bend in this respect), educating in cooperation with these other people the clientele of the community in their legal rights. They will work, I would think, in a way legal aid traditionally has not, as counsel for the poor as a group

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[1] JULES BRIERE, MARC GIGUERE, HUBERT REID, *L'assistance judiciaire au Québec*, pp. 6 and 7.

[1] Our ideals of the role of government were inevitably and profoundly affected by the attitudes prevailing at the beginning of the nation when liberty meant liberty from governmental regulation. Seventeen seventy-six was the date of Adam Smith's *Wealth of Nations* as well as of the Declaration of Independence. Our Bill of Rights was planned as a protection against government, not through government. The remark attributed to Jefferson, "That government governs best which governs least," is something like a starting point in our political preferences and prejudices. The change that time has brought in views on the function of government can be marked by comparing the policy Jefferson espoused with the program of his party today; or more widely by contrasting the American Bill of Rights of the late 1700s, designed as a protection against government, with the Universal Declaration of Human Rights of the United Nations of the middle 1900s, which embodies a conception of affirmative duties of government to advance the welfare of the people. Yet the prevalent American attitude remains that government should not undertake an activity unless private action has proven itself ineffective or insufficient for the public welfare. This attitude is a powerful obstacle in the way of a public system of legal aid, or even a mixed public-private system such the English system." ELLIOTT EVANS CHEATHAM, *A Lawyer When Needed*, New York and London, Columbia University Press, 1963, pp. 49-50.

interest, in addition to counseling for individual poor people as clients in particular matters [1].

These are only some of the reference points to be taken into consideration when the time comes to define in detail the legal security service we intend to recommend for Quebec.

It has already been said that the intervention of the State must be of such a nature that the freedom which the individual still possesses is not subjected to further limitations. The State, as a *silent financial partner,* must therefore respect the autonomy and independence of the services which it subsidizes.

It should also be remembered that legal security must apply to groups, as well as to individuals.

3 — THE IMPLICATIONS (16-18)

INFORMATION, CONSULTATION, DEFENCE

16. Various corollaries arise from this concept of legal security. Everybody emphasizes that the citizen cannot have full legal security unless justice is really available to all citizens.

This implies,

a) that citizens must be sufficiently informed of their rights, in order to defend them, or to recover them ;

b) that in case of need, the help of specialists in law can be secured.

If such services are lacking, equality before the law remains an abstract and sterile ideal. No system of legal security would be worthwhile if it could not overcome the obstacles of ignorance and destitution.

Unless legal security is narrowed to mean simply, a paternalistic assistance, it is ridiculous and useless to say that theoretically every citizen has the right to help from a lawyer unless, in practice such services are available to everyone including those who cannot pay for it.

Without State action, legal security in its true sense cannot exist for indigents who are unable to meet the cost of legal consultations or of defence lawyers.

17. It is easy to be satisfied with words, and allow the ideal to far outdistance practice. All countries are as in *our* case, in danger of being

1 MARVIN FRANKEL, *Experiments in Serving the Indigent,* in *National Conference on Law and Poverty,* Washington, D.C., 1965, pp. 73-74.

satisfied with a declaration of principles without creating definite structures to implement them. In France, the Act of August 16-24, 1790, established two principles :

a) equality of all before justice,

b) free access to the courts : the State and not the citizens will henceforth pay the judges [1].

With the passage of time these principles have been lost sight of, and a point has been reached in the system of justice, which by reason of cost, places it out of reach of many of the citizens.

> The experiences of history and even more, the curves of economic and social conjuncture have somewhat altered the original scheme. By the reestablishment of an inherited system of charges (cost of solicitors, lawyers, notaries, clerks, bailiffs) and above all, by the almost geometric progression of taxes, the freedom of justice has been eliminated [2].

A system of legal security must specifically aim to fill the gap which separates principles from reality.

18. Education remains one of the most effective and democratic methods of filling the gap.

Without it, it is not possible to guarantee the equality of all before the law for the simple reason that the majority are ignorant of the law. Nor is it possible, without education, to assure everybody free access to the administration of justice, as the majority would not understand the scope of the legal security services.

Juridical education, as a basis for information and consultation is so clearly a part of legal security that it is surprising not to find it in every system which establishes as its ideal the equality of citizens before the law [3].

1 LOUIS BEAUDOIN, *L'esprit général du régime de l'assistance judiciaire en droit français,* in *Revue du Barreau* 1949, p. 61.

2 RAYMOND CHARLES, *La justice en France* (Que sais-je), Paris, Presses Universitaires de France, 1953, p. 28.

3 A great many Government programs provide the opportunity to educate either youths or adults. Examples include, the Job Corps ; the Neighbourhood Youth Corps (which the Department of Labor operates to train young people in our cities) ; and the numerous programs designed to improve employment skills. There seems no reason why the curricula of these programs cannot include sufficient legal education so that the poor at least know when they should be consulting an attorney. THEODORE M. BERRY, O.E.O., *Legal Services Programs,* in *National Conference on Law and Poverty,* Washington, D.C., 1965, p. 165.

II — INVENTORY OF THE APPLICATIONS

II — INVENTORY OF THE APPLICATIONS

A — THE DIFFERENT FORMULAS (19-48)

19. A legal security service may take different forms.

Some formulas provide as is the case in Ontario, that the individual be free always to choose his own defender, who will be paid by the State. Others believe, chiefly for economic reasons, that it is necessary for the State to employ a number of lawyers and to make them available free of charge to indigents. This second formula generally carries the name of *public defender* [1].

According to a third thesis, the court, or another authority, is responsible for assigning a lawyer to an accused unable to pay for his own legal counsel. This third system has many different applications, according to the number of lawyers who take part in the system, according to the authority responsible

1 The methods of public legal aid are still more varied. They may be put into four groups : 1) assigned counsel, 2) the public defender, 3) aid to men in military service, and 4) administrative commissions and officials. The system of assigned counsel, compensated or uncompensated, is still the most widely used method in criminal cases. It rests on the professional and public duty of a lawyer to accept the assignment to defend an accused in a criminal case when the judge so assigns him. The system has furnished outstanding illustrations of devotion, as mentioned in an earlier lecture. But the quality of representation it affords in most cases has been found inadequate by those most competent to assess it. The provisions for compensation of assigned counsel by the state vary widely, most of them being insufficient.

The *public defender* is a salaried official who stands ready to represent indigent accused. The office has had a long and admirable record in some states. It was created in the District of Columbia, and its authorization in the federal courts generally is under consideration by committees of Congress. As with other public officials the methods of selection vary from popular election through appointment by the judiciary or other officers onto civil service procedures. Deliberate efforts have been made to remove the public defender from political pressures and from subservience to the prosecutor. A civil counterpart of the public defender in some cities has been the public bureau, that is, a public agency to furnish legal aid to the indigent. It has not developed as rapidly as the public defender, perhaps because the legal aid societies were formed earlier and performed the services in civil cases that such a bureau might have taken over. ELLIOTT EVANS CHEATHAM, *A Lawyer When Needed*, New York and London, Columbia University Press 1963, pp. 43-44.

for making the choice of the lawyer in the name of the accused, and according to whether the lawyer receives remuneration or not.

It is also necessary to make specific mention of various other systems which are partly the responsibility of government, and partly that of private enterprise. In the Anglo-Saxon world, we find an increasing number of groups of lawyers formed into societies, and with the benefit of government subsidies, assuming the defence of indigents [1].

For purposes of discussion we will describe the different systems utilizing abbreviated terms : the choice of lawyer, the public defender, the assigned or designated lawyer, the legal society or a mixed system. Although these different systems utilize completely different procedures, the four formulas in theory all endeavour to respect the intimacy of relations between the accused and his lawyer, and to defend to the maximum, the fundamental rights of the accused. Needless to say, some of the systems achieve these goals better than others [2].

In the course of our survey of the different systems, we quote authors extensively, particularly those in the United States. We quote those who defend a formula as well as those who criticize it, those who are part of a system, and those who evaluate it from the exterior.

The Commission was of the opinion that considerable reference should be made to these various texts, because

1) the Commission did not have the time to see all the systems at work ;
2) those who live daily with a system of legal security are particularly qualified to evaluate it ;
3) the government could more easily judge and verify the value of our recommendations by examining some of the systems discussed.

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1 The American Bar Foundation classifies the existing systems for providing legal representation for poor persons accused of crime as assigned counsel, public defender, private defender, and a mixed private-public system. The assigned counsel system is defined as the appointment of individual lawyers on a case-by-case basis. The public defender system consists of the regular appointment of a lawyer who is compensated from the public treasury on a salary basis. The private defender system involves the regular appointment of a lawyer compensated by salary from private sources and supervised by private citizens.

The mixed private-public system is a private defender system which receives substantial support from public funds. A. KENNETH PYE, *The Administration of Criminal Justice,* in *National Conference on Law and Poverty,* Washington, D.C., 1965, p. 50.

2 Since the loyalty of lawyer to client and his independence of control, other than that occurring in the normal course of professional relations between the Bar and the judiciary, is an essential criterion of an adequate system of providing counsel, it is vital that the staff lawyer or appointed lawyer be free to perform his function in as nearly as possible the same manner as he would if privately employed by the client. *Standards relating to Providing Defense Services,* American Bar Association Project on Minimum Standards for Criminal Justice, June 1967, p. 22.

1 — The Designated or Assigned Lawyer (20-27)

a) FLEXIBILITY OF THE FORMULA (20)

20. It is difficult to assess in a general manner, the formula of the designated or assigned lawyer. It has become evident, from one state to the other, and from one region to the other, that the differences are so great that any generalization would be unrealistic and unfair.

> In most of these counties, especially the rural ones, the appointees are probably a fair representation of the active Bar in terms of age and experience. In roughly one-fourth of the counties, however, appointments are concentrated among the younger members of the Bar. By contrast, the assigned lawyers in a few places, notably Detroit, are mostly seasoned veterans in the criminal court. Another system is used in New Jersey and a few counties in other states : the entire active Bar is expected to serve a turn as assigned counsel, with exceptions made for age, infirmity, and employment by state and local government. In view of these variations it may be said that lawyers appointed to serve indigent defendants in ordinary felony cases differ widely in experience and ability, and that the kind of lawyer assigned to any particular case depends on the state, the county, the judge, the seriousness of the crime, and perhaps other factors. For capital and other very serious crimes, however, it is generally reported that the judges appoint able, experienced lawyers [1].

The judges themselves, moreover, are conscious of these disparities, which are reflected in the systems themselves, as well as in the individuals who administer them. In one case, for example, it is the State law which permits only a circuit judge to assign a lawyer to the indigent accused, and which restricts this action of the judge to the felony cases registered in the circuit court. Under this procedure it is necessary to wait until the accused is formally arraigned in court before supplying him with a defender, while other systems intervene much earlier [2].

But even within the same system, disparities of concern to individuals are noticed.

> In the personal interviews, when asked : "If the indigent person asks for a lawyer by name, do you appoint him ?", three of the nine judges said "yes",

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1 LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation 1965, volume 1 : *National Report,* p. 16.

2 "By state law, only the circuit judge may appoint counsel for an indigent defendant and then only in felony cases pending in the Circuit Court. Since a felony case is not pending in the circuit court until an indictment has been filed, the effect of the law is that bail is rarely altered for an indigent before this indictment, and counsel can never be appointed for him until he is indicted. Appointment of counsel varies somewhat between the two counties surveyed". DARAL G. CONKLIN, *Hawaii,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation 1965, volume 2 : *Alabama-Mississippi,* p. 176.

three said "no", and three said that this had never happened. All nine judges stated that if there are two defendants who have interests that may conflict, they appoint separate lawyers for each. If the defendant objects to the lawyer who is appointed, three of the judges said they insist that he keep that lawyer, unless he has a good reason for not wanting him. Three appoint someone else. Three stated that this had never happened, but if it did happen they probably would appoint someone else [1].

The possibility of such different interpretations is a serious weakness in systems of this kind. One comes up against this so often, that the flexibility of the formula is forgotten.

b) FREE CHOICE OR ADMINISTRATIVE CONTROL (21-22)

21. Even if it is impossible to generalize, an evaluation of the system can be arrived at by examining the recommendations made by different bodies to improve it.

The suggestions which we are quoting were apparently intended primarily to rid the system of favouritism and the arbitrary.

> The prosecutors were asked to offer suggestions on how, in their judgment, the present system for providing counsel to indigent defendants might be improved. Among the answers were the following:
>
> 1. Pay assigned counsel more or they are likely to plead the defendant guilty.
>
> 2. The defendant should be given his choice of counsel and the State should pay adequate expenses so that the best lawyers will defend him.
>
> 3. All lawyers who have ever handled criminal cases should be appointed, not just young lawyers.
>
> 4. Make sure the judge appoints qualified counsel instead of his favorites. Have the bar association provide him with an approved list.
>
> 5. If there were less vigor in defending persons obviously guilty, then I believe those who really needed counsel would be more adequately represented.
>
> 6. No person should arbitrarily be assigned a lawyer. After being instructed as to his right by the judge, a defendant should be allowed to accept or reject counsel.
>
> 7. If counsel are not provided for misdemeanors, then a statute should be enacted expunging the record.
>
> A number of prosecutors recommended instituting the public defender system, although others explicitly stated that the public defender is not the answer [2].

[1] *Op. cit.*, p. 290.

[2] HAROLD MORRIS and JOHN F. HAMMOND, *Michigan*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation 1965, volume 2: *Alabama-Mississippi*, pp. 370-371.

It should be emphasized that these different suggestions in no way reduce the paradox which seems to be inherent in the system. On the one hand, the endeavour is to improve the system of designating lawyers; on the other, the effort is to show more respect for the accused to have a free choice.

In this formula, it is most difficult to avoid this contradiction, and there is reason to believe that it will have to give way more and more, to two of the other formulas which give greater guarantees for a sounder administration.

> The most serious defects which have been attributed to the assigned counsel method of providing counsel arise from the absence of system in its administration. Where assignments are made on an ad hoc or informal basis, the public, the defendant and the participating lawyers may experience or suspect favouritism [1].

A number of the systems favour the *mathematical rotation* which certainly eliminates the risk of favouritism. The cases are simply turned over to the lawyer who on that particular day is on duty.

By thus eliminating the danger of favouritism, there is no guarantee of efficiency, as the lawyer on duty is not necessarily the best qualified.

22. Those who favour the formula of the designated or assigned lawyer, emphasize that this form of legal aid shows more respect for the close relationship which should exist between the accused and his lawyer. In their opinion, the system does not make civil servants of the lawyers, and does not require the needy accused to deal with an anonymous government office. Moreover, the same lawyer is able to defend both, clients who are able to pay for their defence, as well as indigents incapable of paying for their legal counsel [2]. In this way, they say, lawyers are not completely separated from their normal customs and methods of procedure.

This system does not, however, permit the accused full freedom to choose his defender. In most of the cases, the court has the responsibility of designating a lawyer, and it even has a list of the independent practitioners who have indicated that they are willing to help indigents. In some cases, it is a committee of the local or regional Bar which will assign the lawyers in turn, or according to the specialties of each. In the system introduced by the Legal Aid Bureau of the Bar of Montreal Inc., those in charge of the office, call different legal firms and assign cases to them. (This is particularly true of criminal cases, as in this area, it is more difficult to satisfy a client

[1] *Standards relating to Providing Defense Services*, American Bar Association Project on Minimum Standards for Criminal Justice, June 1967, p. 24.

[2] LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation 1965, volume 1: *National Report*, p. 18.

with merely a consultation. The Annex explains this situation, which has undergone a change since engaging lawyers on a full-time basis.)

c) QUALITY OF THE DEFENCE (23)

23. Even if the accused does not always choose his defender, experience shows that the services rendered by the designated lawyers are of unquestioned professional quality.

> In experience and ability, it is generally agreed that the assigned defence counsel is about even with the privately retained defence counsel, and it may be conceded that the assigned counsel is sometimes better, because the court is better able to select competent defence counsel than the average defendant [1].

In fact, it can be said that the majority of the legal security systems offer a defence of almost uniform quality. This casts some doubt on the statement which indicates that the work of the lawyer is unsatisfactory, if not impossible, without a close relationship between the practitioner and his client.

The systems which are based on the designated lawyer — regardless of the method of designation — actually congratulate themselves on the excellent work accomplished on behalf of indigents by lawyers who are without warning called upon to help unknown persons. We will return to this rather sensitive aspect of the problem.

d) DIFFICULTIES IN URBAN ZONES (24-25)

24. To offset this, other objections have been made to this formula of the designated lawyer. It is said that the system has serious drawbacks when the court assigns a criminal case to lawyers whose experience has only been in civil practice [2].

---

1 GORDON M. TIFFANY, *New Hampshire,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation 1965, volume 3 : *Missouri-Wyoming,* p. 463. "No significant difference has been noted between the behaviour of assigned and retained counsel with respect to a waiver of the preliminary examination. Whether there is such a waiver depends on the characteristics of the individual case", ALEXANDER D. BROOKS and STEPHEN N. MASKALERIS, *New Jersey, op. cit.,* p. 374.

2 "Other objections made by Essex County lawyers include the familiar ones that assigned lawyers are not capable of handling unfamiliar criminal cases and that defendants therefore get less effective representation than they would get from lawyers trained in criminal law ; that lawyers are not adequately compensated for expenses of investigation and the like ; and that much time is wasted in the handling of criminal cases.

Those making the last complaint thought there was an undue consumption of time in connection with weekly calls, daily trial calls, and the like". ALEXANDER

It is also criticized for requiring the same lawyer on occasion, to defend a number of co-accused. This could result, as can be readily seen, in an unsatisfactory defence for a co-defendant less involved than other members of a gang [1].

The lawyers themselves, however, are the strongest critics of the designated lawyer formula. Systematically, with the increasing number of criminal cases, the different associations of lawyers involved in such programmes of legal security have had to face up to an unforeseen increase in their work. And naturally, they blame the system.

> Recently there has been, particularly in Essex County, considerable disaffection with the assigned counsel system among the court and members of the bar. A major criticism is that lawyers are too frequently assigned in relation to the amount of time or effort required to be spent on the usual case. In the past, many eligible lawyers were excused from the list. Consequently, those not excused handled more assignments than they would have ordinarily [2].

Generally speaking, the urban zones have been the first to feel the increase in the number of cases brought to the criminal courts, and it becomes evident that the private practitioners are unable to assume the defence of all the indigents indicted for criminal offences. The scarcity of criminal lawyers adds to the vicious circle ! Legal aid becomes too great a burden, and an increasing number of lawyers decide to discontinue their services, leaving an even smaller number to carry on an even greater burden [3].

D. BROOKS and STEPHEN N. MASKALERIS, *New Jersey,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, volume 3 : *Missouri-Wyoming,* p. 483.

1 "Another pointed out that codefendants or coconspirators are often represented by the same assigned counsel ; this is not a good practice because, as one attorney said : In some cases one of the codefendants is actually the motivating force behind the commission of the crime, the other being the weaker individual who presumably if left alone would not have committed or participated in the crime. Under these circumstances an attorney representing both codefendants cannot do justice to either client in any pretrial remarks to the court". GORDON M. TIFFANY, *New Hampshire, op. cit.,* p. 464.

2 ALEXANDER D. BROOKS and STEPHEN N. MASKALERIS, *New Jersey, op. cit.,* p. 483.

3 "A lawyer assigned to represent an indigent defendant may, with the approval of the assigning court, obtain other counsel to serve in his stead and still receive credit for the assignment. By rule of court, law clerks and law students can be named to help assigned counsel wherever possible in the investigation and preparation of indigent cases. But their contribution has in recent years been minimal. With the revitalization of legal aid services that is now occurring in the law schools, that contribution may in the near future become a significant one in Essex and Camden Countries". ALEXANDER D. BROOKS, and STEPHEN N. MASKALERIS, *New Jersey, op. cit.,* p. 476.

25. While there are many criticisms of this formula in the urban zones, where the population density is greater, many of the judicial districts in rural areas indicate that they are quite satisfied with this method [1].

For example, in Montana, the system of legal security based on the assigned lawyer, would appear to be the only effective method. A poorly populated area makes it prohibitive to establish a system of legal security based on the *public defender*.

> The assigned counsel system should not be abandoned in Montana. Being a large state but sparsely populated, a public defender system would be difficult to organize and properly finance. In most areas of the state a public defender would have to be a district office probably operated on a part-time basis. The largest county in the state, Yellowstone, paid only $3,800 for the defence of indigent accused persons during the period July 1, 1962, to June 30, 1963. Undoubtedly, a public defender system would require substantially more money with no certainty that it would provide superior service. There now exists a reasonably strong sense of pride and responsibility in criminal defence work and the present system of appointment does not unfairly burden individual members of the bar [2].

All in all, it seems that the formula of the assigned lawyer is considered to be the one most likely to answer the needs of the rural judicial districts, and it is in these districts that we find more supporters than in the cities [3].

However, these commendations should be examined more thoroughly : even in the rural district the formula of the assigned lawyer produces better results in civil rather than criminal matters.

e) POSSIBLE IMPROVEMENTS (26-27)

26. Thus the evaluation of the system varies according to the kind of judicial district, and whether it deals with criminal or civil matters. Furthermore, the analysts are in agreement in criticizing the system of the designated lawyer on the grounds of unsatisfactory remuneration.

Undoubtedly the level of remuneration varies from one country, or one region to the other. However, whether the remuneration be, in full, partial, or not at all, the insufficiency of remuneration is evident in practically all such plans, and it results in a lack of support from a large number of experienced lawyers. It has become evident in different countries, that the youngest members of a legal office are most frequently delegated to handle the cases referred by the legal aid system.

To remedy this problem, it has been suggested that the State assume the responsibility for legal security [1]. Once this principle is recognized, it becomes obvious that there is need to establish a schedule of rates which will permit the courts to pay the defenders of indigents an equitable remuneration [2].

It is not only the lawyers who are in favour of remuneration for the services of an assigned lawyer. The judges themselves, who are particularly well placed to evaluate the time and efforts given by the private practitioners are in agreement with the necessity of remuneration. Incidentally — without remuneration, experience shows that cases are protracted.

> The majority of the judges questioned felt that some payment should be made to assigned counsel. Those who set forth an amount indicated at least $25 to $50 per trial day. They also felt that lawyers should be paid their out-of-pocket expenses for the investigation and preparation of cases [3].

These economic difficulties emphasize the weakness of the system. The volunteer can certainly provide excellent results, but when he is in competition with the salaried professional he loses his resourcefulness :

1 — the lawyer would prefer an "ordinary" case instead of a case to be handled free of charge for someone without means ;

2 — because of the fear that the indigents will increase their demands for assistance, no publicity is given to the benevolent system of legal aid. This prevents a number of legitimate defences, and restricts the availability of justice.

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1 "Most judges responding thought that the present assigned counsel system is inadequate for many reasons. The Ocean County judge, however, thought that the system works well in his county because it is not particularly urban and the load of assigned cases is not too heavy for the practitioners". ALEXANDER D. BROOKS, and STEPHEN N. MASKALERIS, *New Jersey*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation 1965, volume 3 : *Missouri-Wyoming*, p. 488.

2 LARRY ELISON, *Montana, op. cit.*, p. 435.

3 "In certain urban counties such as Essex, the burden of free representation by members of the bar seems to be much greater than was anticipated when the assigned counsel system was first established. In some rural counties the burden does not seem to be particularly heavy. In urban counties much unnecessary time is spent by lawyers answering weekly and daily calls, attending to pleas, awaiting the actual time of sentence, and the like. It is essential either that these services be provided by a publicity supported agency or that this loss of time and money be obviated by a change in rules of procedure and calendaring". ALEXANDER D. BROOKS, and STEPHEN N. MASKALERIS, *New Jersey, op. cit.*, p. 500.

1 "To alleviate the financial burden imposed on some counties, it is recommended that the state contribute a portion of the costs of compensation and reimbursement of counsel". GEORGE L. KIRKLIN, *Oregon*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation 1965, volume 3 : *Missouri-Wyoming*, p. 634.

2 "In assigned counsel counties, it is recommended that a minimum fee bill be established for criminal offences, that the fee to appointed counsel be awarded by the trial court, and that the fee be set at the minimum fee plus reasonable expenses, except where the appointed counsel can establish that he should receive a larger fee". GERALD F. FLOOD, JR., and JACK W. PLOWMAN, *Pennsylvania, op. cit.*, p. 651.

3 ALEXANDER D. BROOKS, and STEPHEN N. MASKALERIS, *New Jersey, op. cit.*, p. 486.

Even with remuneration, this system of legal security is not necessarily assured of the selection of the practitioner best suited for the case, nor of an administration without favouritism.

27. Some lawyers have become critical of the traditional formula of the designated lawyer and have even come to the conclusion that this form of legal security cannot at all respond to the needs, and that the time has come to face up to the formula of a public defender. The problem is even more acute in the cities, where chiefly criminal justice is affected; but the insufficiency of remuneration is universal.

> Many attorneys have voiced criticism of this system for numerous reasons,
>
> 1) that the method of selection of attorneys is unfair;
> 2) that many attorneys are junior members of the bar;
> 3) that many feel the Bar as a whole should contribute their time and effort;
> 4) that the system as applied to Maricopa County results in a waste of time;
> 5) that the coordinate items of compensation and reimbursement of attorneys are inadequate.
>
> There is no question that the institution of a public defender system would cure all of these complaints. The present system is being supported only by those attorneys who desire to serve as assigned counsel [1].

Notwithstanding this, the same professional circles are in the majority opposed to the formula of public defender. The following is an opinion given concerning the system of legal security which prevails in Missouri: it is typical of the arguments put forward by the defenders of the system of a designated lawyer.

> There are obvious deficiencies in the present system of assigning counsel in *Missouri,* but these deficiencies can be remedied. The defects in the public defender system are inherent. The major objections to the assigned counsel system, and the possible remedies thereto, are as follows:
>
> a) The economic problem. It is said to be unfair to require lawyers to give up substantial amounts of time without compensation. Although many would dispute this proposition, it is obvious that lengthy cases do work a hardship on many lawyers. Forty-seven of our fifty states now pay some compensation in at least certain types of cases, and many have done so for years.
>
> b) Assignment rotation. It is argued that there is a tendency on the part of the courts to discriminate in making appointments. This is the easiest problem to solve. The Bar should prepare and maintain a master list and request all state courts make most of their appointments from this list in sequence.
>
> c) The problem of securing adequate investigative help. There is no reason such services could not be provided here, either through a private organization or from the same state funds used to compensate counsel.

1 DAVID L. GROUNDS, *Arizona,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation 1965, volume 2: *Alabama-Mississippi,* p. 42.

> d) Lack of knowledge on the part of assigned counsel as to criminal procedure and inability of such counsel to conduct proper investigation. Many experts deny vigorously that such a problem even exists [2].

The Commission will endeavour to assess these different opinions when the time comes to make its own recommendations.

Note that this type of legal security has not had any marked expansion in recent years. In many countries, or judicial districts, this formula has even given place to new systems, better able to spread the responsibilities, and of greater protection to the administration.

Moreover, the formula of the assigned lawyer is often that adopted in judicial districts when they first accept the principle of legal security. In other words, while this formula has considerable appeal: it is the use of it which shows its weaknesses.

2 — The Lawyer Chosen by the Accused and Paid by the State (28-37)

28. As we have seen, the formula of a designated or assigned lawyer does not always guarantee the accused the choice of his lawyer. Even the States and the regions which have retained this system have modified it considerably so as to leave the accused some freedom of action.

For example, an increasing number of judges take into consideration the wishes of the accused at the time of assigning a lawyer; and in practice, it is rarely that anyone endeavours to impose on the indigent, a lawyer whom he does not want. Thus there is an effort towards the ideal which would be, for the accused indigent, the freedom to choose his own legal counsel.

The evolution goes even further. It is readily agreed today, that it is unjust to deprive an indigent accused, of a choice which could be exercised by the more fortunate citizen. The formula of *the lawyer chosen by the indigent himself,* is practiced today in Ontario, and it establishes as a fundamental principle, the equality of freedom of choice between the citizen capable of paying, and the accused indigent. We now arrive at the study of the second formula, that of free choice, by using the Ontario system as an illustration.

a) THE ONTARIO SYSTEM (29-30)

29. The Ontario system is considered today, and rightly so, as one of the most advanced in the world. The legislation passed June 28, 1966 (and

1 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967) pp. 117-118.

which came into effect April 29, 1967) undertook to create the ideal system which had been recommended by a very highly qualified study committee[1].

This Committee had made an extensive and detailed enquiry on all aspects of legal aid. It had sent 525 questionnaires to organizations and individuals who had already shown an interest in this form of social security. The Committee carefully analyzed the 90 replies. In addition, the Committee devoted 13 days to public hearings in the most important cities of Ontario. In the course of these public hearings, 79 briefs were presented and discussed. The Committee also analyzed the systems in effect in Canada, in some American States, in England, Scotland and in Australia ; it also made study trips to England, Scotland and to different American cities.

On the negative side, on might say, as did the American specialist, Lee Silverstein, that the Committee made a somewhat perfunctory study of the *public defender* formula.

> The committee's appraisal (of the public defender system) not only resulted in a recommendation against public defenders for Ontario, but it has also influenced the Widgery Committee on Legal Aid in criminal cases in England. It is regrettable that the Ontario Committee was not better informed about public defender operations in the United States[2].

This was particularly regrettable because this formula was the least known to the Ontario public. The latter had known various forms of legal aid, but no application had ever been made of a system based on the permanent public defender.

30. In the Ontario formula all the members of the Bar who agree to participate in the legal security service, are available to the accused indigent. Certain duty lawyers to give legal advice and to represent arrested persons, are replaced on the basis of one team every week. Their role ends with the appearance in court, and they cannot, apart from exceptions, *retain* the case. Other lawyers hold themselves in readiness to act for the indigents, if the latter choose them.

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1 The committee followed the recommendations of the professional Association of lawyers very closely : "The Association expressed the view that the voluntary system of legal aid could not continue and that compensation for lawyers engaged on legal aid work was essential for the operation of any legal aid plan. The Association took the view that the financing of the plan should be primarily the responsibility of the Ontario Government, and, further, that the establishment of a public defender office in Ontario would not be desirable. The view was expressed that it was in the interests of society as well as of accused persons and the Bar itself that participation in the criminal legal aid plan should be the responsibility of the Bar at large rather than that of a limited number of so-called public defenders". *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 93.

2 LEE SILVERSTEIN, *The New Ontario Legal Aid System and its Significance for the United States,* in *The Legal aid Briefcase,* volume XXV (1967) pp. 83 to 90.

The first group is remunerated at a rate of $75 a day ; the second group is entitled to 75% of the fees as established in the list of tariffs (Appendix 1).

A classification is made of the demands for help so as to prevent abuse, and to determine those who are really in need[1]. The originators of the system emphasize that their formula allows every accused person, even the indigent, to make his own choice from the list of lawyers who participate in the overall system of legal security.

b) MERITS OF THE ONTARIO SYSTEM (31-32)

31. The great merit of the Ontario formula was the agreement to the extraordinary expenditures required by a system so complete and so close to the ideal. These costs weigh even more heavily on the system because it quickly won popular favour, and rapidly exceeded all budgetary estimates. We will return to this.

It should be noted for the moment that the formula of *free choice* has permitted our neighbouring province, to overcome from the very beginning, the objections which were made to the system of the designated or assigned defender. The Ontario system, in introducing a global plan for the entire province, and integrating into the plan the vast majority of practitioners, avoided the reproaches of improvisation and favouritism which were made against most of the systems conceived according to the principle of assigning.

The American analysts moreover, have recognized quite frankly, the quality of the system introduced by Ontario, and they have even gone so far as to say that the creation of such a system calls for some *soul searching* by the American systems :

> The joint committee report suggests several questions for readers in the United States. The form and method of the report are themselves valuable. Any one of our states could profit from a systematic, statewide survey of legal aid in civil and criminal cases, jointly sponsored by the legislature and such organizations as the state bar association, the judicial council, and a law school. The difficulty in this country is that we are not accustomed to thinking in statewide terms and that we seldom consider civil and criminal matters together[2].

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1 "The number of persons accused of criminal offences who are charged and tried without either legal advice or representation i appallingly high. Again only estimates exist of this number but there is significant agreement among persons familiar with the matter. The studies made by Professor Friedland and the estimates made by Crown attorneys, magistrates, lawyers, social workers and others indicate that one half to two thirds of all persons charged with criminal offences at present in Ontario are tried without being represented by counsel" : *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 20.

2 LEE SILVERSTEIN, *The New Ontario Legal Aid System and its Significance for the United States,* in *The Legal Aid Briefcase,* volume XXV (1967), pp. 83 to 90.

32. From its inception, the Ontario system has therefore, overcome difficulties which are still faced by the older systems. Ontario has arrived at this result by associating in the work of preparing its legislation, specialists in the judicial sector, and representatives of the legal profession.

In our case the legal professions have also been associated in the study of legal security, although in a somewhat different manner.

1. Many members of the Bar have participated in the work of the Advisory Council of the Administration of Justice on legal aid, and we have been able to take advantage of this work.

2. The Bar itself has undertaken its own work on the matter, and have most kindly made available to us all their documentation.

3. The analysis of the work done during 10 years by the Legal Aid Bureau of the Bar of Montreal have been made known to us by Mr. Loranger.

The Ontario system from the start had the advantages which were expected, in a rather idealistic manner, of the formula of the designated lawyer. The Ontario formula provides for remuneration of lawyers who participate in this global plan of legal security, thus reducing considerably, the number of those who otherwise might have withdrawn, as was the unfortunate experience in some of the American plans. The wish of the accused becomes an important factor in the assigning of the lawyer, and in this way the risks of being arbitrary are eliminated. To this should be added, contrary to the majority of the American systems of designation, a set of administrative rules which emphasizes the harmony of the entire plan.

In actual fact the system has undergone certain changes : for example, there is recourse to a team of permanent lawyers in the most populated area (York). This is similar to the Montreal experience (cf. Annex) which has shown that lawyers who are always on duty, can effectively receive the requests for aid, and even satisfy the many demands for consultation.

The permanent lawyers, however, do not appear before the courts. They only deal with requests for information.

c) LIMITATIONS IN THE CHOICE (33-36)

33. The system which permits the accused, even indigent, to obtain at the expense of the State, a lawyer of his choice, is certainly the formula which best fills the gap created by economic differences. Ontario may well be proud of it.

This freedom of choice, even in the case of the rich citizen, is subject, however, to some limitations ; it would be wrong to believe that a system of legal security is not satisfactory unless every indigent citizen can conscript at will, the lawyer he desires above all others !

It has sometimes been said that those without means are not placed in the same position as those with means unless they are entitled to choose quite freely from the entire criminal Bar. For instance, a person accused of a criminal offence in Ottawa might wish to have leading counsel from Toronto represent him. If he is a man of means, he might be able to do this. The question then is, should legal aid place a man without means in the same position ? The considerations, of course, are practical ones. The first problem is that certain members of the Bar are so well-known that it is reasonable to assume that many accused would wish to retain these leaders under a legal aid plan. This would mean that the great number would be disappointed since these lawyers cannot represent everyone. While it is expected that these leaders of the criminal Bar will participate to a considerable degree in an extended criminal legal aid program, they cannot carry the entire program on their own shoulders. Some restriction therefore, is also placed upon the supposed freedom of choice of the man of means. It is, in fact, limited by the considerations we have mentioned. Even the wealthiest are restricted in their freedom of choice since one lawyer can serve only a limited number of clients.

The Committee takes the view that it would be a sufficient guarantee of freedom of choice if the accused is permitted to choose, in the first instance, from panel lawyers who practice in his locality. He may, of course, and perhaps should be assisted in his choice by the local legal aid director.

At the same time, the Committee recognizes that in some localities there may not be counsel of sufficient experience to meet the needs of a particular case. In such cases, we think that the director should be given a discretion to be exercised judiciously, in the interest of the accused to arrange for the accused to engage counsel from outside the locality, but at the same time, bearing in mind the general principle that local practitioners should be appointed where possible. This is a discretion that would perhaps at least while experience is being gained, be exercised after consultation with the Provincial Director [1].

When the system of *public defender* is criticized for depriving the indigent of his right to a lawyer of his choice, it would be well to recall that no system permits the engaging of top legal talent on a few minutes notice.

34. The system of free choice is criticized for not living up to its high ideals for other reasons. It appears that the system of full legal security has not succeeded in preventing the practitioners of experience, from confiding most of the work related to legal assistance to the younger lawyers in their offices. Even the Ontario system is subject to this criticism.

In Quebec where the Legal aid bureau solicits the cooperation of lawyers in private practice, it is evident that the youngest members of the office carry the major part of the burden.

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[1] *Report of the Joint Committee on Legal Aid,* Province of Ontario, March 1965, p. 55. It should be noted that :
a) The indigent in the Ontario plan, must indicate three lawyers ;
b) The lawyer in the Ontario system is free to refuse a case or to transfer it to a confrère.

> The assigned counsel system provides valuable experience for younger lawyers. This argument comes close to conceding that many assigned counsel systems are inadequate, for experience is valuable in this sense only to one who needs it. In any event, the argument must have weighed against the vital requirement that the indigent client have competent representation. The proper role of the beginning lawyer is to serve as *assistant counsel* until he has learned enough to provide competent representation on his own. Subject to this severe qualification the argument is sound [1].

The author continues, however, with the following :

> Assigned attorneys are often young attorneys or others who lack experience in criminal law, hence they are no match for the prosecuting attorney. The survey disclosed wide variations among and within the states as to relative experience of prosecution and defence attorneys [2].

Although not without reproach, there is no doubt that the Ontario system merits less criticism than other formulas. In Ontario, the lawyers who defend the accused indigents are better remunerated (cf. Appendix 1) than in most of the systems of designation. That is to say, the lawyer chosen by an indigent is more inclined to assume the full responsibility of the case [3].

The work of Mr. Loranger (Annex) makes no comparison between the professional qualities of the various groups of lawyers, but it certainly indicates that the Junior Bar has supplied more than its share of legal aid in Quebec. In the absence of reports from the practitioners, Mr. Loranger was not able to determine whether a designated lawyer had transferred the file to a young lawyer in his legal office. Such incidents do occur, as clients have complained to the legal aid bureau that they have not been able to remain in contact with the lawyer of their choice, and that their case was turned over to a young assistant, or to a young associate.

35. The economics are unchanged : the fees paid by virtue of a global plan of legal security, remain lower than those secured in private practice. For this reason, recourse to the youngest associates continues to be a procedure used more frequently than one would expect at first sight.

However, this is not the only drawback resulting from this practice. In fact, even if it is true that the youngest lawyers in legal offices are not as

1 LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1963, volume 1 : *National Report*, p. 19.

2 *Op. cit.*, p. 20.

3 Even the Ontario system implies loss of revenue which could result in withdrawals : "It would appear that a similar result could be achieved in Ontario if in legal aid proceedings a lawyer received 75% of an ordinary solicitor and client account. From what we have learned during this enquiry this percentage would result in a foregoing by the profession of one half of normal profit at the very least". *Report of the Joint Committee on Legal Aid*, Ontario, March 1965, p. 52.

experienced in criminal law as the more seasoned lawyers, we note that the younger lawyers more frequently put forward the plea of not guilty, which has the result of calling for a further study of the case. The figures are not available for the Ontario system which has only been in effect for a short period, but this is the explanation given for some systems using the pleas of not guilty more frequently than others.

There have been many efforts to explain the fluctuations in the number of guilty pleas. While different factors influence this, age and experience of lawyers are amongst the reasons given for this [1].

36. The Ontario system has not been in existence long enough to be able to judge the merits of another criticism. Just as in the case of the designated lawyer formula, the system of a defender chosen by the accused and remunerated by the State, is charged with being conducive to prolonging the cases of indigents.

Knowing that the State and not the client is paying there appears to be a tendency for the lawyer to give preference to the cases in his own private practice, and to deal with the cases of legal assistance in the slow periods of his practice.

In this way the system of the lawyer chosen by the accused, and remunerated by the State, costs even more than it should, and cases proceed with undue slowness.

Undoubtedly the Ontario system has a number of administrative controls which have a regulating influence. However, it would seem that even this system pays a high price to assure the indigent his choice of a defender. And this leads to the financial requirements of the Ontario system.

d) ECONOMIC REQUIREMENTS (37)

37. The Ontario system has great merit, subject to one disparaging factor, namely the cost of the plan.

1 "This table reveals that clients of defenders plead guilty more frequently in a somewhat higher proportion of counties than do clients of assigned counsel (67% compared with 60%). Similarly, clients of retained counsel plead guilty more often in a higher proportion of assigned counsel counties than of defender counties, namely 26% compared with 17%. Moreover, the 26% is probably conservative, since the combined figure for 35 additional assigned counsel counties also falls into this category.

As explained in chapter 2, p. 21, these 35 counties were lumped together because very scant data were available for any one of the counties. The combined statistics for these counties show 46% of the assigned counsel clients pleading guilty compared with 51% for retained counsel". LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation 1965, volume 1 : *National Report*, p. 69.

This cost is extremely serious from the point of view of the government. But it should not be forgotten that this system, more than any other in the world, endeavours to respect all the rights of the citizen. The Report prepared by the joint committee in Ontario recognized, quite frankly, that its recommendations would involve the State in considerable expenditures.

A study made by a specialist at the request of the Committee, concluded that :

> Any attempt to estimate, by comparison with the cost of the English scheme, the cost of a similar plan in Ontario, is bound to be inaccurate because of the many differences between the two countries [1].

And so the Committee agreed that no realistic estimate of expenditure could be made for this plan : there was no way of forecasting the demand. All the reports prepared in an effort to predict the cost of the legal aid system which would leave the citizen with a choice of his lawyer, *necessarily* led to the same impasse.

> The possible cost of a legal aid plan extended along the lines suggested in this report has been a question to which the Committee has given its closest attention. It is regrettable that the Committee is forced to conclude that no accurate estimate can be made. It is worth noticing that the Rushcliffe Committee when faced with the same problem in the United Kingdom was forced to the same conclusion [2].

The Ontario government, however, did make an approximate estimate. But the cost of the system is increasing at so rapid a rate that it is causing concern to the government : $3.9 million for the first year ; $6.7 million for the second. Further on reference will be made to the statements of the Premier of Ontario on that point.

While the Ontario regime can be praised for its efforts to respect even minor rights, its advantages with regard to the freedom of choice are neither as real nor as important as we have been led to believe. Furthermore, the high cost has already made it necessary to include some permanent lawyers. The real cost (more particularly in civil matters) will only be known in 1970. (An important nuance : the cost includes civil and criminal.)

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1 *Report of the Joint Committee on Legal Aid,* Province of Ontario, March 1965, p. 90.

2 *Op. cit.,* p. 134. The American specialist Lee Silverstein also came to the identical conclusion : "It is difficult to foresee the problems of providing counsel for poor persons in all these kinds of cases, for no one knows just how many defendants would require appointment of counsel. In most states it is not known how many misdemeanor prosecutions there are. Very few counties or cities have reliable figures on the proportion of misdemeanor defendants who are financially unable to provide for their own defence. Also, the methods of offer and waiver of counsel affect the total that would be required and the extent of release on recognizance or cash deposit *in lieu* of bail" : *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, volume 1, *National Report,* p. 134.

3 — The Public Defender (38-44)

38. According to the third formula the State engages lawyers on a permanent basis and makes them available to the accused indigent. In the United States, this official and permanent lawyer is called a *public defender.*

In most of the American States which use this formula, the office of the public defender has more than one lawyer, and there is at least one office of this kind which has more than 200 lawyers engaged full time.

This system does not permit the accused the freedom to choose his defender, and the Ontario Study Committee took this fact into consideration when they rejected the public defender plan. Because of our decision to recommend this formula of legal security, it is our intention to put forward a double series of comments. In this first part of our analysis (paragraphs 38-44) we will, examine the professional and social duties of the public defender, and, endeavour to measure the economic advantages and administrative difficulties. We will then examine in detail, the different objections made to this formula (paragraphs 102-118).

a) IDENTIFYING THE PROFESSIONAL RESPONSIBILITIES (39)

39. Our system of justice has already accustomed us to the idea of a lawyer dependent, from an administrative point of view, on the State, and professionally to his professional association. Our Crown prosecutors, as every other lawyer, are subject to the professional ethics, and disciplinary control of the Bar, even though the State is their employer.

It therefore becomes apparent that the public defender is in an analogous situation — he retains all his professional obligations in conformity with his title and training as a lawyer :

> The primary duty of the Public Defender is to represent indigents accused of crime — those who have no attorney and lack the means to employ one. The Public Defender's being a public official does not change the established rules relating to the duties of attorney to client, according to decisions of the Supreme Court of the State of California. A Public Defender, as a licensed attorney, is guided by the same ethics and standards of conduct that govern the private attorney. There is, of course, no distinction between the obligations of a Defender toward his client and the duties of a private attorney in the same circumstances. Both owe a duty of high fidelity to their clients and an obligation to assert every possible defence permitted by law. In affirming this basic truth, the resolution of the Defender Section of the National Legal Aid and Defender Association in Pasadena in 1958 adopted the precise words of Canon 5 of the Canons of Professional Ethics : it is the right of the lawyer to undertake the defence of a person accused of crime regardless of his personal opinion as to the guilt of the accused ; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defence. Having undertaken such defence, the lawyer is

bound by all fair and honourable means, to present every defence that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law [1].

The Californian jurisprudence has, moreover, quite often stressed the need to consider the public defender in the same way as any other lawyer. In this capacity, the public defender has the same privileges as the representative of a private legal office, and has the same professional responsibilities, vis-à-vis his clients [2].

b) SUPPLEMENTARY SOCIAL RESPONSIBILITIES (40)

40. While the public defender resembles, from a professional point of view, any other lawyer for the defence, he fulfills an entirely different social role. It is only recently that the function of the public defender has become the subject of numerous commentaries ; but it is becoming more and more evident that legal security is something different from the simple defence of indigents or accused, and that it is necessary to visualize the task not only from the point of view of the individual, but also from the point of view of the community. In other words, legal insecurity has not disappeared under the pretext that some individuals help some indigents. (cf. Par. 13-15) :

> "The public defender has a much broader role than that of advocate in a hard-fought criminal trial. He must help to effect long-term changes in the lives of people who, when they reach his office, often are about to become or already

1 EDWARD T. MANCUSO, *The Public Defender System in the State of California*, Chicago, National Legal Aid and Defender Association, 1963, p. 5.

2 "In re Hough, 24 Cal. 2d 522, proceeding in *habeas corpus* to procure release from custody on murder conviction, death sentence pronounced :

"Public defender was appointed at time of arraignment, and the deputy acted during entire proceedings. Petition contends that the public defender is an officer of the county, and represents the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney, or other officer of the state or county connected with the prosecution of criminal cases. Under this statute, when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represented. With such plenary powers given a public defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such acts were performed by an attorney regularly employed and retained by the defendant". *Op. cit.*, p. 26.

> are locked into a life-long cycle of poverty, crime and punishment. Public defenders do not have the facilities to help break this cycle, but they should take an active role in prodding those who can establish or expand the necessary facilities. Some areas for action have been outlined here. In the broadest sense, public defenders must be advocates of the poor" [1].

If legal security is to be shared by the less favoured classes, in the same manner as the better provided groups, the defender of the indigent must work in cooperation with other agents of animation and social rehabilitation [2]. This social role of the public defender will be an important factor when the time comes for us to recommend a plan of legal security to the Quebec Government.

It is not at all a matter of provoking distinctions between the different social classes, on the contrary it is a mater of re-establishing an equilibrium which has been lacking for some time, between a minority, well taken care of by the most important legal firms, and the many, who are ignorant of the law and abandoned to their own resources. Making lawyers available to indigents is no more improbable than lawyers acting on behalf of industrial corporations or of loan companies !

Today crime is so well organized that they even have their own lawyers available to them at all times.

What remains to be done is to give legal security its full social dimension.

c) ECONOMIC ADVANTAGES (41-42)

41. In all countries in the world it is admitted today that society itself should carry the economic responsibility for legal security. It is no longer

1 MORGAN/SMITH, *Gaps in Defender Services*, in *The Legal Aid Briefcase*, vol. XXVI (1968) p. 221.

2 "We may represent a man on a substantive charge, then as a probation violator, then see him in jail a few years later as a parole violator. The number of old clients whose names appear in the local papers concerning their arrests in other jurisdictions is endless. We are working to break this cycle in several ways :

1. — Adams County has the first comprehensive community mental health center in the five-state Rocky Mountains area. Many clients, either on bond and awaiting trial or on probation, get out-patient treatment at the center. In addition, a psychiatric social worker regularly visits the jail to evaluate clients referred by us.

The juvenile court, through the new Colorado Children's Code, has become involved in more dependency cases. Although the Colorado statutes do not provide for public defender representation here, we have been appearing in these cases and have been attempting to get the district attorney's office involved. Often a dependency action is more effective in solving a family's problem and keeping it together than the strictly punitive prosecutions for contributing child neglect.

We are also contesting the right to prosecute parents for child neglect after that family has been brought into court in a dependency action"... *Op. cit.*, p. 218.

considered to be normal procedure to allow the Bar, or any other professional association of lawyers, to be financially responsible for the defence of indigents before the courts [1].

At the point where the support of the state is asked for a programme of legal security, it becomes necessary to place the economic factor high on the list of major considerations. In other words, from the moment that we undertake to finance legal security with taxpayers' money, the economic factors of the programme take precedence. For this reason legal security based on the formula of the public defender, is of particular interest to public administrators.

> "In the more urban counties, consideration should be given to the establishment of public defender systems. Studies elsewhere have indicated this is the most economical method of providing adequately trained and dedicated counsel for the indigent. In counties where law schools are located, a program to involve the senior law students should be considered. This not only would be of help to the public defender, but would give future practitioners an understanding of the problems faced by the indigent accused and an opportunity to become experienced in criminal law". [2]

The modern trend is to have the State responsible for financing the legal security plan. It follows that the State should have the right and the duty to have recourse to the most economic method of financing, since all government financing stems from public funds. In this perspective, there are those who state that it is not possible to confide the financing of legal security to the State without opting at the same time for the formula of public defender [3].

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1 "This view was reflected in the brief of the Ontario Federation of Labour, where, for instance, the following occurs :

"We do not believe that legal aid to defendants should be essentially a charitable operation of the legal profession, but rather it should be the responsibility of the whole community". *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 51.

2 CHARLES H. MILLER, *Tennessee,* in LEE SILVERSTEIN ; *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, Vol. 3 : *Missouri-Wyoming,* p. 700.

3 "All who have studied the matter, however, seem to agree that in urban communities of more than 40,000 persons, the public defender system commends itself to more efficient and more economical representation of an indigent accused. Secondly, if it is assumed that a public defender system should be established in particular areas or throughout the state, should there be a public defender in every county, in every circuit, or should some other geographical division be established ? Thirdly, should a public defender be elected or appointed, and if appointed who should make the appointment, — the circuit judges, the county court, or a combination thereof ? Should the public defender devote full time to his office, or should he be permitted to engage in the private practice of law ? Fourthly, can the answer to these questions be uniform throughout the state, when great differences in population

42. The direct participation by the State in legal security results in major advantages :

— uniformity of benefits offered, and

— reduction of costs.

If it were necessary to depend on private initiative to assure all indigents full defence before the courts, it would become necessary for a sound administration of justice to verify whether the different regions and different municipalities gave their indigents a comparable service.

It becomes quickly evident that it is impossible to have uniformity unless there is systematic and planned intervention by the government itself [1].

As already noted, the plan of public defender has many economic advantages which are more evident in the case of urban and well-populated judicial districts, than in rural zones. Criminality is generally much higher, and more violent, in the urban centres, which calls for a more elaborate system of justice in the urban judicial districts.

This does not mean, however, that the public defender plan cannot be introduced economically in rural zones, but it implies that only the States can establish a uniform system throughout its entire territory [2]. The expe-

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and caseload exist ? Lastly, and the obvious question — should the state, the counties, private foundations or agencies such as the United Fund provide the funds to carry out the program ?" JOSEPH J. SIMEONE and T.E. LAUER, *The Proposed Public Defender System for Missouri,* in *Journal of the Missouri Bar,* 23 (1967), p. 126.

1 As the Act is proposed, the cost of the operation of the defender system is to be borne by the State of Missouri. There are many reasons for this. The duty, we believe, to defend an indigent defendant is properly to be borne by the State just as is the duty to prosecute. Further, in order to obviate the difficulties that would be encountered if the various counties were responsible to bear the costs of the system, the Act places the burden upon one central authority. In other states where the defender system has been supported by private funds, or by local authorities, difficulties have been encountered. Therefore, the Act provides that any funds to operate the system should come from the State in order that there may be continuous and adequate funding. The Act is drafted in a manner to allow the General Assembly to appropriate funds in an amount deemed by the members to be sufficient to operate the system. Preliminary studies indicate that the initial first year cost should approximate funds in an amount deemed by the members to be sufficient to operate the system. Preliminary studies indicate that the initial first year cost should approximate $541,000 and $764,000 for following years. JOSEPH J. SIMEONE and T.E. LAUER, *The Proposed Public Defender System for Missouri,* in *Journal of the Missouri Bar,* 23 (1967), p. 129.

2 "There is no reason why a part-time public defender could not operate successfully in a rural county, or as an alternative, why a full-time defender could not serve more than one county. A multicounty public defender system should be considered." CHARLES H. MILLER, *Tennessee,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 700.

riences abroad, and the representations from Quebec groups, would indicate that better results can be achieved through the *public defender* (cf. Annex).

In the case of Quebec, where the geographic factor is of prime importance, it is fortunate that a public defender formula can be both flexible and uniform.

It is quite evident that the formula of public defender carries with it economic and other advantages. The defence would have large "legal laboratories" similar to those found in any large, private legal office, particularly with regard to civil law. Specialization becomes possible with its guarantees of efficiency and speed. In addition, the substitution of salaries for fees assures a better control of costs.

d) ADMINISTRATIVE DIFFICULTIES (43-44)

43. Even amongst the detractors of the public defender system, no one seriously questions the economic advantages of the public defender formula. However, it should be pointed out that there is no such thing as low cost legal security, and that having recourse to the State frequently results in higher costs than in private enterprise.

Even if it did cost less for the public defender to take charge of the case of an impecunious citizen, than for a lawyer in private practice, the public defender is not freed from all the administrative problems. In fact, such a plan of legal security must, like the others, be financed by public funds, and it therefore becomes necessary to obtain these funds from the executive authority. And that is where the shoe pinches.

> A chronic shortage of adequate funds to finance a public defender is inevitable under our political system. It is difficult if not impossible for a public defender to obtain sufficient funds. While a new and vigorous public defender system may be adequately financed at the outset, in the long run, even the best examples of public defender systems have been unable to secure sufficient funds from their legislatures to provide adequate representation. This invariably results in underpaid and overworked defenders, with many individual defendants receiving inadequate attention to their cases. Heavy caseloads present great temptations to persuade defendants to enter guilty pleas, and inevitably result in inadequate preparation for many of the cases which are tried [1].

This is not an exaggeration — quite the contrary, as experience confirms this to be a criticism against any government budgeted system. The annual reports of the public offices of legal security confirm these views [2].

1 LEWIS C. GREEN, *State v. State*, in *Journal of the Missouri Bar*, 23 (1967), p. 108.

2 "The amount of work has been very heavy upon the personnel. This is about the only problem confronting us at the present time, or that has confronted us for the past several years. We have to base our estimates on what has happened during the past year in preparing our next budget, but the population increase goes right on. Every substantial number of new residents in a community bring with them their crime problems, their charity problems and all other manner of problems that go with people in general. Hence, we usually find ourselves just a little bit behind". ELLERY E. CUFF, *How the Public Defender System Works in Los Angeles County*, p. 2.

Speaking frankly, a Quebec system of this kind might not develop according to the needs. Not meeting the demands for personnel could result in an increasing part of the needs remaining unsatisfied. In this regard the public defender faces particular risks : he who promises $6 per child cannot control increasing expenses ; he who spends $1,000,000 for a need can refuse to increase his grant the following year.

44. Quite often the administrative difficulties inherent in our political system, counterbalance the real economic advantages of the formula of a public defender. At present, few of the governmental systems of legal security have succeeded in overcoming these difficulties.

Some public defenders state that they have never met this lack of understanding on the part of the government, and have never had any difficulty in obtaining the necessary funds for the administration or expansion of their services. However, a careful examination of the facts shows that it is only rarely that the office of the public defender secures its full budget from the executive authority : in any case, the increase in the budget never parallels the increase in the number of criminal cases requiring the attention of the public defenders.

Thus, the system of a *lawyer chosen by the accused,* as is practiced in Ontario, permits so little opportunity to plan and place a ceiling on the costs, that the executive authority find it difficult to put any brakes on the increasing demands. On the contrary, the system of a *public defender* permits the executive authority so much opportunity of control that the legal security system could find itself in jeopardy [1].

1 "Although it might be easier initially to obtain funds for a public defender than for compensating assigned counsel, the public defender system presents a far more difficult problem with respect to subsequent appropriations to meet an expanding caseload. Suppose, for example, that a circuit defender is initially granted $100,000 a year to hire ten attorneys. Assuming that this is initially adequate, if the caseload were to double in five years, the defender would have to obtain an additional yearly appropriation of $100,000. However, if a bill were once passed requiring the state to pay appointed counsel $10 per hour up to $500, no new legislation would be required to meet an expanded caseload." LEWIS C. GREEN, *State v. State*, in *Journal of the Missouri Bar*, 23 (1967), p. 109.

4 — Mixed Systems (Legal Societies Subsidized) (45-48)

a) HOPE OF AN ADVANTAGEOUS COMBINATION (45)

45. The systems of legal security which we have described up to the present, involve different financial options. Certainly the objective remains the same, but the strategy and even the priority of values differ radically from one system to the other.

Moreover, with the years, each of the systems reveals deficiencies to such an extent, that different regions endeavour to arrive at compromise formulas which combine the advantages of the different structures [1] and neutralize the weaknesses.

It is in this manner that different countries have developed mixed systems of legal security. In most of these cases, the mixed systems develop from a *private* legal society, which comes to the aid of indigents by utilizing *government* funds for financing.

For all practical purposes, these mixed systems may on the surface resemble any other kind of formula of legal security. The private organization, may either establish a system of rotation of practitioners, or it may itself engage a team of permanent lawyers, and make them available to indigents. A mixed system started in this way, resembles either the formula of the public defender, or even more closely, the system of the designated or chosen lawyer.

The supporters of these mixed systems emphasize the necessity of an absolutely independent intermediary interposing itself between the indigent and the State, which would avoid a confrontation between the Crown prosecutor, paid by the State, and a public defender also remunerated directly by the same employer [2]. In this connection the mixed system has

1 "The two general methods sketched above for providing legal services to the poor are antithetical : one through private means with no governmental aid, the other through governmental means without private participation. The third method is joint participation of governmental and private organizations, that is, government support and private operation. It is most highly developed in England". ELLIOTT EVANS CHEATHAM, *A Lawyer When Needed,* New York and London, Columbia University Press, 1963, pp. 44-45.

2 "The chief of the criminal branch of the society indicated that the fact that the society's operation was administered by a private board of directors insulated the operation of the criminal branch from undesirable pressures". ROBERT KASANOF and PAUL I. BIRZON, *New York,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 ; *Missouri-Wyoming,* p. 533.

numerous advantages, and it functions in a most satisfactory manner in cities such as Philadelphia and New York [1].

> The assigned counsel system has served us well. Though assigned counsel in some areas have suffered from inexperience, there can be little doubt of the devotion or competence of most lawyers. Indeed the system has probably been fairer to the indigent defendant than it has been to the bar. In rural areas it may still constitute the best method of providing counsel. However, in many urban centers there are simply too many defendants to depend upon assigned counsel alone. In addition, it is difficult to provide a lawyer at preliminary hearings, much less police interrogations, if there is total dependence on the assigned counsel system.
>
> There is much to be said for the private defender system. Independence is assured by supervision from private citizens. However, lack of financial resources poses an almost insurmountable obstacle to purely private systems.
>
> To many knowledgeable observers the answer lies in public defender or public support for private defender organizations. These systems provide representation equal to that provided by assigned counsel. They are probably cheaper in large cities with a large volume of cases. There is little evidence to justify the traditional charges that public defenders are less independent. However, the hearings on the Criminal Justice Act of 1964 provide an effective testimonial to the fact that the concept of public defender is still anathema to many. The fear of creating a bureaucracy when added to the desire to use available funds to compensate fellow attorneys, constitutes and effective barrier to the passage of public defender legislation in many areas. Furthermore, there are cogent arguments against giving any small group a monopoly of the indigent cases. There should be someone to represent the defendant on appeal and in collateral proceedings, when the effectiveness of the public defender is questioned. There is much to be said for the contributions of assigned counsel in terms of imagination and creativity. An experienced attorney in private practice may question settled doctrines which the criminal law specialist has learned to accept. Mallory, Durham and other landmark decisions are the direct result of the infusion of new ideas from the practicing bar.
>
> I suggest that the answer for many cities and States lies in a combined public defender-assigned counsel system, supported by public funds and operated under the supervision of members of the bar.
>
> Such a system has been created for the District of Columbia by the Legal Aid Agency Act of 1960 and the Criminal Justice Act of 1964 as implemented by the Judicial Council for the District of Columbia Circuit [2].

1 "If the suggestion to turn the defence of indigents over to "circuit defenders" is rejected, there are three basic alternative means of furnishing counsel to indigents.

The first alternative is to leave our present uncompensated assigned counsel program as it is. Few could defend this position.

Secondly, private defender programs, such as "Voluntary Defender" in Philadelphia, "Legal Aid" in New York etc., which have staff attorneys to try cases, represent a great improvement over the public defender systems by removing the aroma of "State v. State". LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967), p. 120.

2 A. KENNETH PYE, *The Administration of Criminal Justice,* in *National Conference on Law and Poverty,* Washington, D.C., 1965, pp. 50-51.

46. With time, relatively modest private societies have had so great an expansion that they have become even in the most populous centres, highly respected systems of legal security [1].

To achieve such results, it was necessary for the lawyers recruited by the private societies to provide as highly professionalized a service as would have been rendered by the lawyers chosen and paid for by the accused.

> There was general agreement among those serving in the New York Legal Aid Society, the district attorneys who oppose the society in court, and the judges before whom its lawyers appear, that the society acted at least as vigorously and independently as retained counsel. The private, non governmental board of directors which administers the society's funds, includes a number of leaders of the bar. Where such a board is interposed between the defender and the public source of funds, it seems reasonable to expect as much independence and vigor from the defender as would be the case if the lawyers who served as directors were acting themselves on behalf of clients who had retained them [2].

Moreover, it was also necessary that the lawyers thus made available to indigents be able to cope effectively with the representatives of the prosecution, and to be of equal professional competence. The experience of different American systems showed that this was also the case [3]. Thus regardless of the formula used, the professional quality of the assistance offered, is maintained.

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1 "In the populous counties of New York City, where the volume of criminal business is enormously greater than it is in the less populous upstate counties, the Legal Aid Society has won acceptance as the principal source of representation for indigent defendants, and the New York City judges without exception express a very high regard for the work of the Legal Aid Society, in some instances expressing the view that the Legal Aid Society provides better representation than retained counsel. In less populous communities, assignment of counsel from lists of varying kinds remains the rule". ROBERT KASANOF and PAUL I. BIRZON, *New York,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 534.

2 *Op. cit.,* p. 547.

3 "All of the judges and district attorneys interviewed in New York and Queens Counties were of the opinion that the representation offered indigent defendants by the Legal Aid Society was equal to that offered by privately retained counsel, and that the work and professional performance of the society's lawyers were on a par with that of the district attorneys. Indeed, in several instances, the work of the society's lawyers was rated higher than that of usually retained counsel of the district attorney's office, and in no instances did any of the respondents find the work of the society's lawyers below the level of the district attorney or average retained counsel". *Op. cit.,* p. 533.

47. Experience has shown that the mixed systems have been more successful in the more densely populated judicial districts.

The Bar of the County of Nassau, one of the suburban counties of the city of New York, has established a legal aid society which has taken the form of the system of legal security based on the assigned lawyer [1].

In Philadelphia the legal security of indigents is assured continously, 24 hours a day and 7 days in the week [2].

At the risk of reducing these successes to less impressive proportions, it should be pointed out that there is little or no significance in describing the formula as "particularly effective in the large centres". In fact, it is "particularly in the large centres" that the formula has been tried. This succeeded efforts of a localized nature which could not possibly stand up to urban needs. By praising their success, there is danger of misinterpretation : *better* able to bear the burden than preceding formulas, the formula of a mixed system might create the impression of *complete* success.

In spite of these shades of meaning which are applicable to all "formulas of replacement", the mixed system if often successful from the point of view of quality.

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1 "In Nassau County, one of the great suburban counties adjoining New York City, the enormous growth of population made evident the inadequacy of the *ad hoc* assigned counsel system, and in March, 1962, the Criminal Courts Committee of the Nassau County Bar recommended that Nassau County operate a defender system through the Legal Aid Society, in accordance with the provisions of sections 224 and 716 through 721 of the County Law, which empowers counties to contract with private philanthropic societies to furnish defender service". ROBERT KASANOF and PAUL I. BIRZON, *New York,* LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 533.

2 The Defender Association of Philadelphia (DAP) is now recognized as on a parity with the prosecutor's office.

Three attorneys provide round-the-clock coverage seven days a week in the twenty-four hour magistrate court. Other (OEO) attorneys provide representation in seven magistrates courts at preliminary arraignments * and preliminary hearings, usually conducted in the morning. These attorneys are at the central office in the afternoons to work as the caseload dictates. One attorney provides prisoner counseling throughout the state, and another is responsible for a law development and education program for the staff. Of the nine NDP-funded attorneys, five are assigned to felony bail cases. Counsel is also provided at preliminary hearings before the United States Commissioners, at probation and parole revocation hearings, and at hearings. Representation is provided in both the state and federal courts for hearings on detainers and bench warrants, in hearings on postconviction petitions and writs of *habeas corpus,* and in the county court in wage attachment proceedings for non-support. And even this list of expanded services is incomplete.

* The purpose of a preliminary arraignment is to fix bail and set a date for a preliminary hearing in order to provide the accused an opportunity to obtain private counsel. *The Legal Aid Briefcase,* February, 1968, vol. XXVI, no. 3, p. 118.

48. These mixed systems of legal security have in common :

1 — that they have developed from other systems which have become unsatisfactory ;
2 — that they have given worthwhile results in many urban centres ;
3 — that they have given the Bar, or the professional association of lawyers an important role to play.

This third "common denominator" is of importance as it shows the direct interest of the profession in the problem [1].

In Scotland, it is the professional association itself which prepares a list of lawyers who must take their turn defending indigents [2]. Other countries go further, and allow the Bar the full responsibility of administering the entire system of legal security :

> The most comprehensive scheme appears to exist in South Australia where the Law Society operates a plan supported by an annual Government grant covering administration, out-of-pocket expenses and certain payment towards fees. While the plan is voluntary, it is not free ; the Society decides how much of the cost of proceedings the applicant must pay. The lawyers praticipating in legal aid appear to receive part of their normal fees. The eligibility limits are very flexible and no rigid categories exist [3].

It should be noted that Quebec has adopted in the course of recent years, a policy which up to a certain point is similar to that which prevails in South Australia. In fact, the Quebec government makes a more and more substantial contribution to the Bar, which has organized a system of legal security, providing for the payment to private practitioners for certain expenses by engaging lawyers on a full-time basis, whose services are made available free of charge to indigents. In some instances such as in the case of Montreal, the Bar has formed a corporation to administer a Legal Aid Bureau, subject to, the authority of, and the policies established by the Bar (cf. Annex).

In other districts, as in Quebec, the Bar itself supervises the administration of legal aid very closely.

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1 "There were occasional suggestions that contributions to the cost might be made by municipalities and by the Government of Canada. But these suggestions were not intended to shift from the province the major burden of the cost involved. It was also the almost unanimous opinion that legal aid should continue to be administered by the Law Society". *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 49.

2 "In all places where Criminal Courts are sitting, solicitors whose names are on a roster prepared by the Law Society attend for periods of a week at a time and are compensated at reasonable rates for the work. These are solicitors in private practice who have volunteered for this work and who have been approved by the Society". *Op. cit.,* p. 48.

3 *Op. cit.,* p. 21.

B — FOREIGN EXAMPLES (49-79)

INTRODUCTION (49-50)

49. After this rapid survey of the various formulas of legal security, it is necessary to see how these different systems work.

With regard to the formula of a *public defender,* we intend to borrow our examples from the American system, by reason of their seniority, because of the extent of their resources, and the amounts which they spend. Moreover, this formula hardly exists in its pure form in other countries.

We will then proceed to examine the formulas which are in effect in different European countries.

Only minor reference will be made to the legal security systems which grant the needy accused the right to choose his own lawyer at the expense of the State. The Ontario system, which we have already described (paragraphs 29-38) is the best example.

Once again we draw attention to the Annex of the present report : it gives an excellent description of the Montreal system, which for all practical purposes, is a mixed system undergoing rapid change. This Annex is important in another way, in that it makes valuable comparisons of the financial aspects of the different systems.

50. To place the American examples of the public defender in the right perspective, it should be understood that practically no system in the United States is similar to the *Ontario system.* Moreover, recourse to the public defender, has come into existence in many places, because it was impossible to satisfy the needs of the public with the formula of the *designated* or *assigned* lawyer. It might be well to recall here some of the comments which were made earlier regarding the mixed systems : that a system which is better than the preceding one, does not necessarily qualify it as a complete success. Actually the public defender has shown itself to be a worthwhile substitute for the formula of a designated lawyer. It has sometimes succeeded where the mixed system has failed. We do not know of any example where it has superseded a system similar to that of Ontario.

In fact a legal security system based on the choice of the lawyer by the indigent himself, is not found very often in the United States. It is therefore, more difficult than realized to compare the system of the public defender and the system of the *lawyer chosen by the indigent and suitably remunerated by the State.*

In the examination of the American situation, the Commission has concentrated especially on the public systems of legal security of Massachusetts, San Francisco, Los Angeles, and of the federal courts. We should

again put the reader on guard against the temptation to jump to conclusions and assume on reading these descriptions that all the systems of the public defender in the United States, use. as the above mentioned do, only personnel on a permanent basis.

1 — The United States (51-62)

a) MASSACHUSETTS (51-55)

51. At the time of the Commission's visit to Boston in December 1967, the service of the public defender of the Commonwealth of Massachusetts included 58 lawyers full time. Even then, the documentation praised this system as being both economic and satisfactory.

> Apart from its inefficiency the assigned counsel system is no answer to the financial problem. In fact the contrary is true, as has been pointed out by the National Legal Aid & Defender Association. Not to go afield for an example, careful studies indicate that, with a payment of $20.00 a case, the district courts in the Boston area alone would call for an appropriation greater than that sought by the Massachusettts Defenders Committee to cover the entire commonwealth. (The figure of $20.00 per case may be compared with that of $1,000.00 per case allowable to counsel assigned under our present statute in capital cases).
>
> The establishment of the Massachusetts Defenders Committee was cited by the director of the National Legal Aid & Defender Association as worthy of being taken as a model by other states confronted with the problem of the defence of the indigent. It is managed by the Supreme Judicial Court and directly responsible to it. Its staff is competent as is shown by its results. The operation is completely free from vulnerability to any form of improper pressure. Four years of experience show that it has worked well, at a minimum level of expense.
>
> Even so its cost is very considerable. But it is no greater than the need [1].

52. The Commonwealth of Massachusetts has a population of a little more than 5 millions, which makes possible worthwhile comparisons with the Quebec needs. In the course of the year which preceded the visit of the Commissioners, the permanent lawyers of the legal security service had represented in the courts, 18,000 indigents involved in 27,000 complaints of a criminal and penal nature. The office operated principally through funds received from the Commonwealth of Massachusetts, and also from a federal subsidy. The total budget of this legal aid service for a population comparable to that of Quebec, was in the neighbourhood of $700,000 for the year, which included the federal subsidy of approximately $100,000. (These figures, quoted in the course of a verbal discussion and written into our Minutes are approximations which should be checked against the statistical reports.)

[1] LARUE BROWN, *Equal Justice Under the Law* in *Massachusetts Law Quarterly*, pp. 61-62.

If we leave aside for the moment, the question of costs, and take a quick glance at the effectiveness of the system, it is noted that the public defenders of that State brought the majority of their cases before the court within an average delay of 7 days, while the legal aid bureaus in the Province of Quebec found it difficult to fix a time for hearings within less than 4 to 6 weeks notice, apart from cases of extreme urgency.

In fairness to the Legal Aid Bureau of the Bar of Montreal Inc., which has referred to this matter specifically, it is true that criminal and penal cases normally receive special treatment if the Bureau decides to take charge of them. This has become more and more frequent since the Bureau has begun to utilize an increased permanent personnel. The experience of the first 10 years (1956-1966) shows however, that the Bureau only devoted a minimal portion of its time and its resources to criminal and penal matters.

Note that the budget of $700,000 made available to the legal aid service in the Commonwealth of Massachusetts, covers the necessary investigations made by qualified detectives.

53. In Massachusetts, the management of the legal aid service is under the direction of an experienced lawyer selected by a Committee of Judges of the Superior Court. The Director then has the responsibility and authority to engage the lawyers who will form the personnel of the Public Defender system. By this nominating procedure, Massachusetts endeavours to answer the criticism that the public defender system results in a confrontation in the courts between two employees of the State. Although it is true that the public defender lawyers are employees of the State, they are however, only responsible to the director. This method of nomination and appointment of personnel eliminates the possibility of having the lawyer for the defence and the lawyer from the prosecution both receiving their orders from the Attorney General. This also eliminates the kind of collusion one fears to see established between the permanent prosecutor and the permanent public defender. Placing the administration of the service in the hands of a man who is responsible only to the magistrature, solves at least part of the difficulties which could result from intervention of the State representing both sides of the case.

Recourse to the magistrature is not, as we shall see, the only method of overcoming the problem of having one employer for both sides of the court. Nor is it the best in the opinion of the Commission.

54. On the administrative plan, the office of public defender for Massachusetts believes that it has taken all the necessary precautions to avoid the abuse of having the system used frequently or regularly by those who have no need for it. In some areas, there is reluctance to introduce an overall

system of legal security because of the impossibility of forecasting the extent of the costs. Statistics compiled by the Canadian Provinces and the American States, indicate that almost 90% of those who are accused, plead guilty before the court. With the introduction of a legal aid system, it is quite likely that the number of "not guilty" pleas will increase in an appreciable manner, thus aggravating the already existing bottlenecks in our courts.

Instead of 10% of not guilty pleas, the volume might increase to 28% and even more, which could mean twice as many cases before the courts as at present. It is not difficult to imagine the dramatic consequences such an increase in the number of cases would have on our entire system of justice.

The objection assumes greater importance because it is almost impossible to prove that innocent parties have ever agreed to guilty pleas. Public opinion would not object to "paying the price" for pleas of not guilty from the innocent, but society would resent increased expenditures by reason of a multiplication of pleas of innocence stemming directly and exclusively from free legal aid.

55. With this in mind, we should consider the results achieved by the legal aid service of Massachusetts. From the very beginning of that system, 80% of the individuals whose defence was undertaken by the public defender, acknowledged their guilt to the charges brought against them. This in itself indicated a very definite increase in the number pleading innocent, but it did not prevent the system of public defenders for Massachusetts from remaining within their very modest budget, nor from maintaining a fast tempo in the presentation of cases.

Quite obviously, nobody would wish to have the *public defenders* limiting themselves to advising their clients to plead guilty. Moreover, we have already made reference to figures according to which the percentage of guilty pleas recorded by the permanent defenders are not noticeably higher than those of lawyers in private practice.

It is hoped that by assuring the public of legal security, citizens will question the statements made by the police more often than they would if they were left to themselves. From this point of view, an increase in innocent pleas is a logical and happy result of the respect of fundamental rights.

Note also that the public defenders in Massachusetts win 92% of the cases they defend. It should be pointed out that not only is the case in which the individual is found to be innocent, considered to be a victory, but also the case in which the public defender has succeeded in obtaining a reduced charge.

If the statistics are interpreted correctly, they cannot be made to say that the public defenders only wait for a winning case before assuming the

defence of an indigent. Rather, the figures show the merits of the defence put forward.

Thus, twice as many of those defended by the permanent public defenders in Massachusetts profess their innocence as do the general average of accused individuals. The verdicts secured are, however, favourable in 92% of the cases ; and the State is able to do this at a reasonable cost [1].

b) SAN FRANCISCO (56-60)

56. During its visit to California in March 1968, the Commission attached particular importance to the system of legal security available to the citizens of San Francisco (Appendix 4).

It should be emphasize that California has not adopted one system of legal security for the entire State. On the contrary, each "county" (the level of intermediate government in the United States between the municipality and the State) establishes the system of legal security of its own choice.

The public defender of San Francisco has the responsibility of assuring the legal security of a population of a little more than one million citizens. For purposes of comparison, the legal aid service of the "County" of Los Angeles, serves approximately 7 millions citizens.

Special mention should be made of certain features in the San Francisco system, as they are definitely different from the general trend. The Director of the legal aid service of San Francisco, is actually elected by the entire population, which makes him one of the rare *public defenders* elected in the entire United States. The documentation coming from San Francisco, claims a superiority for this procedure, but we believe that it would be difficult and dangerous to import such a custom into our Province.

57. That, however, is not the most important feature. What is striking in the San Francisco system is its astonishingly low cost. According to the statistics, the public service of legal aid assumes responsibility for approximately 85% of the misdemeanors, and of 70% to 75% of the felonies. The volume of cases handled by the 20 lawyers in the San Francisco public defender service is even greater than the number of cases handled by the 58 permanent defenders of the State of Massachusetts. For the year 1967, for example, 25,400 individual cases were handled in San Francsco as against 18,000 in Massachusetts.

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[1] To secure such results calls for a personnel of high calibre. Otherwise, it would not be possible to defend *so great a number* of accused *so well* and *so quickly*. To be able to effectively evaluate this personnel, we are reproducing (Appendix 2) the scale of salaries in effect in the Massachusetts service and a summary of the activities.

Notwithstanding a caseload at least as great as that of Massachusetts, the total budget of the legal aid service of San Francisco totalled $266,000 as against $700,000 for the legal aid system of the State of Massachusetts. The remarks which we made in comparing the economics of the system of Massachusetts with that of Ontario, apply to an even greater degree in the case of the legal aid system in effect in the County of San Francisco. The statistics for San Francisco show an average cost of $10.49 per case, and of $4.60 per appearance.

Hasty conclusions should not be drawn from these figures because the definition of a *case* varies from one system to the other. Even so, the variations do not negate the economic advantages of the San Francisco system.

58. It appears that at different stages the San Francisco system was exposed to criticism :

> The public defender of San Francisco County, who has seven full-time lawyers in his office, has made formal application for two more full-time deputies. He stated that the size of his present staff does not allow the deputies to devote adequate time to the cases to be tried. (The Bar Association on San Francisco, in a report dated August 4, 1962, concluded that the "quality of representation of indigents has not been sufficiently maintained," primarily because of inadequate staff.) The San Francisco defender, who is an elected official, believes that the fact that he is elected enables him to retain his independence [1].

At the time of the visit of the Commission to San Francisco the service seemed, however, to have overcome its difficulties, and could count on 20 full-time lawyers in addition to several professional investigators.

Other features of the system in effect in San Francisco are worthwhile mentioning. It is surprising that with a population of approximately one million, the number of cases referred to the legal aid service, should be about the same as that for the population of Massachusetts (5 millions).

The most plausible explanation seems to be that the legal aid service of San Francisco does not make any check on the real indigence of the citizens who come to the bureau. The service requires each of the accused to reply to a questionnaire which is reproduced in Appendix 5, but in reality, no verification is made of the replies given by the presumed indigent.

According to those interviewed by the Commission in San Francisco, it would be prohibitive and useless to proceed with even the slightest enquiry : at the point where the defence of an individual involves a cost in the

[1] NORMAN ABRAMS and BERNARD PETRIE, *California,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 2 : *Alabama-Mississippi,* p. 75.

neighbourhood of $10 a case, it would actually be ridiculous to proceed with an investigation which in itself would be more costly [1].

The Widgery Committee in England came to the same conclusion, and warned against introducing a detailed procedure for investigation (paragraph 106). That Committee did not reject the idea of verification, but it wished it to be extremely simple and quick.

59. We should point out another major difference between the system of Massachusetts and that of San Francisco. At all levels, the salaries paid in San Francisco are higher than the salaries offered by the legal security service of Massachusetts. While the lawyer in Boston, or one of the neighbouring cities, begins at a salary of $6,900, a permanent public defender starting his career in San Francisco receives a salary of a least $12,000 a year.

However, the San Francisco office demands much higher qualifications as they only employ lawyers who have had a minimum of five years experience. A recent amendment has made it possible to engage lawyers who have had only two years of experience, but the Director indicated that they have not yet taken advantage of this amendment.

It would appear that the choice of more experienced lawyers has made it possible for the legal aid service of San Francisco to follow a different policy : they have recourse more often to negotiations outside the court. This places the public defender in San Francisco on just about the same basis as a normal legal office. In other words, the defender of the needy person has recourse to all the forms of negotiation and conciliation which might result in reducing or dropping the charge against his client.

60. It is regrettable to note that the economic advantages of the legal security system of San Francisco have not been fully appreciated by those controlling the purse strings. In fact, the administrative difficulties of which we spoke of earlier (paragraph 43 and 44) are found in full in San Francisco, so much so that the Director of the service doubts that he will be able to satisfy the needs of the population with the budget and the restricted personnel made available to him by the executive powers :

[1] In almost all of the cases, however, the affidavit of indigency is the only basis of inquiry. Judges tend to rely exclusively on the affidavit of indigency, without further independent inquiry or investigation, even on a spot-check basis, apparently because the court feels it lacks the personnel to conduct investigations. It is thought that in some cases applicants for assigned counsel conceal assets and thereby obtain free services to which they are not entitled. ROBERT KASANOF and PAUL I. BIRZON, *New York, op. cit.,* vol. 3 : *Missouri-Wyoming,* p. 533.

> From being the model for Public Defender offices throughout the United States, the Public Defender office in San Francisco is now unable to meet even the minimal standards required for Defender services, let alone handle the new courts and constitutionally required expanded services.
>
> The Public Defender is now in the process of preparing a supplemental appropriation for the additional help needed so that the office may adequately provide the much needed and required service. If additional help is not granted, the Public Defender will be forced to ask the Judges to appoint private counsel in many instances [1].

This confirms in a striking manner, the criticisms made against this formula of legal security. Notwithstanding the economic advantages, the political powers all too frequently use their authority to restrict the expenditures required by the legal security system.

c) LOS ANGELES (61)

61. It is unnecessary to spend much time on the characteristics of the legal security service which has been in existence since 1914 in the County of Los Angeles. This service resembles that of Massachusetts.

The principal difference is the magnitude of the service in effect in Los Angeles : it has an enormous office with more than 200 full-time lawyers, and a budget in the neighbourhood of 2.8 millions dollars. Los Angeles is also an example of close cooperation between two different systems of legal security. The city has its own system while the regional government *(the County)* also has one [2].

The legal security service of the *County* of Los Angeles also differs in the method of naming its Director, who is selected by the executive of the regional government from the three best qualified candidates submitted by the Civil Service following examinations.

This third method of selection differs from that of Massachusetts, which uses the magistrature, and that of San Francisco which has a public election. Different methods of nomination are possible in California within the limits

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1 EDWARD T. MANCUSO, *Public Defender of the City and County of San Francisco*, July 1, 1966 to June 30, 1967, p. 3.

2 "The City Public Defender of Los Angeles is an ordinance created position. That office has jurisdiction over misdemeanors committed within the city limits. They have no superior court jurisdiction. The county office has jurisdiction over the cases tried in the superior court at all stages of the proceedings, including the preliminary hearings. The County Public Defender has jurisdiction over one misdemeanor, that is, contributing to the delinquency of a minor. This is so because that crime alone is a misdemeanor over which the superior court has jurisdiction". ELLERY E. CUFF, *How the Public System Works in Los Angeles County*, p. 3.

of the State and the County, by reason of legislation which permits either, the election, or, the nomination of the Director of the legal aid service [1].

d) MISSOURI (62)

62. By reason of its flexibility, it is worthwhile drawing attention to the system of legal security in the State of Missouri.

This is a mixed system in the sense that it provides for recourse to the public defender in all regions of more than 100,000 inhabitants, and the utilization of a designated lawyer in the less populated zones. This practice conforms in many ways with suggestions made for Quebec :

> The proposed Act does provide that in regions having a population of less than 100,000 persons, the Commission may establish, in lieu of a defender system, an "alternative appointed counsel system". In those regions counsel would be assigned under the traditional method. This provision was inserted for the reason that in rural areas in the state, the assigned counsel system may be more efficient and less costly than establishing an office staffed by a public defender and assistants.
>
> The Act concludes with a provision that in any region in which counsel is assigned to represent an indigent, the attorney appointed shall be reimbursed for "actual expenses reasonably incurred in the defence of the person". The claim for reimbursement is to be made to the judge of the court where the case is tried, or to the appellate court in which the attorney represented the defendant. It is to be noted that nothing in the proposed Act provides for compensation for the services of the assigned attorney. The great majority of lawyers are, we think, willing and feel a duty to represent an indigent and will do so without compensation for their time. But we believe that lawyers generally just as strongly feel that they should be reimbursed for the expenses which they incur in the defence of a criminal case which is assigned [2].

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1 " Section 23 of the charter prescribes the duties of the Public Defender. Section 55 provides that the District Attorney, Public Defender, County Counsel, and their deputies, shall not engage in any private law practice and shall devote all their time and attention during business hours to the duties of their respective offices.

The State Government Code, from Section 27700 on, provides *different manners in which the office of public defender may be set up throughout the State.* It provides that a public defender may be either elective or appointive and, if appointive, the appointment must be made by the board of supervisors. It also provides that two or more counties may combine in a district and appoint a public defender to represent the district. The duties of a public defender, are set forth in the Los Angeles County Charter. There is one exception, however. The State law makes it a duty that the public defender must defend all persons charged with crime triable in the Superior Court at all stages of the proceedings, including the preliminary hearings. Section 25 of the charter apparently anticipated that the State would add certain duties and, therefore, makes it the duty of county officers to fulfill duties as prescribed by State laws as they become effective". *Op. cit.*, p. 1.

2 JOSEPH J. SIMEONE and T.E. LAUER, *The Proposed Public Defender System for Missouri*, in *Journal of the Missouri Bar*, vol. 23 (1967), p. 129.

The legislation in the State of Missouri prohibits the public defender from all private practice of law, which is also the situation in the County of Los Angeles [1].

In Appendix 6A we give other American examples. They underline the flexibility of the formulas, and encourage Quebec to hope for a system truly adapted to its needs.

2 — Europe (63-79)

63. Generally speaking, in the matter of legal security, the European countries adopt a policy entirely different from that in effect in a number of American States.

For example, Europe does not have, west of the Iron Curtain, any example of a "permanent public defender". This term is currently in use, particularly in the Scandinavian countries, but it has an entirely different significance.

It should not be concluded that the European countries minimize, or are less aware of the responsibilities of the State in legal security matters.

On the contrary, most of the European countries have had for a considerable length of time, system of legal aid which guarantee to each accused, the services of a legal counsellor.

a) THE SCANDINAVIAN COUNTRIES (64)

64. Two Scandinavian countries studied by the Commission, Sweden and Denmark, have always recognized the responsibilities of the State with regard to the defence of the impoverished citizen.

However, neither of these two countries utilize the American formula of public defender made available to the accused indigents on a full-time basis.

[1] "The regions are divided into four classes: those over 500,000 persons; those having a population of 250,000 but not more than 500,000; those having a population of 100,000 but not more than 250,000 and those having a population of less than 100,000 persons. The salaries of the various regional defenders are commensurate with the caseload and the population of the region. The salary of the defender in the various regions are "not to exceed" $17,000 in the most populous areas and $12,000 in the smaller regions, with the exception that the defender appointed in the region in which the Missouri State Penitentiary is located may receive a sum not to exceed the maximum authorized in regions having more than 500,000 persons. The Act explicitly prohibits the public defender from engaging in "the private practice of law" and prohibits him form accepting "during his term any other public office or employment for which he receive compensation". This provision was felt by the committee to be essential". *Op. cit.*, p. 127.

To assure the defence of deprived citizens, the two countries have recourse either to the Bar itself, or to lawyers in private practice; which places their legal aid service closer to the kind of service rendered by the legal aid Bureau of the Bar of Montreal, than to the Ontario system.

i) SWEDEN (65-67)

65. The Swedish system of legal aid makes scarcely any distinction between the criminal and civil domains. Following introduction of a law in 1919, every individual who cannot himself defray the cost of judicial procedures, may obtain free assistance (Appendix 7).

The Swedish system has schedules which endeavour to establish a line of demarcation between the poor and the rich. At the present time, every individual whose average revenue is below the level of 1,100 Swedish Kroner a month (approximately $220) has the right to free legal procedures.

In the following year, 1920, another service was started by the City of Stockholm for the purpose of furnishing the necessary legal services to those with modest revenues. This additional service was directed specifically to defence before the courts, while the law of 1919 covered principally, legal procedures:

> A person can however, besides legal proceedings also need legal aid. For the purpose of making it possible for people with low incomes to get quite as good legal assistance, as people in a better economic situation can obtain by paying, the city of Stockholm founded in 1920 the Legal Aid Institution of Stockholm (Stockholm stads rattshjalpsanstalt).
>
> Many cities and counties have followed this example. In Sweden there are now 16 such institutions, mainly in the middle and southern part of Sweden. According to the law the state must subsidize the costs of these institutions.
>
> The institution here in Stockholm assists people living in Stockholm (both Swedes and foreigners) with legal matters of all kinds, give advice and information, assist in drawing up documents, in settling disputes and coming to agreements, and to appear before the court within the district covered by the institution [1].

66. This legal aid service which supplemented and broadened the law of 1919, helped those who had a revenue in excess of 1,100 Swedish Kroner a month (approximately $220) but were unable to assume the full cost of their defence.

In Stockholm for example, this supplementary service of legal security, extends its help to individuals whose revenue may reach 1,600 to 1,700 Kroner a month (approximately $320 to $340) and this level is raised by 250 to 350 Swedish Kroner a month (approximately $50 to $60), for each

[1] Document supplied by the Legal Aid Bureau of Stockholm.

dependent. This limit may be raised if the individual has to face considerable special expenses : increased rental, costly legal procedures . . .

One may well question how these two services can coexist. The essential difference is that all judicial procedures are free to the individual who benefits from the legal assistance, started in 1920, while in the case visualized by the law of 1919, the "free services" only applies to the procedures themselves, and not to the defence, properly speaking.

However, by subsidizing the legal aid visualized by the private system introduced in 1920, the State makes the defence itself free of charge.

67. In the Swedish procedure, it is not essential for a defender to be a member of the Bar to plead the cause of another before the court. Of the twelve lawyers who make up the permanent legal aid group of Stockholm, only ten belong to the Bar. The following details have been supplied by the Service (same document) :

> If a person is not granted free legal proceedings he must pay for the costs of reports of proceedings, verdicts, etc.
>
> Assistance for legal aid is, as a rule, free of charge.
>
> Twelve lawyers, of which ten belong to the Swedish Bar Association — together with a necessary staff — have full-time work. The number of new cases amounted in 1967 to more than 15,000. 7,500 cases concerned domestic problems ; 7,500 other matters, etc. One group which requires much work and attention is the one concerning compensation damages in traffic, in work and similar affairs.
>
> The institutions yearly expenses amount to 1,600,000 Kroner ($320,000 dollars). These expenses are covered by the *incomes* of the institution (remuneration for legal proceeding, etc.) : 400,000 Kroner ($80,000 dollars) ; by *subsidy ;* 450,000 Kroner ($90,000 dollars) and *by the city of Stockholm :* 750,000 Kroner ($150,000 dollars).

Another important difference separates the two services of legal aid. In all minor offence cases where there is no risk of imprisonment, the indigent need only go to a lawyer of the legal aid bureau. In the cases where the offence might be punished by imprisonment, the person in need has the right to ask for a lawyer of his own choice. The judge then ratifies the choice and the State pays the cost. In theory the individual, liable to a sentence of imprisonment, can ask for a lawyer who is part of the legal aid service, but in view of the lack of personnel, this bureau only handles such cases in exceptional circumstances.

ii) DENMARK (68-72)

68. Denmark adopts a different system. Here, the selected lawyers are recommended by their professional association, and approved by the Minister of Justice, who by a system of rotation assures the defence of indigents before the criminal court.

The lawyers are not named for a specific case, but when it is the turn of a lawyer on the official list to go to court, he assumes the defence of all indigents who appear that day. On this point, the Danish system is similar to the formula of the designated lawyer, and even more so to the "duty solicitor" of Scotland. More is said about this in the Guthrie Report (1960).

In the Danish system, as in Ontario, the accused is entirely free to refuse to deal with the lawyer who is present in Court, and to ask for a lawyer of his own choice. In this event, the lawyer who has helped the accused at this appearance, transmits the file to the lawyer chosen by the accused [1].

If the lawyer chosen by the accused is on the official list, it is still possible for the accused to benefit from the free services of legal aid. If the lawyer so chosen is not on the official list, the accused is required to pay for the cost of his own defence. In almost all cases the accused is satisfied with the lawyer who was in the court on the day of his appearance.

A most important point - the designated lawyer cannot transfer the file to another lawyer, nor even to another member of his own legal office, without a satisfactory explanation to the court.

69. It may seem strange that the Danish procedure hardly makes any mention of the fact that legal proceedings related to the defence of indigents are free of charge.

This is to some extent due to the fact that the police forces and court stenography in Denmark, play an entirely different role from that which exists in Quebec. For example, the Danish courts do not make stenographic transcripts of all the proceedings. At the end of the trial, the court itself, through its Chairman, makes a summary of the discussions, limiting itself to the evidence offered. After receiving the approval of the two parties involved in the affair, only this summary is typed. The result is a resume of a few pages which is made available free of charge to those who ask for it.

Similarly the services of the Danish police forces are not available exclusively to the prosecution. The lawyers for the defence have, and exercise, the right to utilize the police forces to complete their evidence. The association of lawyers for the defence informed the Commission that the Danish police carried out this task scrupulously, and gave the defence all the cooperation that could be hoped for. It should also be emphasized

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[1] As in Canada, the appearance in Denmark must take place within 24 hours following the arrest of an individual. At the moment of his appearance, the court decides whether it is necessary to detain the accused or to grant him his liberty while awaiting the hearing of his case. Even if the accused reserves the right to choose his own lawyer, the legal security service sees to it just the same, that he is represented by a lawyer from the very moment of his appearance.

that the Danish trial does not include any element of surprise, as the defence and the prosecution have in advance, exchanged the lists of their witnesses, and each has made known to their counterpart, the entirety of the proof which they intend to submit.

Consequently, when an indigent secures the services of a defender, paid for by the State, this also includes the entire legal procedures free of charge. Furthermore, it is the Government administration, and not the court, which grants this benefit.

70. The procedure of the legal aid service in Denmark has another special feature : the accused found guilty, is called upon to pay the state the costs involved in his defence, notwithstanding that he has benefitted from a defence at no charge.

The lawyer is not required to wait for payment of his fees as the government pays the fees of the lawyers made available to the indigents, and then endeavours to collect, if at all possible, the amount owing.

In practice, it is evident that the State has little hope of collecting such debts.

The officers of the Department of Justice in Denmark believe that there is no justification for society paying for the defence of citizens who can assume this responsibility themselves ; and it is normal for repayment to be asked from those who have some resources. On this point, the Danish procedure of legal aid is somewhat similar to the Ontario system, and conforms to the recommendations of the Widgery Committee which calls for a repayment of costs by the accused who benefits from "provisional authorization" of a free defence, but who subsequently is unable to establish his indigence [1].

[1] En matière civile aussi bien que correctionnelle, les principes de publicité et d'instruction verbale sont généralement appliqués. La publicité des débats est cependant soumise à certaines restrictions dans l'intérêt même des parties, des témoins, etc. Un autre principe important du système judiciaire danois est que les preuves, y compris l'audition des parties et de leurs témoins, doivent en général être produites devant le tribunal chargé de juger. Cette règle ne vaut toutefois pas pour la Cour suprême qui statue presque toujours sur le vu de procès-verbaux et autres preuves écrites, cependant que la présentation des preuves et les débats sont verbaux.

Les personnes peu fortunées dont les chances d'obtenir gain de cause auprès des tribunaux paraissent raisonnables, qu'elles soient demandeurs ou défendeurs, peuvent bénéficier de l'assistance judiciaire gratuite (*fri proces*). Celle-ci assure à l'assisté la remise des frais de justice et en cas de besoin le concours d'un avocat nommé d'office. Les frais sont à la charge du Trésor. Par contre, l'assistance judiciaire ne dispense pas le bénéficiaire qui perd son procès d'indemniser la partie adverse de ses frais. C'est l'administration qui décide si l'assistance judiciaire doit être accordée en dernier ressort, le ministre de la Justice et non pas les tribunaux. *Le Danemark*, Manuel officiel préparé par le Service de presse et d'information du ministère royal des Affaires étrangères du Danemark, Palais de Christiansborg, Copenhague, 1965, p. 212.

71. The Danish system of legal security has a number of characteristics which distinguish it from the Ontario system.

It is the responsibility of the court at the time of the first appearance to fix the rate of remuneration. In the opinion of the practitioners, the rates are satisfactory for the lower courts, but become more and more nominal as the procedures come closer to the Supreme Court. On the average it appears that the lawyers involved in the defence of indigents receive from 750 to 1,000 Danish Kroner ($100 to $140) per day of work on behalf of indigents. In the opinion of the Commission, these rates are comparable to those paid by Ontario to the lawyers who serve the legal aid service. It should be noted that the Danish legal aid utilizes lawyers of the highest standing.

The Danish Minister of Justice estimates between 7 and 8 millions Danish Kroner (approximately $1 million) are collected in fees by the practitioners within the framework of this programme. This undoubtedly, is more economical than the Ontario system, but it should be stressed again that the Danish judicial procedure is much less elaborate than the Canadian, making it possible to have much quicker trials. Furthermore, Denmark's population is below that of Ontario, and the demographic concentration is not the same.

There are other factors which simplify the Danish procedure. For example, in a large number of cases, it is sufficient for the accused to plead guilty to the charge laid against him by the prosecution, for a fine to be imposed immediately, without court proceedings. It is therefore easy to understand why almost 80% of the cases never come before the court, and do not require the intervention of the legal aid service.

72. On the whole, the Danish system depends upon a group of lawyers in private practice coming to the aid of the indigents through a system of rotation. Denmark has not yet thought of transforming the defenders of indigents into civil servants.

In the course of meetings with practitioners, judges and university professors in Denmark, the Commission discussed at length the advantages and disadvantages of the different legal aid systems (Appendix 8). Most of the Danish authorities were strongly opposed to any form of *public defender* for the simple reason that the public would not willingly accept that both the defence lawyer and the Crown prosecutor be in the service of the same employer [1].

[1] " The practice of criminal law, especially at the trial level, requires attorneys to be experienced not only in the law but also in the practicalities of the concrete situations, such as individual characteristics of the judges and the peculiarities of local practice. Young attorneys, or even older ones who sometimes volunteer their services, are not aware of basic courtroom procedures and cannot instantly be taught them.

This is an objection raised frequently by the Ontario Committee, responsible for defining the fundamental principles of the legal aid system for that Province [1].

Then again, the lawyers who act within the framework of the Danish legal aid system receive their fees through the intermediary of the police. In this way the Danes do not feel that there is the conflict of interests which is feared if the defenders of indigents were to become civil servants.

b) HOLLAND (73-74)

73. The Netherlands system, as in most European legal security systems, depends to a great extent on the professional association of lawyers. Each of the nineteen districts of Holland has its own Bar, which organizes in its own manner, a Council of Legal Aid, subject however, to the authority of the magistrature, in the sense that it is the President of each court who names the lawyers forming the Council by ratifying or refusing the recommendations of the Bar (Appendix 9).

Each of these Councils establishes a list which every judge can use to make help available to indigents. The system in Holland is very close to that of the system of the lawyer designated by the court. It differs from the Danish system in that the list includes, at least in theory, all the lawyers who are members of the Bar. Actually the list is limited to lawyers who have joined the Bar in the last three years ; which places the legal security services in Holland in line with generally accepted standards elsewhere, namely, that the youngest lawyers carry the greater part of the responsibilities with regard to legal security.

74. Like many other European judicial systems, the Netherland procedure includes the Judges of Instruction. This one fact, changes the entire picture with regard to legal security. The presence of this judge explains, without

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Using such counsel to defend indigents may mean acquiring courtroom experience for counsel in exchange for a lengthy period of incarceration for the client". *The Legal Aid Briefcase,* February 1968, vol. XXVI, no 3, p. 105.

[1] It would appear that the Ontario committee has misinterpreted the actual situation by summarizing the Scandinavian systems in the following manner : "It appears from that committee's report that in Norway, Sweden and Denmark, no investigation is made where accused appears without counsel. Accused is furnished with counsel of his choice by the State and such counsel is paid on the ordinary scale for such work. His counsel is given access to the prosecutor's file and is also provided with the facilities of the prosecutor's office, which includes laboratories and investigations by experts. If the accused is ultimately acquitted, he is not called upon to make any payment towards his defence". *Report of the Joint Committee on Legal Aid,* Ontario, February 1965, p. 45.

any doubt, why the councils of legal aid only deal with a small number of cases (in The Hague they only have 200 to 300 cases a year).

The defence lawyers, even when they are paid by the accused, rarely attend the interrogation carried on before the Judge of Instruction although they are permitted to do so. Even the accused who are able to pay the cost of their own defence are in the hands of the Judge of Instruction or of the police, during the first four days of detention. The Judge of Instruction does not intervene in all the criminal and penal cases, but in cases of detention, he is nonetheless responsible for making it difficult for the accused and his lawyers to contact each other.

For this reason, it is hardly possible to think of utilizing the Holland procedure of legal aid in Quebec or in Canada. Our judicial procedure calls for the accused benefitting as quickly as possible, from the services of a legal counsellor, and Quebec would not admit, as Holland does, that a lawyer should not take charge of the case of his client until two or three weeks after the arrest.

We repeat — the accused who pays his own lawyer can have him at his side before the Judge of Instruction. It is not at all equitable for a legal security system to permit the citizen who has the means, to secure a lawyer within a few hours following his arrest, while the indigent is unable to benefit from any legal help for several days.

c) BELGIUM (75)

75. Belgium, like Holland, has a Judge of Instruction. It is this judge who has the responsibility of deciding within the 24 hours following arrest, whether the accused has need of the services of a lawyer.

In the Belgian procedure, the judges do not intervene in any way in the choice of lawyer, as the entire legal security system is under the authority of the Batonnier. From a practical point of view, it would seem that the accused has not the privilege of choosing his own lawyer. The Executive of the Bar have introduced a system of legal aid from which the accused indigent can benefit ; but this comes much closer to the system of the designated lawyer than the formula of a lawyer chosen by the indigent and remunerated by the State. In our opinion, and as is the case in Holland, the designated lawyer enters the picture too late.

Moreover, the Belgian lawyers who agree to defend indigents, receive no remuneration for their professional services.

Such a system of legal aid, also centred around the Judge of Instruction, does not fit into the needs of Quebec : it does not satisfy the lawyers who receive no remuneration, nor the public who ask for the systematic intervention of the lawyer from the moment of arrest.

In brief,

1. Action by the Bar rather than the court ;
2. Little choice for the accused ;
3. Late intervention by the lawyer ;
4. No remuneration.

d) FRANCE (76)

76. The French legislation defines legal aid in the following manner :

> A benefit granted by law to enable those persons who have not the necessary resources to take full advantage of their right to justice at no cost and with the free assistance of the auxilliaries of justice.

We find in France, as in Holland and in Belgium, many consequences from a procedure based on the Judge of Instruction. The legal aid service only comes into play quite late in the procedure, judged by our North American standards.

Some official comments on the French legal aid system are reproduced in Appendix 10. It should be noted that the defender of the indigent can hardly intervene before the Judge of Instruction has begun the questioning of the accused. That is to say, there has already been a considerable lapse of time following the arrest. Here again, we do not believe that the French procedure can inspire Quebec in the development of its own system of legal security.

e) ENGLAND (77-79)

77. The British procedure is much closer to the customs of Quebec and Canada ; legal security in England, is of such a nature that it is most instructive for us.

In England, the legal professions and the prosecution are organized in so different a manner to that of Quebec and Canada, that the Commission looked in vain for *Crown prosecutors. . .*

78. By the end of the last World War, the system of legal security in England was still quite modest. Up to that time they had been able to preserve the independence of practitioners [1].

[1] "In summary, the system of legal aid in England prior to the 1947 statute was very limited. Through vigorous leadership and efficient administration England has developed a system that is suited to her conditions and that has the cordial support of the legal profession. In our decentralized federal nation, we continue to experiment with

During the fifteen years which followed, the British system of legal security underwent rapid and substantial developments.

> The English Legal Aid and Advice Schemes, implemented by statutes and regulations from 1949 to 1961, is based on three sets of principles. They concern the clients, the government and the lawyers. First, as to the clients : "The Schemes provided under the Legal Aid and Advice Acts aim to make available to the public those services of solicitor and counsel which a reasonable man would provide for himself had he sufficient means to do so."
>
> Second, the government should pay the costs of the services beyond what the clients can pay, but the government should have no share in the administration of the system. Third, the organized legal profession should have the controlling part in the operation of the legal system, the legal work should be done by lawyers in private practice, and in the individual case the relation between the private lawyer and the client should be direct with no interposition of an official or organization [1].

The formula of public defender has already gained some support in England, while the mixed systems based on legal societies of a private nature, have grown even stronger than in the past. However, as indicated by Mr. Cheetham, England has not yet given up the formula of the assigned lawyer [2].

All in all, England presents the image of a peaceful coexistence of almost all the possible systems. It should however, be noted that the system of the public defender is making the most spectacular advances (Appendix 11).

79. Notwithstanding the coexistence of different formulas, England is still tending towards legal security, organized and controlled by the professional

and to employ a variety of methods of making legal services available to those who need them. The principal method, the voluntary legal aid society, originated early and has taken on a life and form of its own. From the English example we can gain support for the necessary independence of the lawyers provided and observe how this independence may be preserved even when public funds are the source of the services. But the institutional setting and in lesser measure the political ideals are obstacles in the way of our adoption of the English system". ELLIOTT EVANS CHEATHAM, *A Lawyer When Needed*, New York and London, Columbia University Press, 1963, p. 57.

[1] *Op. cit.*, p. 45.

[2] "The great growth in legal aid in the decade and more since the English system got under way has been directed principally to *strengthening the legal aid societies and to spreading the office of public defender*. Yet in a few cities a beginning has been made with a mixed public-private system administered by the local legal aid societies and supported in part by local public funds. There is an old mixed system, mentioned earlier, to which we are so accustomed that we scarcely recognize that it is made up of both public and private elements. It is the system of assigned counsel in which state compensation is provided. Private lawyers are assigned case by case, the appointment is made by the judge, a state official, and compensation comes from state funds". *Op. cit.*, p. 49.

association of lawyers. In the Scottish procedure, the lawyers participate in the defence of indigents by a system of rotation [1].

In its evaluation of the English system, the Ontario Study Committee, already quoted (paragraph 29), has emphasized that the Bar has an important part to play in the administration of legal security. However, it should be mentioned that the English procedure, which gives the Bar almost complete control of legal security, calls for close administrative control of the lawyers.

> England has stronger organization of lawyers than we have. The four Inns of Court have a control over all barristers that rests on immemorial custom. The Law Society has broad control over solicitors which is based on a statute and which is deserved by the excellence of the Society's leadership and administration. Observing the need for legal services for the poor, and confident in its strength, the Law Society devised and urged the scheme of legal aid and assistance. It is worthy of note that the plan for legal services was put forward by lawyers and is administered by them, while the English plan for medical services was not devised by the medical profession and is administered by the state.
>
> *Another characteristic of the English legal profession is a system of supervision of fees, either by legal provisions or by official taxing masters.* This system makes it relatively easy to determine the fair or going fee for a lawyer's work and to block excessive charges.
>
> In this country (United States) the professional organizations are ordinarily not all-inclusive, as with the Inns of Court, nor are they as active as the Law Society even in states with the all-inclusive bar organizations. The system of fees is chaotic, with little indication of what is a fair fee [2].

Naturally, such an administrative control of the fees of lawyers, has on many occasions irritated the members of the legal professions. However, the Widgery Committee which has studied this question recently, does not believe this custom should be broken [3].

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1 "In practice, even under the Scottish system, enough time does arise in most cases for an enquiry to be made into eligibility by an independent body, such as our Department of Public Welfare. Under the Scottish practice, solicitors on the "Duty Roster" attend before Court opens to interview prisoners who have requested legal aid. In that interview they give forthright and competent advice on the three major issues: how to plead, bail, and legal aid. If the accused decides to plead guilty and the question of sentence can properly be dealt with immediately, the legal aid solicitor represents him upon his appearance in Court which occurs immediately thereafter. If the accused decides to plead not guilty, the duty solicitor will automatically represent him on such plea and upon any application for bail". *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 47.

2 ELLIOTT EVANS CHEATHAM, *A Lawyer When Needed*, New York and London, Columbia University Press, 1963, p. 57.

3 "The Widgery Committee recommends no change in the authorities responsible for determining the fee of solicitor and counsel, thereby rejecting the Law Society's suggestion that it be given the authority to determine fees in the superior courts; * however, the committee acknowledged the lack of uniformity in assessing legal aid cost among the 150 clerks, many of whom refuse to consider itemized bills and determine the fee by "rule of thumb" methods, such as automatically assessing the fees of defence counsel and solicitor at the same figure as those on counsel and solicitor for prosecution. ** The committee recommends that solicitors should be entitled to submit itemized bills of costs, that taxing officers should be allowed to demand them, and that assessment of costs must be based on such bills when submitted. ***

Further, the committee recommends an improved procedure for review of assessed fees in the higher courts-*viz.* Instead of appealing directly to the trial judge, the dissatisfied solicitor's fee would first be reviewed by the clerk of the court, and finally by the Supreme Court Taxing Officer. **** It also recommends a similar method of review in the Court of Appeal. *****

* The Widgery Committee Report, pp. 88-90.

** Ibid. and Legal Aid in Criminal Proceedings, First Report of the Working Party, Her Majesty's Stationery Office (1962), pp. 6-7.

*** The Widgery Committee Report, pp. 91-92.

**** Id. at p. 93.

***** Id. at p. 94.

THOMAS FITZPATRICK, *Legal Aid for Criminal Cases in England: Part II*, in *The Legal Aid Briefcase*, June 1968, vol. XXVI, no 5, p. 237.

In evaluating the British system, it should be realized that *the prosecution is far from being as organized as it is in the North American countries.*

In almost all cases, the lawyers in private practice (or the police), are charged by the State to prosecute a specific case. *Only a small number of cases are prosecuted by the government service.* In this context, it is evident that the disproportion between the powers of the prosecution and the resources of the defence, is much less noticeable than in our system [1]. There is reproduced (in Appendix 12) an explanatory text of both the British Bar and the English legal aid procedure.

C — THE QUEBEC SITUATION (80-87)

80. If Quebec intends adopting the best of the American and European systems, which we have just reviewed briefly, it must make up for considerable lost time, even though Quebec and Canada have not remained entirely out of this evolution.

The Federal Government is hardly involved in this problem, and has no direct responsibility for our slowness in establishing a sound system of

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1 "A most significant aspect of the English system is that *it does not rely on a permanent staff of public prosecutors-defence* and prosecution are both handled by privately practicing lawyers, a curious phenomenon to those of us inured to the image of a tough and efficient public prosecutor. *

* A limited exception to this is the office of Director of Public Prosecutions which acts under the supervision of the Attorney General in certain specified crimes, and decides whether to prosecute. It maintains a small permanent staff of solicitors and barristers in magistrates' courts, and briefs privately practicing barristers (known as Treasury Counsel) to prosecute certain crimes in the higher courts". *Op. cit.*, p. 238.

legal security. As stated by the Ontario Committee, already quoted [1], it is evident that the principal responsibility in the realm of legal security belongs to the provinces :

> It should be kept in mind that the Provincial Government is constitutionally responsible for the administration of justice in the province. If legal aid is to be regarded and accepted as part of the administration of justice within the province, then the constitutional responsibility, financial and otherwise, would be that of the Provincial Government. Many witnesses appearing before the Committee contended that legal aid was a "right and no longer a charity" and it was, therefore, the financial obligation of the Government of the Province to the citizens of the Province to defray the cost of legal aid. It was further contended that it was a right unrestricted to any particular place but of general application throughout the Province.
>
> The view was further expressed that to have legal aid paid for on other than a provincial basis would be to lose the uniformity of administration and operation that is essential to such a plan. For instance, if a legal aid plan was to be administered on a purely local basis, then the concept of legal aid might vary from place to place and a lack of uniformity would inevitably lead to confusion, discrimination and resulting unfairness. For instance, if legal aid in divorce cases were within the legal aid plan in one area and outside the legal aid plan in another, depending on the local community attitude, a situation would exist which would be the subject of justifiable criticism [2].

This will suffice to place legal security in its constitutional context. And we can now pass to a short outline of the different provincial initiatives in this domain [3].

1 — Background of the canadian scene (81)

81. Two studies — the one published by a native of Quebec in 1966, the other made by a group of English Canadian specialists — give a rather pessimistic description of the situation prevailing in Quebec :

1 "Federal Government participation to some extent in legal aid was suggested by others who appeared before the Committee. It was contended that as the Federal Government institutes certain civil or criminal proceedings in the Provincial Courts and in the Federal Court, such as for narcotic or income tax offences or civil claims, it should have some responsibility for legal aid for those persons qualified for legal aid against whom such proceedings are taken. The Committee expresses no views on this suggestion. Whether the Federal Government should or should not participate financially in an extended legal aid is a question that is, in the opinion of the Committee, of secondary consideration. It is the firm conclusion of the Committee that the prime financial responsibility for an extended legal aid plan is that of the Provincial Government". *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 98.

2 *Op. cit.,* p. 98.

3 Quite recently, according to newspapers, Ontario expressed the intention to ask the Federal Government to contribute towards the financing of legal aid. This has been denied (Appendix 13).

> In Canada, it is Manitoba which has done the pioneering work ; since 1937 the Law Society has been issuing certificates of legal aid to indigents which entitled them to the free services of a lawyer. The laws in effect in the other provinces date from the second half of the century. This has been taken from the publication of the Report of the Ontario Joint Committee on Legal Aid issued in March 1965 (. . .).
>
> The Province of Quebec was a poor relative until 1951, the year in which the legal aid service of the Bar of Quebec was established under the direction and administration of the Syndic of that section.
>
> Before 1915 this service was left to the charitable impulses of the individual members of the Bar, or to charitable societies who only came to the aid of their co-religionists, for the Protestants (the Montreal Legal Aid Bureau), or for the Jews (Baron de Hirsh Institute).
>
> Even in 1948 the study committee on legal assistance created by the provincial Bar had recommended the establishment throughout the province of legal aid bureaus, under the immediate authority of the Council of sections. These suggestions did not fall on deaf ears, as the members of the Junior Bar of Montreal decided to put them into effect [1].

The other study, listed (up to 1965) the different provincial efforts with regard to legal security. It placed considerable hope in the Ontario project, which has since been realized :

> The legal professions in all provinces provide free legal aid in some form. In Newfoundland, Prince Edward Island, and the Territories, it is unorganized. In the other provinces, it is organized in various ways. In Nova Scotia, Quebec, and Ontario, participating lawyers receive no remuneration. In New Brunswick, the only remuneration is a small allowance for defence of capital charges. Elsewhere, provision is made for paid legal aid in certain classes of cases. On the whole, although the first annual report by the director of the British Columbia scheme, introduced in 1963, expressed satisfaction with it, none of these schemes results in adequate representation in criminal cases.
>
> The work usually falls on the shoulders of a few enthusiasts, assisted by inexperienced counsel and law students, in each centre, all of whom do good work as far as they can. There are not enough of them to handle all cases where help is needed. Rules are made limiting the kinds of cases where help is given, and persons previously convicted may be refused aid or no aid may be given on appeals. In some areas, no aid is given in ordinary criminal cases.
>
> The profession has never been completely unresponsive to the needs of the indigent accused, and much unrecognized legal aid has always been given and is still given on a personal and haphazard basis. Leading counsel frequently and voluntarily defend, without fee, persons charged with homicide and certain other offences that attract a great deal of public or professional interest, but an indigent accused before the magistrate on a charge of breaking and entering or theft may have as much need of help, and may not get it because of his previous record or because counsel are not available. The Montreal Legal Aid Bureau employs two lawyers, who distribute work among members of the Bar. The latter are theoretically obliged to undertake it. In Halifax, the fifty-two junior members of the Bar are required to serve in rotation.

1 BERNARD GRENIER, *La justice accueillante à tous,* in *Thémis,* 1966, no 1, p. 372.

In Ontario, growing dissatisfaction with the voluntary unpaid scheme out-of-pocket expenses, led to the employment, first, of one, and later of two fulltime salaried solicitors to co-ordinate the work in Metropolitan Toronto and to give assistance in penal institutions. A committee appointed by the provincial Attorney-General has recently submitted a report based on extensive study, recommending introduction of a comprehensive scheme of state-supported legal aid along the lines of the English civil legal-aid system. The scheme would be administered by the provincial Law Society in co-operation with other agencies. Lawyers volunteering for the work would be paid about seventy-five percent of normal fees. Aided persons who are able to contribute to the cost would be required to do so according to their ability. Aid in criminal cases would cover all proceedings up to sentence on charges of indictable offences against persons without criminal records, and might be granted in special cases to recidivists and for appeals. If adopted, the scheme should bring about a great improvement in the defence of needy persons, and would have a profound effect on the work of the criminal courts. Congestion would be increased through a reduction in numbers of pleas of guilty and through longer trials. A higher proportion of trials before judges, with or without juries, could be anticipated. Legal-aid counsel would be under a heavy responsibility, both to their clients and to the cause of justice, in deciding how to advise their clients to plead. At the same time, a considerable number of recidivists would continue to lack effective representation [1].

2 — Quebec efforts (82)

82. During the past 15 years we have seen the introduction of various systems of legal security in different judicial districts of Quebec. On the whole they have remained quite modest, and none of them presumes to have resolved the problem of the representation of indigents before the court in a satisfactory manner.

Notwithstanding the recent improvements with regard to the financing and the structure of the Legal Aid Bureau of the Bar of Montreal Inc., which up to recently has been the only effort which might be referred to as a fully developed system of legal aid in the Province of Quebec, we must accept the description of our situation given by the joint committee which prepared the Legal Aid Legislation for Ontario [2].

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1 STUART RYAN, *The Adult Court,* in *Crime and its Treatment in Canada,* Toronto, Macmillan of Canada, 1965, pp. 188-189.

2 "Each local section of the Bar in Quebec is autonomous in legal aid matters. The Bar of the Province of Quebec furnishes funds to the local Bar Council, which offers legal aid. Five of the twelve sections of the Bar in the Province have organized some form of legal aid. The largest and most extensive scheme exists in Montreal where the Legal Aid Bureau has two full time lawyers assisted by a secretarial staff of five. They are engaged in administering the scheme and in proper circumstances assigning cases to the eighteen hundred lawyers practising in Montreal. Most of the work appears to be done by members of the Junior Bar. This scheme is assisted by the City of Montreal, which contributes about $12,000

We must also accept their conclusion : the Montreal initiative has attained its maximum and it should be replaced by a much more ambitious system. Here again, the study made by Mr. Loranger confirms this opinion (Annex). This should not, however, cause discouragement: a number of the largest American metropolises are in just as deplorable a situation today, notwithstanding the important decisions of the Supreme Court of the United States [1].

a) IN MONTREAL (83-84)

83. As we are publishing as an Annex the excellent study made by Mr. Loranger on the "ten years of activity of the Legal Aid Bureau of Montreal", we will deal, in a cursory manner with the Montreal situation. It should be mentioned that the government contribution towards financing the Legal Aid Bureau of the Montreal Bar Inc., has made it possible to improve the quality of the service during recent years.

However, civil eases have constantly monopolized the time of the majority of the personnel, as well as most of the funds available. The procedure utilized up to the present has consisted of calling on lawyers in private practice to come to the aid of the indigent citizen. A rapid survey

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annually and by the Province which contributed last year, for the first time, $10,000 to $12,000. These grants have covered the cost of administration. The total cost of administration is estimated at $65,000 per *annum*, the balance being paid by the Montreal Bar.

All legal services are rendered free of charge and value of such services is estimated in the region of $500,000 per year. All Court costs and disbursements are paid by the Legal Aid Bureau. The Office of the Bureau in the Court House is provided by the Provincial Government. In 1964, there were 3,000 applicants for legal aid, and approximately 700 legal aid cases go to Court each year. 75% of these are civil cases involving domestic relations.

"No information was received which indicate the number or nature of criminal cases which might be included in these figures".

The demand for interviews so far exceeds the capacity of the Bureau that it is now difficult to obtain an appointment "within a month or so" except in cases of emergency. The system appears to have reached its limit and the Montreal Bar is negotiating with the Attorney General for the Province for the establishment of a scheme whereby the Government would underwrite the cost of legal aid in criminal matters on a Province wide basis with the administration remaining the responsibility of the Bar'. *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 24.

[1] "However, from the standpoint of adequacy of representation, the problem is a critical one. The public defender in the city of St. Louis has only two assistants, an inadequate salary schedule even for these, no investigators, and no funds for depositions or the hiring of expert witnesses. Private counsel are not even reimbursed for expenses, much less compensated for their time". LEWIS C. GREEN, *Introduction,* in *Journal of the Missouri Bar,* 23 (1967), p. 107.

shows that this formula has not always permitted the legal aid service to choose the most qualified lawyer to defend the needy citizen. This probably accounts for the fact that files of legal aid cases dealing with the separation from bread and board have been found in private legal offices, which normally do not deal with such problems.

If the situation had not changed radically during the last year, the Commission would have been obliged to endorse, without any reservation, the following judgment :

> The aid offered by the Legal Aid Bureau of Montreal to those under detention and to the accused, was ridiculously inadequate, just as much because of the large number of arrests, as for the insufficiency of personnel in the Bureau... Out of the 19, 356 cases accepted from the beginning, only 1, 366 came under criminal law. The problem was complicated by the fact that there were only a limited number of criminalists in the profession (150 in Montreal), and by the noticeable lack of interest amongst the students in this less remunerative branch of law (more than one half of the clients are penniless).
>
> The philosophies of our criminal law consider the accused innocent until he has been proved guilty, and recognize his right to a full and complete defence. There is no exception to this right by reason of financial status, race, or religion. The daily practice in criminal law shows, however, that this principle is observed in the breach : 60% of the accused make their first appearance before a judge without the help of a lawyer [1].

84. A major change which has occurred recently in the Legal Aid Bureau of the Bar of Montreal Inc., has radically transformed the philosophy of this organism. Faced with the inability to find criminal lawyers in private practice in a sufficient number to deal with the needs of the public, the Bureau began to engage on a full time basis a number of lawyers who assume the role of a *permanent public defender of indigents,* without being paid directly by the State. Certainly it is the State which subsidizes practically the entire financial operation of the Legal Aid Bureau of the Bar of Montreal, but it is the Bar, through the medium of a private corporation formed for this purpose, which establishes the policies of the legal security service. (Appendix 14) We are adding (Appendix 14a) more recent figures than those found in the Annex of this report.

b) IN THE PROVINCE (85)

85. Even if the studies quoted up to the present consider the work of the Legal Aid Bureau of the Bar of Montreal Inc., to be outstanding, in all fairness it should be recognized that the lawyers of other Quebec regions have also endeavoured in many ways to better serve the needs of the public.

1 BERNARD GRENIER, *Rapport de la Commission d'études sur l'assistance judiciaire,* April 1966, p. 30.

It is not our intention to review all the different initiatives of the various regional Bars. Special mention should, however, be made of the systems established by the Bar of Quebec and by the lawyers of the Saguenay/ Lac St. Jean region.

The charter of the Legal Aid Bureau of the Bar of Quebec has recently been repealed so that the Bar itself determines the policies of legal aid and is responsible for its administration in the district of Quebec. Appendix 15 supplies statistics with regard to the activities of this legal security service.

By reason of the provisions of the new Bar Act it has become possible to consider the Legal Aid Bureau as a direct responsibility of the Bar. thus doing away with the intermediary groups, which had become unnecessary [1].

Particular attention is drawn to the initiative taken by the Saguenay Bar as it shows considerable respect for the different objectives of a legal security programme. In Appendix 16 there is quoted the "resolution of the Bar of Saguenay, dated February 6, 1966, with regard to its Public Relations Committee". To this is added (Appendix 17) the "Plan of Legal Aid adopted by the members of the Bar of Saguenay" February 26, 1966.

The Bar of Saguenay recognized at the outset the need for legal information, and it endeavoured to disseminate information to the entire population, as well as making a better defence available to indigents before the courts.

This dual activity would appear to be more satisfactory than most of the other Quebec formulas in responding to the requirements of legal security. As has been indicated in a study made at the request of the Consulting Council of the Administration of Justice of Quebec, the legal aid service of the Bar of Saguenay was established under special circumstances [2] ; however, this in no way minimizes the originality of the venture.

1 13. 3. f) Établir et administrer un organisme d'assistance judiciaire dans toute la province et conclure à cette fin toutes ententes utiles avec les sections et les autorités gouvernementales ; *Loi, Règlements et Résolutions du Barreau du Québec,* 1967, p. 6.

2 « L'adoption, par le Barreau du Saguenay, d'un régime d'assistance paraît avoir eu pour motif déterminant le souci de redorer le blason du Barreau un peu terni dans la région depuis quelques années surtout dans le monde ouvrier. En effet, un sentiment assez vif d'aversion à l'égard de la gent légale s'est développé dans les milieux ouvriers à la faveur d'une campagne d'assainissement des finances familiales entreprise, au cours de l'année 1964, par une centrale syndicale.

Au vrai, cette antipathie a dégénéré en véritable guerre par suite d'accusations proférées par les représentants syndicaux contre les avocats à la radio, la télévision et dans les journaux. Outre plusieurs soi-disant manquements graves à l'éthique professionnelle impliquant certains membres de l'Ordre, les ouvriers reprochaient aux avocats en général le coût prohibitif de leurs services, leur indisponibilité, leur manque de conscience sociale et leur esprit de corps protectionniste. Plus particu-

86. Notwithstanding the interest of a large number of lawyers, and notwithstanding the originality of the different formulas which have been introduced, it seems evident that the general public does not believe that the actual efforts have satisfied the needs. On this point there is a definite cleavage between the members of the legal profession and the general public. It is evident that the critics have not taken the recent improvements into consideration.

> Moreover, the evaluation made by our witnesses of the need is strongly conditioned by the impression they have of the role played by the lawyer in actual society. This difference was apparent in a most definite manner when we questioned them about the system established by the local Bar, a system depending on the benevolence of lawyers. While the latter, most confident of the social conscience of their group, judged it to be satisfactory, all others considered it insufficient to satisfy the needs. The evidence of the social worker, union worker, and of the director of the labour centre is very clear on this point [1].

This evaluation offered by several witnesses from the Chicoutimi District, is similar to the general comments made before this Commission by the large central unions and the representatives of different welfare and rehabilitation organizations.

This judgment is also confirmed by the results of a survey made at the office of the Clerk of Sessions of the Peace of Montreal, February 1968 (Table 1) : only 42% of the accused (252 out of 591) appeared in court with a lawyer and 24% (73 out of 309) did not even have a lawyer at the trial.

The Commission believes, moreover, that the lawyers themselves are dissatisfied with the actual systems of legal aid. It is our opinion that a majority would even be ready to accept a system of legal security financed and administered by the State. Only an enquiry in depth could confirm or negate these impressions of the Commission.

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lièrement, les représentants syndicaux déploraient l'absence de collaboration reçue de la gent légale dans leur campagne d'assainissement des finances familiales. Après plusieurs débats publics et déclarations fracassantes, les rencontres entre les dirigeants des deux organismes ont fini par rasséréner le climat. C'est par suite des consultations entre les antagonistes que certains membres du Barreau local ont fait adopter une résolution par leurs pairs, visant à mettre sur pied le régime d'assistance que nous avons décrit », HUBERT REID et JULES BRIÈRE, *Rapport du sondage effectué dans le district de Chicoutimi,* 27 janvier 1967, pp. 5 et 6.

1 HUBERT REID et JULES BRIÈRE, *Rapport du sondage effectué dans le district de Chicoutimi,* January 27, 1967, pp. 13 and 14.

TABLE 1

SURVEY FOR THE MONTH OF FEBRUARY 1968

Clerk of the Sessions of Peace
Court-House of Montreal

Infractions	No. of Actions	No. of accused represented at their appearance	No. of lawyers at trials/No. of trials
I — Theft	307	113	92/135
II — Receiving	103	35	41/ 44
III — Fraud	72	39	31/ 48
IV — Possession of arms	23	9	12/ 14
V — Indecent assault	15	13	14/ 15
VI — Acts of violence	22	17	15/ 17
VII — Infractions in fiscal matters	9	6	8/ 9
VIII — Threats	16	12	10/ 12
IX — Vagrancy	5	0	5
X — Weakened faculties	7	2	4/ 4
XI — Absconding	5	2	1/ 2
XII — Dangerous driving	1	1	1/1
XIII — Driving without a permit	4	2	1/1
XIV — Traffic infractions	2	1	1/1
	591	252	236/309

87. Other figures (Tables II to VI) confirm that everywhere in Quebec indigents often find themselves without lawyers. It is nevertheless reassuring to note that in Quebec City, the *trial* rarely proceeds without a lawyer, and that only the appearances create a problem.

Notwithstanding this, some Crown prosecutors and also some magistrates, have questioned the need for a defence lawyer. These judges state that, in the absence of a defence lawyer, the court itself will undertake the defence of the accused, and that he will be dealt with by some sort of compensatory mechanism, as though a lawyer were acting as the representative of the accused. In the same way the Crown prosecutor invokes the fact he has no cases to gain or lose, but that his role is just as much to free the innocent, as to secure the condemnation of the guilty.

In many cases, there is no doubt that the professional conscience of the judge of the Crown prosecutor has permitted an accused deprived of a lawyer to enjoy the full respect of his rights, and to have a satisfactory defence. However, it is not desirable to establish such a substitution as a principle, as it does not entirely respect the customs and the spirit of our courts of justice [1].

It is necessary, however, to foresee the cost of reform. If each of the accused benefitted from the services of a legal counsellor, our courts would have to envisage a great deal of extra work, as there would be more trials and more prolonged debates. The Commission believes that this is a situation which we must face up to, if the rights of the citizen to legal security are to be respected [2].

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1 "In my jurisdiction, I, prejudicially, feel that no person whether indigent or not, is accused of crime unless there is a *prima facie* case, i.e. the prosecutor must represent the accused as well as the people, at the initial stage. I also feel that any accused, due to the technicalities of criminal law, has a good chance of being acquitted if the matter is tried. Consequently, it is true that an accused who can hire a lawyer has a better chance of being acquitted, even though the basic elements of the crime have been established. In conclusion, it is my feeling that guilty defendants are often, in fact, acquitted if they can hire counsel. This, of course, is not a fair system of law. Perhaps, the only answer is to appoint counsel in every felony case where the accused is not represented by counsel". LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 1 : *National Report*, p. 13.

This quotation reflects the opinion of a prosecuting lawyer in the State of Michigan who is quoted by Mr. Silverstein.

2 This is the sense of the famous judgment in the case of *Gideon v. Wainwright*, (372 U.S. 335, 344, 1963) : "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him".

TABLE II

SURVEY FOR THE MONTH OF FEBRUARY 1968

Clerk of the Sessions of Peace
Court-House of Quebec

Infractions	No. of Actions	No. of accused represented at their appearance	No. of accused represented at their trial or at the prel. enq./No. trials
I — Theft	70	30	17/19
Auto theft	4	0	nil
Robbery with violence	11	7	8/ 8
Burglary	25	15	9/11
II — Receiving	30	20	10/13
III — Fraud	19	13	6/ 8
IV — Possessing arms	11	5	4/ 4
V — Indecent assault	3	1	1/ 1
VI — Acts of violence	20	7	2/ 2
VII — Infractions on fiscal matters	nil	nil	nil
VIII — Threats	1	1	nil
IX — Vagrancy			
X — Driving with weakened faculties	28	12	7/ 8
XI — Absconding	11	4	1/ 1
XII — Dangerous driving			
XIII — Driving without a permit	11	3	1/ 1
XIV — Damages	22	20	1/ 1
XV — Perjury	1	1	0/ 1
XVI — Interfering with justice	2	1	nil
XVII — Disturbing the peace	8	3	1/ 2
XVIII — Lottery	2	1	nil
XIX — Forgery			
XX — Neglect of children	1	0	nil
XXI — Attempted suicide	1	1	1/ 1
XXII — Counterfeit money	2	1	1/ 1
	283	146	70/82

TABLE III

SURVEY FOR THE MONTH OF MARCH 1968

Clerk of the Sessions of Peace
Court-House of Quebec

Infractions	No. of Actions	No. of accused represented at their appearance	No. of accused represented at their trial or at the prel. enq./No. trials
I — Theft	76	16	16/16
Auto theft	nil	nil	nil
Robbery with violence	1	0	nil
Burglary	26	9	10/10
II — Receiving	16	10	7/ 7
III — Fraud	16	8	6/ 6
IV — Possessing arms	3	1	1/ 1
V — Indecent assault	4	2	1/ 1
VI — Acts of violence	19	8	3/ 4
VII — Infractions on fiscal matters	nil	nil	nil
VIII — Threats	nil	nil	nil
IX — Vagrancy	nil	nil	nil
X — Driving with weakened faculties	21	9	4/ 4
XI — Absconding	6	2	2/ 2
XII — Dangerous driving	3	1	1/ 1
XIII — Driving without a permit	10	4	1/ 2
XIV — Damages	8	2	2/ 2
XV — Perjury	nil	nil	nil
XVI — Interfering with justice	nil	nil	nil
XVII — Disturbing the peace	nil	nil	nil
XVIII — Lottery	3	1	nil
XIX — Forgery	4	2	nil
XX — Neglect of children	nil	nil	nil
XXI — Attempted suicide	1	1	1/ 1
XXII — Counterfeit money	nil	nil	nil
XXIII — Malpractice	3	0	0/ 1
XXIV — False declarations	2	2	1/ 1
XXV — Extortion	2	0	nil
	224	78	56/59

TABLE IV

SURVEY FOR THE MONTH OF APRIL 1968

Clerk of the Sessions of Peace
Court-House of Quebec

Infractions	No. of Actions	No. of accused represented at their appearance	No. of accused represented at their trial or at the prel. enq./No. trials
I — Theft	70	21	13/16
Auto theft	4	0	nil
Robbery with violence	5	2	2/ 3
Burglary	23	11	9/ 9
II — Receiving	11	3	6/ 6
III — Fraud	21	7	4/ 5
IV — Possessing arms	8	5	4/ 4
V — Indecent assault	2	0	nil
VI — Acts of violence	32	10	7/10
VII — Infractions on fiscal matters	nil	nil	nil
VIII — Treats	nil	nil	nil
IX — Vagrancy	nil	nil	nil
X — Driving with weakened faculties	44	12	8/ 9
XI — Absconding	10	4	3/ 3
XII — Dangerous driving	nil	nil	nil
XIII — Driving without a permit	8	2	nil
XIV — Damages	9	3	1/ 1
XV — Perjury	nil	nil	nil
XVI — Interfering with justice	nil	nil	nil
XVII — Disturbing the peace	3	1	nil
XVIII — Lottery	2	0	nil
XIX — Forgery	nil	nil	nil
XX — Neglect of children	nil	nil	nil
XXI — Attempted suicide	3	0	nil
XXII — Counterfeit money	nil	nil	nil
XXIII — Refusal to support	2	0	nil
XXIV — Murder	1	1	1/ 1
XXV — Extortion	1	1	nil
	259	83	58/67

TABLE V

COMPILATION OF THE SURVEYS FOR THE MONTHS OF FEBRUARY, MARCH AND APRIL 1968

Clerk of the Sessions of Peace
Court-House of Quebec

Infractions	No. of Actions	No. of accused represented at their appearance	No. of accused represented at their trial or at the prel. enq./No. trials
I — Theft	216	67	46/ 51
Auto theft	8	0	nil
Robbery with violence	17	9	10/ 11
Burglary	74	35	28/ 30
II — Receiving	57	33	23/ 26
III — Fraud	56	28	16/ 19
IV — Possessing arms	22	11	9/ 9
V — Indecent assault	9	3	2/ 2
VI — Acts of violence	71	25	12/ 16
VII — Infractions on fiscal matters	nil	nil	nil
VIII — Threats	1	1	nil
IX — Vagrancy	nil	nil	nil
X — Driving with weakened faculties	93	33	19/ 21
XI — Absconding	27	10	6/ 6
XII — Dangerous driving	3	1	1/ 1
XIII — Driving without a permit	29	9	2/ 3
XIV — Damages	39	25	4/ 4
XV — Perjury	1	1	0/ 1
XVI — Interfering with justice	2	1	nil
XVII — Disturbing the peace	11	4	1/ 2
XVIII — Lottery	7	2	nil
XIX — Forgery	4	2	nil
XX — Neglect of Children	1	nil	nil
XXI — Attempted suicide	5	2	2/ 2
XXII — Counterfeit money	2	1	1/ 1
XXIII — Malpractice	3	0	0/ 1
XXIV — False declarations	2	0	nil
XXV — Extortion	3	1	nil
XXVI — Refusal to support	2	0	nil
XXVII— Murder	1	1	1/ 1
	765	305	183/207

TABLE VI

CLERK OF THE PEACE

District of Chicoutimi

(5/8/66 to 5/1/67)

Infractions	No. of Actions	No. of accused represented at their appearance	
I — Theft	34	11	
II — Receiving	2	1	
III — Indecent assault	2	0	
IV — Acts of violence	3	0	
V — Infractions on fiscal matters	132	21	
VI — Various infractions of the Vehicle Act	34	1	
VII — Threats	1	1	
VIII — Vagrancy	3	0	
IX — Dangerous driving	10	4	
X — Driving vehicle with weakened faculties	50	6	
XI — Driving a vehicle without permit	46	0	
XII — Excessive speed	7	0	
XIII — Criminal negligence	1	1	
XIV — Absconding	7	0	
XV — Disorderly	13	1	
XVI — Infractions of the unemployment insurance act	7	0	
XVII — Infractions with regard to hunting and fishing	8	0	
XVIII — Infraction of the Liquor Board Act	8	1	
XIV — Others	33	12	
	401	60	

N.B. This survey, made at the request of the Advisory Council of the administration of justice, does not indicate the nature of the *representation*. There is reason to believe that it applies to the appearance.

III — CHOICE OF GLOBAL PLAN

III — CHOICE OF GLOBAL PLAN

88. Having thus reviewed the various formulas of legal security, the Commission can now indicate its own preference. Notwithstanding the evident merits of the Ontario system, the Commission is tending in a different direction. In doing so, the Commission is conscious of the fact that it is departing from the procedures adopted in many of the European countries with regard to legal security and that it is much closer to some American viewpoints.

The Commission is keeping in mind the ideal to attain, but is even more concerned with the specific needs of the indigents in Quebec [1].

Obviously we do not challenge that the system of legal aid in effect in Ontario is, as to principles, an ideal which Quebec should strive to attain as nearly as possible. We do not believe, however, that Quebec can overnight, introduce a system of legal security as costly as that of Ontario.

To the economic limitations of Quebec should be added the characteristics of the Quebec legal profession :

> The way in which legal aid is granted must depend to a large extent on the organization of the legal profession. In England all legal aid is given by solicitors and barristers in private practice, who are paid by fees that are broadly based on the work that is done in each individual case. Whereas in Canada and the United States, there is an undivided legal profession, and counsel may be in a salaried job and yet able to act as advocates, a system of public defenders may be more workable [2].

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[1] There are two basic questions. First, what system or combination of systems will be most beneficial to indigents, the Bar, the public, and the administration of criminal justice ? Second, what is the best system or systems which, as a practical matter, can be created ? It is submitted that they should be considered in that order. LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967), p. 107.

[2] R. M. JACKSON, *Enforcing the Law,* New York, 1967, p. 88.

A — PREFERENCE FOR "PUBLIC DEFENDER" (89-101)

1 — Traditional reasons (89-91)

89. We therefore visualize the establishment in Quebec of a legal security system based on a group of *public defenders*. We count on the effectiveness of this system to reduce the number of accused who are required to appear before the court without benefit of the services of a lawyer. This should be the goal of any legal security system [1].

If we recognize the theoretical superiority of the Ontario system of legal security, it is not only because it assures the indigent of legal representation before the courts, but it also permits the impecunious citizen to choose his own defender. In the other formulas, whether it be that of a public defender, or the system based on the lawyer assigned by the court, the accused indigent can, more or less, indicate his preferences as to the choice of his lawyer, but he has no assurance that his wishes will influence the final decision.

We believe, however, as indicated above, that this superiority of the Ontario system is mostly theoretical, and we are even more strongly convinced that Quebec must, because of its limited economic resources, first of all assure the indigents of legal representation before the courts, and postpone until later, the development of a system in which the free choice of the indigent may become the standard procedure.

90. In addition to taking into consideration, the economic resources, and the characteristics of its legal professions, Quebec must concern itself

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1 "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." * Thus the Supreme Court, in *Gideon v. Wainwright,* culminated the long struggle to provide counsel for all felony defendants. A concurrent struggle has been that of the Bar to devise the best means of providing counsel for the indigent accused. Beginning with the days when the judge customarily appointed the first face in the courtroom that his eye chanced to light upon, a number of solutions have been tried. Some jurisdictions have retained an uncompensated appointed counsel system, but have introduced some organized system of rotation. "Forty-seven of the fifty states have enacted legislation for compensating counsel." ** Legal Aid Societies (e.g., New York) and "Voluntary Defender" programs (e.g., Philadelphia) have assumed the burden in many cities. Los Angeles created a Public Defender in 1914, and Chicago and St-Louis later followed suit (as have certain other jurisdictions). LEWIS C. GREEN, *Introduction,* in *Journal of the Missouri Bar,* March 23, 1967, p. 106.

* *Gideon v. Wainwright,* 372 U. S. 335, 334 (1963).

** 110 Cong. Rec. 455 (1964) (remarks of Representative McCulloch).

particularly with the difficulties faced by *its own* indigent accused [1]. It is this last mentioned feature which merits the greatest attention and which is the most conducive to the establishment of a Quebec system of legal security based on the public defender.

Numerous studies have shown that the majority of accused do not secure the services of a lawyer. It is *urgent* to put an end to such a situation.

It is an illusion to believe that the freedom to choose a lawyer is applied in an absolute manner even for the citizen of means. Notwithstanding its great generosity, the Ontario system itself cannot guarantee an unlimited exercise of this freedom. On the basis of *facts,* the system which we visualize will give as satisfactory results as the Ontario system, and calls for much lower costs.

In practice, there are only minor differences between the system which allows everyone to choose his lawyer, and the system which supplies the indigents with lawyers paid by the State. These differences are even less noticeable when, as in Toronto and Montreal, the Bar entrusts a considerable part of the legal security work to permanent lawyers engaged exclusively for this purpose.

91. When the system based on the *public defender* will have made it possible to reduce in a marked manner the percentage of those who cannot obtain the legal aid which they need, it will be time to perfect the system, and consider undertaking further economic sacrifices to grant more freedom of choice to the indigent under detention. At present, and in principle, the absolute priority would appear to us to be to give all accused persons an adequate defence.

Professor Friedland estimated that at least 60% of all those accused of serious offences in Ontario have not the means to pay a lawyer. Moreover, only one person out of six received the legal assistance asked for. Facts such as these led to the establishment of the Ontario system.

This is corroborated in Quebec by the information from the Legal Aid Bureau of Montreal : 48% of the cases dealt with matrimonial problems, 27% of the problems were of an economic nature, while only 7% of the services rendered dealt with penal matters [2]. If the Bureau had the means

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1 The problems of legal aid in Ontario cannot be precisely equated to the situation in England nor to the situation in any particular part of either Canada or the United States. Any new system, although it may adopt features of systems in use elsewhere which are suitable to Ontario, must be designed with the needs and problems of Ontario specifically in mind. *Report of the Joint Committee on Legal Aid,* Province of Ontario, March 1965, p. 95.

2 As a consequence, it is necessary to explain the figures quoted by the Ontario Committee with regard to the Montreal bureau : This situation appears to be reflected elsewhere. Members of the Committee who visited the United States found

to undertake all its responsibilities, according to the Director, the proportion of penal matters would have gone from 7% to almost 60% [1]. The Ontario study committee presented equally impressive statistics :

> "The number of persons accused of criminal offences who were charged and tried without either legal advice or representation is appallingly high. Again, only estimates exist of this number, but there is significant agreement among persons familiar with that matter. The study is made by Professor Friedland and the estimates made by crown attorney, magistrates, lawyers, social workers and others indicate that one-half to two-thirds of all persons charged with criminal offences at present in Ontario are tried without being represented by counsel.
>
> Professor Friedland's study of 6000 cases finally disposed of in the Toronto magistrates' courts comprising charges under the criminal code, indicates furthermore that "over 95% of all persons who appeared in court in custody for their first court appearance and pleaded guilty, did not have a lawyer" [2].

In our opinion, such figures justify the priority given in our recommendations to the defence of all citizens, and our suggestion to postpone the establishment of a system of free choice.

Certainly we expect more from the public defender than merely the defence of indigents before the courts, but without even considering a more modern version of legal security, the statistics referred to, are in themselves, sufficient justification for our preference for a formula which can achieve the necessary results in a quick and satisfactory manner.

2 — New hopes (92-101)

92. In expressing our preference for the system of public defender, we are not assuming that it is necessarily the best system to establish in every country in the world [3].

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that a high percentage of all applications for civil legal aid arose out of domestic problems. Information furnished by the Law Society of England reveals that matrimonial proceedings constitute three-quarters of all civil litigation and recognition of the importance of domestic proceedings in Magistrates' Courts (which are similar to those conducted in our Family Courts) is reflected in the recent extension of civil aid to such proceedings. *Thus in Quebec seventy-five percent of legal aid cases taken to Court involve domestic relations.* In South Australia one-half of all assisted proceedings are matrimonial or domestic. *Report of the Joint Committee on Legal Aid,* p. 64.

1 The figures given in Section, indicate clearly the manner in which the Legal Aid Bureau of Montreal Inc. was on the one hand, limited in its activities, and on the other, with problems foreign to the Criminal Code. For example, it will be seen that only 62 cases on criminal or penal matters were referred to lawyers in the course of the year April 1, 1966 to March 31, 1967. The situation has improved considerably since the change in policy and the engagement of permanent lawyers.

2 *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, pp. 19-20.

3 We must also determine whether we can better provide the lawyers needed through the assignment of attorneys at the private bar, through creation of public defender's

On the other hand we believe that this formula has possibilities not even suspected by those who have had such a plan for some length of time.

It is our hope that the public defender will have a social role of much greater importance than that which he fills traditionally in the United States. For example, legal security should cover far more than the defence of indigents before the courts. It should include, as we have already indicated (paragraph 16 - 18), legal information and free consultation; and the public defender, in his work on behalf of the less favoured classes should be called upon to play a social role of prime importance.

If this were achieved, it would further justify our decision to recommend the formula of public defender.

a) LEGAL INFORMATION (93-95)

93. Investigations carried on in different areas including Quebec, indicate the necessity of making more than legal counsel available to indigents at the time they appear before the courts; other needs, just as basic, become evident, and must be taken into consideration.

The initiative of the Bar of Saguenay has given us an example of a legal security service which goes much further than merely simple legal aid. Such an extension of the service is essential, as neither the Ontario legal aid system, nor the formula of public defender, which we visualize for Quebec, can by themselves, guarantee to society the possibility of equal justice for all.

94. Of the new roles which an integrated legal security service must fulfill, we place information first.

Everybody realizes today the increasing complexity of the law, and even the most informed citizen would hardly dare to venture personally into a law suit without having a sound legal training. We go even further: it is exceptional to meet a citizen who knows exactly what are his rights.

It would be wrong to conclude that the only legal information necessary is that which lawyers have, and that it would be useless, and even dangerous, to disseminate even the most elementary legal information to the general public. Complaints and comments from different sources indicate that today

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office or by some other system. The choice of system is affected by the availability of funds, efficiency of rival techniques, and general attitudes of the bar, bench and the community with reference to notions of fairness, rights of a defendant charged with crime, professional responsibility, and independence of the bar and other factors too numerous to catalogue. *It is obvious that no one system is necessarily the best for every community. EDWARD V. SPARKER, The Poor Man's Lawyer and Governmental Agencies,* in *National Conference on Law and Poverty,* Conference proceedings. Washington D.C., June 23 — 25 1965, p. 50.

there is great need to make information available so that all citizens are aware of their rights, and the possible recourses.

95. To give some examples. The Commission has received approximately three hundred complaints from citizens which indicate amongst other things, that quite a number of citizens have had grievances for years without knowing in what manner to proceed to secure satisfaction. The experiment attempted by the Saguenay Bar also shows the usefulness of legal information. The experience of *Ombudsmen* in many countries in the world, is along similar lines, and shows that even to a greater extent than by reason of the slowness of our government procedures, there is discouragement on the part of citizens whose rights have been encroached upon, and who are deprived of all juridical information.

Civil justice is not part of the mandate of this Commission. However, we believe that civil justice will benefit just as much as criminal and penal justice by the establishment of a legal information service. Moreover, it would be a useless and costly duplication to establish two different information services. If, at any point in time, a decision was made to introduce a plan of legal aid in civil matters (definitely outside of the mandate of this Commission), it would be necessary to see to it that these two sectors which would actually be part of the same legal security service, had a joint information service for the benefit of the entire public [1].

The public should be informed of its rights through every media of information, and we do not believe that the result will be to deprive the legal profession of its livelihood any more than progress in public health and the campaigns for safety on the road have resulted in the disappearance of the medical profession.

b) FREE CONSULTATION (96)

96. The Commission also believes that the public defender should, from the start, make free consultations available to the indigent public, and to the accused and those condemned.

1 A system similar to that presently adopted in England should be adopted to advise people charged with a criminal offence of their rights. A printed advisory form should be prepared in as many languages as may be deemed necessary setting out the fact that a person has the right to be represented by counsel if they so desire and advising of the qualifications necessary to apply for legal aid and how one may go about applying for legal aid. Such a form should be appended to all summonses and handed to all persons arrested on warrant and should be posted in conspicuous places in the cells of all police stations and in all city and county jails. We also believe that all magistrates should similarly advise any accused persons appearing before them without counsel and that the services of an interpreter should be used for this purpose if necessary. *Report of the Joint Committee on Legal Aid*, Province of Ontario, March 1965, p. 71.

We believe that the public defender will progressively reach the point where he is defending the majority of persons brought before the courts. For this reason, this service could with less difficulty than any other organism, arrange for periodic, visits to the individuals detained in prison institutions, and bring their various problems to the attention of the courts. By asking the public defenders to satisfy the requests for information and the needs for consultation from the less favoured groups, the personnel of this service will become trained to realize that an overall system of legal security includes much more than the simple defence of the accused indigents before the courts.

Moreover, the *defence* itself includes many more elements than is generally realized. There are those who do not think it is necessary to defend individuals who admit their guilt. Even amongst authors with narrow views. it is generally admitted that the defence must go much further :

> One view is that legal representation is not required unless there is some contention or defence that cannot be adequately presented except by an advocate. This is not confined to what lawyers call a defence but embraces a number of points that may be taken, such as : objection to a summons or indictment (a rare occurence) ; a point of jurisdiction, usually because of alleged failure to conform with procedural requirement as to notices and other matters (not so rare) ; whether the prosecution produces evidence of every element of the offence. Then there is the question whether the accused, if he is found guilty, needs help in presenting any mitigating circumstances before he is sentenced. If a charge is at all serious and it has not yet come before magistrates, there is a consensus of legal opinion that the accused's interests need watching. When there has been a committal for trial the position is different ; the evidence of the prosecution is on the depositions, and by interviewing the accused a lawyer can form a good estimate of what can be done or said to help him [1].

Free consultation, like legal information, should form part of an integrated system of legal security. However, consultation is chiefly of concern to indigents, while information should be available to the entire society [2].

1 R.M. JACKSON, *Enforcing the Law*, New York, 1967, pp. 85-86.

2 The works of Mr. Loranger are again most eloquent on this aspect of legal security. They make it clear that the dissemination of information resulted in a considerable increase in the business opportunities (remunerative) of the legal offices.

The American formula of referral illustrates this situation very well. The lawyers who undertake to participate in the system agree to give any person a consultation of at most 30 minutes, free of charge, or for a nominal sum. England (Appendix 12) has two similar systems, one for the indigents ($0.50), the other for the general public ($2.60). For meetings which might follow this first consultation, the two parties come to an agreement.

In these different cases, the lawyers say that they secure their rewards for the dissemination of information.

It is necessary here to differentiate the various groups of impecunious citizens.

— In the case of an accused person, the need for free consultation is rather limited, since this group will benefit as will all citizens, from a legal advice service.
— There is need for free consultation inside the houses of detention.
— Numerous summary convictions might not always require the presence of a defence lawyer before the court, but the fundamental rights of the individual would be respected to a greater extent, if they were preceded by legal consultation.

We have already indicated that whenever possible the summons should be the normal procedure in preference to the warrant of arrest. To every summons issued there should be attached a circular giving full information of the legal services available to the accused.

These examples do not exhaust the field open to free consultation. They enable us however, to measure the extent to which a legal security service would be deficient if it did not include a free consultation service.

The cases of the condemned individuals warrant special attention. Our society all too often is led to believe that the citizen found guilty has lost all his rights. By reason of the tight security in our prisons, it is extremely difficult for a condemned person to inform a lawyer of the anomalies which might have taken place in his case. In the same way, revocations, of conditional freedom, or of the suspended sentence, take place without the person affected by the decision having the opportunity to interest a lawyer in his case. We believe that there will be many occasions for the consultation service to be of use.

c) SOCIAL INVOLVEMENT (97-101)

97. Today it is impossible to separate justice entirely from other social problems which our civilization faces. If disturbances and dissentions are increasing at an accelerated rate, the deficiencies in our administration of justice are responsible to some extent. Undoubtedly, it is not only justice that is involved, but it must carry, as does education, health or welfare, its share of the responsibility for the discontent of citizens.

> All of us, both as lawyers and as interested citizens, must do what we can to eradicate the root causes of the large-scale public disturbances that have recently become almost annual occurrences. Although defining those root causes and solving the problems they pose, lie perhaps more properly within the jurisdiction of other learned professions ; lawyers cannot simply wait for the social scientists to find the answers. We all know, in general terms, some of the principal causes of riots, inferior housing, substandard schools, unequal employment opportunities. All the responsible elements of the community, including the bar, must act to alleviate these conditions by direct action. Bar association resolutions are not enough ; the efforts of the individual lawyer who personally involves himself in the school board's problems or offers his services to the local equal employment agencies are vital.
>
> There is another cause of riots, an equally generic and perhaps even more serious cause, that of "measured justice". American courts unfortunately are still not always blind to the color, class, creed or credit rating of these who stand before them for judgment. Although in recent years, the bench and bar have rejected the proposition that there will always be inequalities between the rich and the poor in the administration of criminal justice, the problems of the poor before the courts are far from solved ; the solutions must come through the efforts of interested individuals [1].

While the formula of public defender we are thinking of, will satisfy the need for a defence before the courts, we also wish the less favoured classes to be in a position to depend upon a team of legal specialists who will be acting and thinking on their behalf. It is not a matter of creating other social classes, nor to blame weaknesses in our social system on the differences between the various classes ; it is rather a matter of recognizing frankly, that insecurity is not strictly an individual problem, but that it affects every social class. The dissatisfaction of a large part of the public with regard to justice, could persist even if the indigents obtained the help of lawyers when they appear before the courts. This insecurity will not be resolved unless *our population is basically convinced that justice is truly accessible to everyone.* It will not suffice to have "company lawyers" made available in rotation to an indigent for an hour or so; the economically weak, through the efforts of lawyers available at all times, should enjoy the same treatment in their involvement with justice, as does the president of a company.

Faced with social problems and the necessity of reconciling the less favoured classes and the administration of justice, we place our faith in the public defender, by adding to his legal responsibilities, a marked and constant interest in the social problem [2].

i) REFORM (98-99)

98. The public defender could only assume his social role successfully if he had first-hand knowledge and understanding of the environment, the habits, and the manner in which the economically poor citizens live. Aware

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1 *The Legal Aid Briefcase*, vol. XXVI (1968), p. 107.

2 "However, here it is important to point out that riot problems are not best met by a large number of attorneys *but by a proper organization of those that are available.*

Legal representation must be coordinated into the overall emergency plans of the city. The volunteer attorneys could be assigned well in advance of any full-scale outbreak of rioting to predetermined emergency detention centers in sufficient numbers to handle mass arrests. Extra magistrate's courts, again with predetermined emergency staffs, could be organized to go into additional sessions perhaps in other locations and around-the-clock if necessary." *Op. cit.*, p. 109.

of the nature of the problems which thousands of such individuals encounter daily, he would be in a position to press for necessary action and reforms of both a legal and social nature.

> Law reform is important in order to change the harsh conditions under which the poor live ; it is also an effective way to use scarce program resources. The action that affects the lives of many people removes the necessity of handling hundreds of cases on an individual basis.
>
> In discussing law reform, it is needless to say that the lawyer's principal duty is to his client. He advances or retreats only as far as his client, informed of the available avenues, determines. Still the lawyer should be aware of the law-reform potential of any case, and he should advise his client of that potential. *The legal services lawyer is called upon to do more than represent individuals, for in a sense he also represents the poor community*. He must use his talents and the law to attack the sources of exploitation or the causes of poverty in that community. His job is to end poverty, not merely to make it more comfortable. As a result, he must understand the community and its problems in order to recognize the opportunity for law reform [1].

While such reforms might be legal and social at one and the same time, they will never arouse sufficient interest amongst the specialists in law unless a number of lawyers on a permanent basis, and as part of an organized team, are at the service of the less favoured classes [2].

99. Located in the very environment of the indigent, the permanent public defender will be more likely than anyone else to try for those reforms which we have already linked to the law and sociology. Merely by reason of his presence, social work is more likely to succeed ; the defence of indigents will be regenerated, the unhappiness of masses will be less desperate. Moreover, the State is more likely to agree to expenditures required by the public defender than to the expenditures solicited by private lawyers. *As one public defender has said* :

> Investigations are planned and carried out by a professional staff of two investigators. A striking development in criminal law enforcement has been the greatly increased use of scientific methods within the last few years. Alameda County has kept abreast of this trend by permitting the Public Defender the assistance of such specialists as psychiatrists, pathologists, and experts in the fields of ballistics and criminalistics, or the study of physical evidence.
>
> The assistance of medical witnesses is becoming especially significant. Hospital commitments are ordered instead of prison terms, medical treatment is provided in place of punishment for the insane, and future crimes and other personal tragedies are prevented because defendants are better understood [1].

1 WILLIAM M. BARVICK, *Legal Services Program Evaluations,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 199.

2 " Evaluation of law reform efforts proceeds along two paths. Pending activities that can be characterized as law reform as well as problems and areas where the project sees a need for law reform, are discussed with the staff. Secondly, the evaluators in their discussions with the poor, social welfare agencies, and community action agency staff will attempt to pinpoint problem areas that may be suitable for law reform activity. They will then review their findings with the staff to determine whether problems in these areas have been coming to their attention and what kind of action has been taken. " *Op. cit.,* p. 199.

To an ever-increasing degree, public demonstrations are creating more acute problems for lawyers of the defence as it suddenly becomes necessary for them to foresee the study of hundreds and even thousands of new cases [2]. However, at the moment of a riot it is too late to start a rapid conscription of all the defence lawyers available. The Quebec situation has not yet caused us the nightmares which have been the lot of our American neighbours. However, following the demonstrations of St. Jean Baptiste Day on June 24, 1968, more than 200 rioters were called upon to appear before the Montreal courts. This resulted in many delays, so much so that at the moment of writing these lines (January 1969) a number of the rioters have not yet been judged. In our opinion this is inadmissible, and it shows that in actual practice, our administration of justice and our defence Bar, are not able to face up to social problems of this order. Undoubtedly our Bar could as others have [3], pass resolutions and endeavour to quickly organize new mechanisms. We believe that the formula of public defender, by bringing into existence a permanent and polyvalent organism, can more easily adapt itself to such critical situations.

The public defender, if he were located in the right milieu, would be in an excellent position to forestall violence by being the voice of the less privileged groups.

1 EDWARD T. MANCUSO, *The Public Defender System in the State of California,* Chicago, American Bar Center, 1963, p. 12.

2 "Riots present extraordinary problems for defence counsel. The crimes involved are predictable, the robbery and theft charges growing out of the looting, the assaults and batteries, the homicides, and even the conspiracies or the incitings to riots. The elements of these charges will have to be proved in the usual way. It is in the volume of cases and in the emotionally charged circumstances that the problem lies." *The Legal Aid Briefcase,* vol. XXVI (1968), p. 108.

3 " Be it resolved by the Executive Committee of the Association that the Association :

1. *give the highest priority to attacking the underlying and triggering causes of riots and implementing* the recommendations of the Kerner Commission ;

2. appoint a special subcommittee to recommend to the Board such policies and other matters as are necessary to implement the resolution ;

3. appoint a Director of Urban Affairs whose responsibilities will include the implementation of this resolution ;

4. pledges its cooperation to the Urban Coalition, the lawyer's Committee for Civil Rights, and other public and private agencies operating in this area ; and

5. encourage local Legal Aid programs to accord a similar priority to this work and to appoint special committees and staff lawyers to focus all available facilities directly on these issues. " *Civil Disorders — Mandate to Legal Aid and Defender Services,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 216.

100. Involved more closely and continuously in the surroundings and every day lives of those who have need of legal services without having the means to pay for them, the public defender could, to a greater extent and more readily than private lawyers, inform and educate those whom he is serving. For example, he could offer an accused under detention, free consultations without creating any problem [1].

Furthermore, the public defender would also be in a position to inform the entire public of the legal services available to them, and of the rights to which all are entitled. It is not difficult to see that through the public defender system information and consultation assume their true dimensions within an overall system of legal security.

> Community education, of course, refers to the preventive law campaign and the general publicity related to the availability of free legal services for the poor. *The poor* frequently have a distorted idea of the law and also *do not know what kind of services lawyers perform.* The goal of community education is to create an awareness of when to seek the professional advice of a lawyer. The Community education program may include printing and distributing brochures, posters, leaflets and handbooks. It may also include the use of newspapers, radio, and television, or a speakers bureau. The contents of these presentations usually describe the law in ordinary situations that affect the poor, how to avoid common pitfalls, and when and where to see a lawyer. Effectiveness depends upon simplicity and an ability to attract and hold the interest of the poor client. In addition, a companion education program is frequently created to instruct non-legal professionals and sub-professionals in the poverty community to identify legal problems and make referrals to the legal services project when appropriate [2].

101. To achieve such results, the public defender must obviously have the confidence of those he intends serving.

> Community relations are important to program effectiveness. *If it is to succed, the program must have the confidence and trust of the poor as to his sympathy for their problems.* To withstand the criticism that surrounds controversy, the program should have the support of the bar, which is best equipped to explain the lawyer's role as advocate [3].

1 "For defendants in prison on remand or awaiting trial, the Committee believes the information folders insufficient due to many prisoners' lack of intelligence or interest. It recommends appointing an officer whose positive duty is to inform all prisoners of how to obtain legal aid and to help them complete the application; however, in no event should this officer be considered a kind of lay legal adviser: legal advice must be given only by lawyers under a legal advice procedure recommended by the Committee." THOMAS FITZPATRICK, *Legal Aid for Criminal Cases in England: Part II,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 235.

2 *Op. cit.,* p. 196.

3 WILLIAM M. BARWICK, *Legal Services Program Evaluations,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 200.

With this in mind, the public defender should agree to establish his locale in the very heart of the areas in which the underprivileged group lives. He would establish his daily timetable in such a manner that the indigents could make use of his services without having to make additional financial sacrifices when they wish to consult him. It would be unrealistic to pretend to make a legal information service, or legal security available to indigents, by expecting them to be able to go to the office of the public defender between 9 and 5, particularly if the office is located in another sector of the city.

> The review of administration and management focuses on the project director's administrative and supervisory ability. *Offices must be accessible to the poor* and should provide adequate and attractive working space. The office should be properly equipped and have a law library large enough to meet the daily work needs of the staff.
>
> The lines of authority and the division and delegation of responsibility should be soundly conceived and clearly understood by the staff. The orientation and training of non-legal staff and their subsequent supervision and evaluation is important. In addition, personnel policies on working hours, vacations, sick leave, promotions, and grievance machinery should be consistent with sound office administration [1].

We do not believe that a programme of information established outside the neighbourhood of those who are going to be served is adequate [2]. The complaints, to which our Annex refers, confirm this.

B — ANALYSIS OF THE OBJECTIONS (102-118)

INTRODUCTION

102. In setting forth the system of the public defender (paragraphs 38-44) we have stressed the economic advantages. As the Commission is recommending a massive recourse to this form of legal security, it becomes necessary to make a much more detailed study, and to assess the various objections.

1 *Op. cit.,* p. 198.

2 "The Committee considers that the purpose will be adequately served by the combination of a general publicity programme undertaken by the Law Society, notices of the availability of legal aid to be posted in jails, lock-ups, and custodial institutions throughout the province and a notice along the lines of the Edmonton pilot project being furnished by the police to arrested or summonsed persons. The police need simply distribute the notice; they need not become involved in discussion or giving advice. The notices containing pertinent information regarding legal aid and its availability should be conspicuously posted up in every jail or lock-up throughout the province so all persons in custody are informed, without equivocation, as to the right to apply for legal assistance." *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 73.

The public defender in almost all cases is a successor to other legal aid systems. This can be explained very easily : in a system of justice, where the defence of the well provided citizen is traditionally assumed by a lawyer chosen by the accused himself, it was normal that in making services available to indigents, the classical procedure be followed as closely as possible. Furthermore, in the absence of the State, the field was left open to private initiatives.

So that, to begin with, the interest and philanthropy of the lawyers in private practice was counted on to assume the defence of the needy accused [1]. The welfare of society and that of the Bar, were united, and the systems which professed a full respect for the accused, also took equal care to have the defence Bar in control of the legal aid field.

If later on, one became resigned to the formula of public defender, it was because of the disproportion between the voluntary work of the practitioners and the extent of the needs of society. The individual and collective dissatisfaction on the part of lawyers, showed itself first, as one might have expected, in the more populated zones [2].

Following this, various systems undertook to remunerate the lawyers for their work related to legal assistance. We believe that they have difficulty

[1] If this interest and benevolence had not been sufficient, the Bar in its own interest would have made up the difference : in brief, it was worth more to *also* defend the impecunious than to give the State reason to involve itself in legal aid.

[2] The idea started and developed because the assigned counsel system in California proved inadequate, particularly in our large metropolitan cities and densely populated counties. It became almost impossible for trial judges to find private counsel to defend the thousands of poor, ignorant, and friendless defendants who came before our criminal courts daily. The very unsatisfactory experiences the courts were having with the assigned counsel system became of considerable concern to those interested in the proper administration of justice. The protection of the life and liberty of such persons by such haphazard methods did not assure justice, or raise the public's respect for the administration of justice.

On the other hand, the impoverished man has the right to adequate protection by la ' of his life and liberty. To protect these rights is as much the logical and proper function and charge of government as is safeguarding the health and morals, or providing for the education, or its citizens.

Justice to each individual, regardless of financial conditions, race, creed, or color, is the concern of all the public, and it is the duty of the state, rather than private individuals, or agencies, to safeguard the rights of an accused person.

This is the opinion of judges, legal scholars, organized bar associations of the nation, social workers, penologists, and many groups throughout the land, interested in the proper administration of justice.

In 1914, after a thorough study of the problem the county of Los Angeles established the office of Public Defender, whose duties are to defend any person charged in the Superior Court with the Commission of a felony, misdemeanor or contempt and who is without counsel or the means to hire one. EDWARD T. MANCUSO, *The Public Defender System in the State of California,* Chicago, 1963, National Legal Aid and Defender Association, p. 4.

in resolving their administrative problems, and that generally speaking, they cost more than other formulas equally effective.

103. Without dwelling at length on the economic advantages of a system of legal aid based on the formula of the public defender, we should however, put the reader on guard against the temptation to jump to conclusions. It is true, for example, that the public defender of Massachusetts is able to serve the needs of the public with approximately $700,000 of State funds, while the Ontario system cost many times this amount in its first full year. It should be noted that the Ontario formula includes civil justice as well as criminal and penal justice, while the system in effect in Massachusetts is limited only to the criminal and penal sectors. There is still a difference in favour of the public defender, but the economic margin separating the two systems may not be as great as one might be led to believe by a first glance at the figures. However, further in this report (Appendix 18) will be found tables which make it possible to compare the different legal security systems on an economic basis.

104. For many reasons it becomes necessary to make a detailed evaluation of what the *public defender* would be within the Quebec context.

First of all it should be pointed out that in most cases this type of defender, even in the best American systems, only offers a limited legal aid which does not at all include the related services we have described. From our point of view, we would have the public defender responsible for other social contributions offered by the legal security service. It therefore becomes necessary to indicate how the public defender could include these new duties in his traditional programme.

In addition, the Commission intends to study the various objections which are currently being made against this form of legal security. It is quite evident that introducing a Quebec service of legal security based on the public defender will provoke reaction in different circles. It is not easy to answer all the arguments, but it is our desire through an analysis of the objections, to place this controversial matter in its true perspective.

105. The formula of public defender is opposed by many. If it is readily agreed that the system of a defender paid by the State has economic advantages, in some circles on the other hand, there is considerable doubt that the system always shows integral respect for the rights of the citizen. Within the framework of this study, it is intended to list the most frequent and most serious objections, and to evaluate their importance.

- In the first place it is stated that the public defender registers a larger number of guilty pleas than the lawyers in private practice.

- The system of a defender paid directly by the State is also criticized because it breaks the close relationship which should exist between the lawyer and his client.
- The system is considered as an attack on the freedom of choice which should be the right of any accused person.
- It is also feared that this formula will make a civil servant out of the adversary of the Crown : by having him responsible to the same employer, the system ties the hands of the person who should be free to dispute every statement made by the Crown.
- The system is also criticized on the grounds that the public defender system deprives the lawyers paid by the State, of their independence.
- Finally, it is emphasized that the system draws attention to the indigence of the accused, while the Ontario system scrupulously preserves the anonymity of the client.

1 — Too many guilty pleas (106-107)

106. As all systems of legal security must endeavour to defend the indigent with at least the efficiency which one might normally expect from a private legal office, it would certainly be disturbing if the public defender used less effort than his confrères to prove the innocence of his client. Nevertheless, some authors state that the public defender registers guilty pleas more often than lawyers in private practice [1].

The Ontario study committee states, for example, that 90% of the individuals defended by lawyers paid directly by the State, have pleaded guilty, while the private practitioners, according to the Ontario experience, have secured acquittals in 50% of the legal aid cases of which they took charge (p. 106).

> It is sometimes said that public defenders advise their clients to plead guilty more often than retained counsel since the defenders have less reason to assert dilatory defences, especially if the client is in jail [2].

The Ontario study seems to infer from these figures that the public defender frequently recoils in face of the enormity of his task, and simplifies

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1 The most conscientious and zealous public defender is forced by the limitations of time and resources available to select those he deems most worthy of his efforts. Where there is a novel point of law to be urged, or bad law to be overturned, the public defender will select the case presenting the best factual setting to urge the point, whereas the private practitioner must urge every available defence for each individual client, subject only to his own individual judgment of what is best for that particular client. LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar*, 23 (1967), p. 112.

2 LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts, American Bar Foundation,* 1965, vol. 1 : *National Report,* p. 53.

some of the cases which he has charge of, by merely registering an expeditious plea of guilty. Here again we have similar criticisms from some Americans :

> The pressure placed on both sides by heavy caseloads constantly encourages them towards time-saving "dispositions". Even the most conscientious of public defenders may not realize when his advice to a defendant is subconsciously motivated by expediency. Further, for the private lawyer, "an attack upon the conduct of the prosecutor often becomes a duty". [1]

However, as we have already pointed out, there may be other interpretations. A number of the innocent pleas, for example, are made by the youngest lawyers who generally speaking, have less experience in negotiations out of court and who wish to gain experience in the actual trial.

Some criticisms are not answered as easily as that. In the eyes of some private practitioners, more particularly in the United States, it is not necessary for the public defender to have a heavy burden of work before neglecting the interests of his client : his mental attitude is not that which is expected from a lawyer for the defence !

> These tactics, or lack of them, are generally not the result of overwork or neglect, but of a philosophy which is anathema to our adversary system :
>
> "The arguments made in its (the public defender system's) favor makes my blood run cold. They are all based on the fact that the public defender will not countenance unfounded defence and will not engage in dilatory or obstructive tactics." *
>
> "(The public defender) saves time in not raising formal or interlocutory questions for purposes of delay." **
>
> "No effort was made to secure the release of defendants on technicalities." ***
>
> Canon 5 of the Canons of Professional Ethics states : "The lawyer is bound, by all fair and honorable means, to present every defence that the law of the land permits. . ." And what, pray tell, is a "technicality" if it is not a "defence that the law of the land permits" ? But, of course "lawyers insisting upon the rights of their clients can be an awful nuisance". **** How many times has a public defender been heard to refer to an indigent defendant as "My Client" ? [2]

107. The statistics which we have been able to obtain from various American sources do not, however, support such statements. For its part, the *American Bar Foundation* states that there is no noticeable difference in the number

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1 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967) p. 110.

2 *Op. cit.,* p. 114.

* Dimock, 42 A.B.A.J. 219, supra note 25, at 220.

** R.H. Smith, *op. cit.* supra note 1, at 120.

*** Wood, *Necessity for Public Defender Established by Statistics,* 7 J. CRIM. L. & C. 230, 232 (1916) (Emphasis added).

**** Stewart, supra note 11, at 118.

of guilty pleas registered by the public defender, and by the systems of legal security based on the designated lawyer [1]. The Ontario committee states quite definitely that there are no worthwhile statistics available on this subject.

It should be realized, moreover, that the public defenders in a large number of judicial districts do not receive a budget which enables them to engage the required number of lawyers. It is certain that the lack of personnel creates additional pressures on the public defenders and this could explain, up to a certain point, a tendency on the part of the State lawyers to shorten the procedures. However, this does not seem to happen frequently.

> A balanced judgment was reached by the Special Committee already referred to in its report "Equal Justice for the Accused". Mindful of the objection that the loyalty and devotion of counsel might be affected, and recognizing the need for protection of the office against control by a corrupt political organization, the Committee concluded : "In most of the jurisdictions examined by this committee, the public-defender system has the reputation of giving representation of a quality equal to that of the more qualified private attorneys who practice in the criminal courts [2].

2 — Breaking of professional relationship (108-109)

108. It is feared that a legal security system using lawyers paid by the State will not stress sufficiently the close relationship which should exist between lawyer and client. It is our belief, that a close relationship can be established just as well in the public defender system as in other forms of legal aid. We believe, moreover, that the contacts would be much easier between the indigent and the lawyer who involves himself in the lives of the impoverished.

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1 In *People* v. *Hood,* 141 CA 2d 585, appeal in *propria persona* on conviction of burglary :

"Appellant's contention that the public defender was derelict in not taking an appeal from the judgment herein is totally without merit. Undoubtedly, the public defender was aware of the long recognized rule that appellate courts do not reweigh evidence or pass upon the credibility of witnesses (*People* v. *Newland,* 15 Cal 2d 678) and confronted as he was with a situation which involved a conviction devoid of any questions of law, it cannot justly be said that he violated the provisions of Section 27706 Subdivision (a) of the Government Code which provides in part as a duty of the public defender to prosecute all appeals to a higher court or courts of any person who has been convicted, where, in his opinion, the effect might reasonably be expected to result in the reversal or modification of the judgment of conviction." EDWARD T. MANCUSO, *The Public Defender System in the State of California,* Chicago, 1963, American Bar Center, p. 26.

2 ELLIOTT EVANS CHEATHAM, *A Lawyer When Needed,* New York and London, Columbia University Press, 1963, p. 54.

Some of the other formulas have, in practice, shown themselves, to be quite vulnerable to criticisms of this kind. Within the framework of the current practice in Quebec, most of the lawyers who have taken part in the legal aid service established by the Bar, have hardly had the time to establish any kind of relationship with their clients. A close relationship in this context, was even more difficult to establish because most of the private legal offices were often given cases which were definitely of a kind not normally handled by these offices. They are only just beginning to reverse this trend, and it is actually being done, by having recourse to permanent lawyers. Appendix 19 refers to these recent activities of the Legal Aid Bureau of Montreal.

The formula now in use in Quebec as it applies to the relationship between client and lawyer, warrants even greater criticism than that of the public defender who would at least have the advantage of being more specialized in criminal and penal law.

This, however, does not answer all the objections :

> The relationship between a lawyer and his client must be one of mutual confidence. At least one federal district court has judicially recognized that such is not the case between a public defender and an indigent accused : "Petitioner's animosity toward the public defender was only natural. The public defender was an employee of the state ; the state was prosecuting petitioner". * From society's standpoint, "it is almost as important that defendants shall believe that they are getting a fair deal as that they actually get a fair deal". ** [1].

109. Testimony given by different Americans, indicates, moreover, that the public defender has no reason to envy the "client/lawyer relationship" of the private practitioner responsible for a case of legal assistance [3]. To these

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1 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967) p. 111.
* Hawk v. Hann, 103 F. Supp. 138, 151 (D. Neb. 1952).
** Dimock, 29 N.Y.S. Bar Bull. 300, supra note 14, at 306.

2 The complacency of Massachusetts is underlined by the fact that her courts even failed to follow the example of other states and to exercise the power to assign counsel to such indigent defendants. It is true that the best that can be said of the system of assigning counsels is that it may be better that no system at all. Among its many weaknesses is the lack of thorough and expert preparation for trial essential to success but ordinarily impossible *to the lawyer projected haphazardly into a case which nearly always is brought to trial almost at once.* But weak as this reed is, its support was denied to nearly all Massachusetts citizens accused of crime and unable to pay counsel to defend them. In 1917, the failure of the assigned counsel system led to the establishment in New York City of a Voluntary Defenders' Committee. In 1933, a similar committee was established in Philadelphia.

A "Voluntary Defenders Committee" is a group of citizens who associate themselves for the purpose of setting up and maintaining a permanent professional staff of lawyers to conduct the preparation and presentation of the defence of criminal defendants unable to pay for counsel. The committee itself serves without

can be added declarations of eminent Quebec lawyers : they are most conscious of the fact, that legal aid in its present form, does not engender the same interest amongst practitioners as do "normal" cases.

It is thus easily shown that a system of legal security which designates a private legal office does not necessarily result in the kind of relationship hoped for between the lawyer and his client.

The Ontario formula offers much better guarantees of success without however, proving that a public defender cannot establish a satisfactory relationship with his clientele. Actually they say :

> The basic philosophy of the legal aid plan is that it perserves the normal solicitor and client relationship between a legally assisted person and a lawyer of his choice who has agreed to act [1].

Here again, we do not question the theoretical superiority of the Ontario formula with regard to the necessary relationship between client and lawyer. We believe, however, that the offices of the public defender, even in the large metropolitan zones, maintain the same standards, as these offices have as many lawyers on their staff as there are in the large legal offices or in one of the lists prepared according to the Ontario formula. In addition, the public defender is more definitely aware of the habits and the way of life of indigents.

3 — Distortion of freedom of choice (110-111)

110. What we have said about the confidential relations between client and lawyer, applies to some of the American systems when they are criticized for refusing to permit an accused the right to choose his own defender [2].

We have already explained that the freedom of choice is subject to limitations everywhere. We believe, moreover, that the formula of the public defender, particularly in the metropolitan zones, permits a greater latitude for the accused. For all practical purposes, the majority of accused do not know the criminal lawyers, and are unable to indicate a preference to any

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pay and its finances are sometimes precarious. But experience has shown that it can find lawyers who, at least for a time, are willing to perform with zeal and competence what they regard as a useful public service, at very inadequate rates of compensation. LARUE BROWN, *Equal Justice under the Law,* in *Massachusetts Law Quarterly,* p. 57.

1 G. ARTHUR MARTIN, *Legal Aid in Ontario,* Toronto, p. 484.

2 In the opinion of the Committee this Scottish system of the Duty Solicitor is preferable to the Public Defender, for in cases of serious consequence to the accused where a not-guilty plea is entered the accused has the benefit of choosing his own privately practising counsel. *Report of the Joint Committee on Legal Aid.* Ontario, March 1965, p. 48.

one [1]. Most of the time, the accused follows the suggestion of the police or the legal aid bureau and gets in touch with the legal office which has been recommended to him. In such circumstances, the choice of the individual is just as limited with other formulas of legal security as with the system of a public defender.

We believe, moreover, that the Ontario formula, notwithstanding the differences which we have already indicated, does not protect the accused fully against the risk of having his case fall into the hands of the youngest members of legal offices. Under considerable pressure by reason of their own practice, senior lawyers have not the necessary time to devote to the study and preparation of the legal aid cases. Even under a global plan of legal security such as that of Ontario, which provides for the lawyers being remunerated by the government for the services rendered to the accused indigents, the fees paid by the State are still lower in most cases than those which a lawyer would receive from an accused financially well off.

It may be concluded quite safely that in most cases it would be impossible to secure the services of the highly placed specialists in the practice of law, no matter what system of free choice was in effect. We may even conclude that the system of a public defender would be more likely than any other, to increase the number of legal competencies made available to the public, and of course, free of charge.

111. Furthermore, the public defender, as we conceive him, should be free to call in lawyers in private practice if his own service cannot supply the necessary competencies in a specific case.

The Commonwealth of Massachusetts made use of this method for a number of years until the office of the *public defender* developed the necessary specialists. The history of the Massachusetts Defenders Committee (Appendix 2) enlarges on this point.

4 — Functionalizing of the adversary of the Crown (112-114)

112. Those who oppose the formula of public defender state that the establishment of such a system will constitute for all practical purposes, *the socialization of the legal profession and threatens to bring about the disappearance of private practice, at least in the field of criminal law.*

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1 The assignment is made from a list of lawyers willing to undertake legal aid defences. Where the accused expresses a preference for some member of this volunteer panel, this preference is, where practicable complied with. When no such preference is expressed or the accused knows no lawyer, one is assigned on the basis of the next name on the list after the last previous assignment. *Op. cit.,* p. 35.

Undoubtedly the public defender will take charge of a considerable number of cases, but this does not necessarily mean that there will be less work for the private offices. Studies which have been made, would lead one to believe that at the present time 95% of those who plead guilty before the court have been up to that point, entirely without a defending lawyer.

On the other hand, it is estimated that between 80% — 90% of the accused, plead guilty before the court. That is to say that at the present time, the legal services of private offices are only made available to a minority of the accused.

If society were to assume the responsibility for the defence of a large number of the accused, it does not imply that the private offices are going to see their share of the business disappear. The American experience shows, moreover, that establishing a team of *public defenders* does not lead to the disappearance of the defence Bar. In San Francisco, where the *public defender* assumes responsibility for 75% of the felonies, and for 85% of those accused of misdemeanors, the defence Bar is just as busy as it ever was [1].

It is hardly necessary to stress the fact that private practice retains the most lucrative part of the clientele.

113. If the establishment of a team of public defenders does not necessarily result in a reduction in the number of clients for the private practitioners, neither does it mean a slowing down in the defence of the accused indigents. On the contrary, the formula of a public defender assures an even greater consistency in the defence, and helps to speed up the process. It is fortunate that this is so, as one of the consequences of a legal aid system is generally an increase in the number of cases.

It has been noticed that where the chosen or designated lawyer is remunerated by the State on an hourly basis, there are increasing postponements, as there is no economic urge on the lawyer to resolve a case as quickly as possible. The public defender, on the contrary, by reason of the number he handles, has no reason to prolong a case unduly.

[1] The decisions of the Supreme Court of the United States will moreover, call for an increasing number of defence lawyers. It is straining credulity to believe that the public defenders could assume all these new responsibilities :
If the Supreme Court does extend Gideon to misdemeanor and juvenile cases, perhaps a public defender will be necessary and desirable for those cases, though even this is quite debatable. However, proponents of the public defender system (or circuit defender, or regional defender) do not limit their proposals to those changes which they claim have multiplied the scope of the problem. Rather, they propose that lawyers hired by the State will represent all (or virtually all) indigent defendants at all stages of all criminal proceedings, to the exclusion (or virtual exclusion) of private counsel. LEWIS C. GREEN, *State v. State*, in *Journal of the Missouri Bar*, 23, (1967) p. 108.

> "A defender system assures continuity and consistency in the defence of the poor, whereas an assigned counsel system results in great variations from one case to another. The truth of this proposition depends on how well the two kinds of systems are operated. In a defender office where the salary range is adequate and other conditions are favorable, turnover is likely to be low and continuity is assured. The larger defender offices, with a staff ranging in size from a few lawyers to 60 or more, is much like a law firm of the same size. In both, changes in personnel occur only gradually over a period of years. The attorneys in the office learn to work together and they build up files of pleadings, motions, and briefs that can be used in later cases" [1].

The various courts in the United States, including the Supreme Court, have on different occasions evaluated the services offered by the *public defender*. The American jurisprudence includes, apart from isolated criticism, many statements by judges praising the efficiency and the professional conscience of the lawyers, paid by the State, and made available to the accused indigent.

114. It is also important to emphasize that in the opinion of the public defenders themselves, this system enables them to obtain a greater cooperation from the Crown prosecutors [2]. Not only does the public defender deny the allegation of collusion of any kind with the public prosecutor, he also points out that he benefits from a much easier access to the evidence in possession of the Crown prosecutor, or the State. Those opposed to the public defender admit this fact, but they complain about it.

> "In a defender system, the defender and the prosecutor have a continuing relationship, thus assuring better cooperation between them than is possible between an assigned counsel and a prosecutor. Defenders and prosecutors were both asked to comment on this in the interview." [3]

The following lists some of the questions which were asked of the public defenders within the framework of the American enquiry :

[1] LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 1 : *National Report*, p. 47.

[2] In St. Louis County the public defender daily secures from the prosecuting attorney a list of the persons against whom warrants were issued that day. He interviews these persons in jail before they are scheduled to appear before the magistrate (which, as noted above, is often for their preliminary hearing). He appears before the magistrate for those he will represent. Transcripts are made of all preliminary hearings. By agreement, half of these are recorded by the stenographer of the public defender's office, and half by a stenographer from the prosecuting attorney's staff. DUANE R. NEDRUD and JULES B. GERARD, *Missouri*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming*, p. 413. This is not necessarily good.

[3] LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 1 : (Appendice C, Form IV, question 14), p. 48.

- Is it easier for you to obtain information from the state prosecutor than it would be for other lawyers ?
- What is the policy of the state prosecutor with regard to making available to you, confessions, statements by witnesses, expert opinions, exhibits, etc. ?
- Do they allow you to use the investigation services of the state prosecutor ? [1]

Generally speaking, the responses confirmed the excellent relations between the lawyers representing the State and those representing the indigent citizen. It is important however, that they work at arm's length — otherwise the public and the Bar would be justified in suspecting collusion :

> A further tendency inherent in the public defender system is for counsel in the defender's office to engage in too close and too frequent cooperation with prosecutors with whom they are in daily contact. "Creation of the office of Public Defender would result in a majority of cases being prosecuted and defended by the same set of men." * This may work to the benefit of one defendant and the detriment of another [2].

5 — Lack of independence (115-117)

115. Is the relationship between the State prosecutor and the lawyer of the accused too close ? This objection, to which we have already alluded, is the one currently invoked against the system of the public defender : the lawyer thus turned into a civil servant, is nothing other than an employee of the State, and therefore much too close to the prosecuting lawyer.

The American judges have quickly answered this objection.

> The judges agreed unanimously as to the invalidity of the objection noted in question 13 of the judge's interview : "Some lawyers say that the public defender cannot be completely independent and zealous in representing indigents because he is just another public official paid from the same sources as the district attorney and the judges." One judge added that the defence is likely to be more vigorous and expert because of the extensive experience of the staff attorneys and the spirit of competition that has developed between them and the prosecutor's office. Another commented that the representation is never underzealous and in his opinion it is sometimes overzealous to the extent staff attorneys press meritless technical legal points [3].

1 *Ibidem.*

* 17 A.B.A.J. 141 (1931) (summary of a report adopted by the Cleveland Bar Association opposing the public defender system).

2 LEWIS C. GREEN, *State v. State,* in the *Journal of the Missouri Bar,* 23 (1967), p. 110.

3 HENRY J. PRICE, *District of Columbia,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 2 : *Alabama-Mississipi,* p. 136.

116. However, it is not all as simple as that. There are, in fact, different ways of putting pressure on the public defender and of restricting his independence.

> State v. State. Regardless of how a public defender is selected and whose supervision he may be subject to, he is always potentially subject to pressures from the courts, from public officials and other political figures, from the press, and from the public in general.
>
> "I also recognize that an attorney, acting as a public defender might never face or, if faced (with), never succumb to pressures of government in doing his duty. After all, Federal judges are on the payroll of the Government and, yet, they rarely face improper Federal control. But, the position of an attorney, appointed as a public defender for a short term of years and, perhaps young and ambitious, as opposed to... a judge with lifetime tenure is so great that a comparison is not possible. The better comparison, of course, is that between public defender and prosecutor. And, there is no question that Federal prosecutors are subject at times to pressures from above" [1].

These pressures are exercised in a very subtle manner. In an adversary procedure such as ours, the two parties must constantly utilize every tool available to them in the hope of convincing the court of the justice of their arguments. Within this perspective it is obvious that the public defender would not be doing justice to his cause, and he would seriously hurt the rights of his clients if he were to show himself fearful and pusillanimous at the idea of opposing some judges [2].

In most cases, the defence Bar believes that a lawyer paid by the State would never dare to show the same aggressiveness, and the same dynamism as the lawyer in private practice [3].

The opponents say that the public defender has not the necessary independence to assure each indigent having a full and complete defence : they say it would be sufficient for a judge to make known his annoyance

1 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967) p. 109.

2 Though the public defender may rarely encounter serious pressure from the public, the more subtle day-to-day pressures from the judges before whom he appears constantly represent an even greater threat to the adversary system. * Even the most able, most impartial judges make mistakes. "Of course, we know that private lawyers must often run counter to the wishes of the judge". *Op. cit.,* p. 110.
* "Aside from the issue of the control over a Federal public defender by the Government, there exists the more limited issue of possible unjustified control by the Federal judiciary." 110 Cong. Rec. 445 (1964), (remarks of Representative Moore).

3 Only private counsel can deal effectively with judicial intransigence or misconduct. "A private attorney is less likely... to be as amenable to court pressure for fast disposition of cases as a defender. Consistent with an adversary system of justice. he is better able to put the interests of his client above all others." * *Op. cit.,* p. 110.
* Comment, Representation of Indigents in California — *A Field Study of the Public Defender and Assigned Counsel Systems,* 13 Stan. L. Rev. 522, 564 (1961).

and the public defender, feeling himself threatened, would suddenly reverse himself :

> Further, in every criminal trial there are borderline questions of what defence tactics are proper and what are not. A certain piece of evidence which cannot be directly put before the jury may be elicited indirectly. Prosecutors labor tirelessly to inform juries of the prior records of defendants. The public defender will always be under pressure to err on the "safe" side when considering trial tactics which may draw a rebuke from the court [1].

117. By contrast, other writers believe it to be perfectly possible for a civil servant to successfully withstand the pressures exercised on him by his superiors or by other departments of the public administration.

> We have the public defender for criminal cases. I see no reason why, in some communities where the bar and the public generally saw fit, we should not experiment with public counsel, publicly paid to serve as advocates for both the civil and criminal problems of the poor. I suppose most lawyers are familiar with the continuing controversy as to the desirability of the public defender, and there are two sides to that, obviously — my side and the erroneous side. My side is a belief that there is no reason why a government servant paid out of government funds could not fearlessly and whole-heartedly fight for the interest of the poor against the government itself. We have many instances in our government of private interest, as it were, being built into and being represented by government agencies. And this possibility should, I would think, appeal to some communities as one device for dealing with the general public problem we are discussing [2].

6 — Publicizing indigency of clients (118)

118. And finally, the system of public defender is criticized because it draws attention to the indigency of the accused being defended. It is possible to answer this objection superficially by saying that any reference to the impoverishment of a client in no way affects the carrying out of justice. However, if the purpose of any system of legal security is to place all citizens on an equal footing, it is important to take the necessary measures to respect and protect personal pride.

In actual fact, different systems which follow the principle of a designated or assigned lawyer, make the indigency of the client known publicly, and this always seems to be an affront. In recommending the public defender system one of the objectives would be to eliminate as much as possible, any publicity about impoverishment.

It must be admitted that merely the presence of a public defender beside an accused creates the risk of the latter being considered as an impoverished

1 *Op. cit.*, p. 110.

2 MARVIN FRANKEL, *Experiments in Serving the Indigent*, in *National Conference on Law and Poverty*, Washington, 1965, p. 75.

citizen. Precautions could be taken which we hope would contribute to minimize any reference to poverty.

First of all, we are not suggesting the setting up of any objective criteria for judging the indigency of an accused, and we are opposed to any systematic verification of the pecuniary resources of the accused. In this way the number entitled to the services of the public defender would be increased and would include citizens of limited resources as well as those who are absolutely impoverished.

In the second place, we would like to leave the door open to partial compensation. In other words, the accused who have *insufficient* financial resources, might however, be able to pay a part of the cost of their defence. (There is no question of refusing any defence under the pretext that the individual is unable to make partial compensation.)

This would help to minimize the publicity with regard to indigency. Seeing the public defender beside an accused would not enable anyone to deduce automatically that the State is undertaking the full responsibility of the costs of the defence. Frequently, and more particularly early in the proceedings, the public defender would be acting on behalf of individuals who can pay for their defence. He should never refuse to act — being prepared to recover unjustified expenses subsequently. Thus, it would be impossible to be certain whether or not the accused is an indigent. This second point is only a minor one. If we intend to achieve the discretion needed, it will be easier to do so despite the complexities involved, by making provision for the system to include, defendants paying nothing, and also defendants offering partial or full compensation.

C — ASSESSMENT OF CRITICISMS (119-129)

119. An evaluation of the criticisms of the legal security system based on the public defender, shows that the most scathing objections come from the criminal lawyers themselves. On the other hand, favourable comments are found at almost all levels of society without excluding the Bar itself.

In listing the objections we start with the reservations found in statements of private practitioners. Notwithstanding this, we repeat — the opinion of most Quebec lawyers appears to tend towards a public system of legal security.

1 — Necessity for Government intervention (120-122)

120. It is said, and with good reason that a powerful Bar is one of the best social guarantees against the passing of unjust laws, and against the excessive government administration.

> The organized Bar is society's foremost lines of defence against unjust laws and unjust officialdom. It is the responsibility thereof constantly to scrutinize the administration of the criminal law to see that our system does the best possible job of sifting the innocent from the guilty [1].

It can be assumed from this that the Bar has a very direct responsibility in the defence of indigent citizens. It is even pointed out that the Code of Ethics of the lawyer obliges him in all conscience, to assume with his colleagues the task of defending all impoverished accused [2].

However, it will be admitted that the specific problem to be faced is that there are not many criminal lawyers and they cannot meet the needs of the public which have grown tremendously. This paradox, however, is not enough to allay the fears of those who do not wish to have the State intervene in the defence of accused indigents. On the contrary, they wish to see a legal security system introduced which will not restrict the role of the Bar, but which will give it the financial means to extend its social responsibilities [3].

121. The Bar objects to the intervention of the State in the defence of indigents, chiefly, because the same employer would control the different participants : the judge, the Crown prosecutor, the defender of the accused.

> "A public defender system would concentrate entirely too much power in the hands of three people in the administration of justice — three government people : the U.S. attorney, the public defender, and the judge... This sort of system is contrary to our time-honored system of checks and balances." *
>
> "Most fearful, however, is the clear and present danger that would exist to our basic liberties if a Federal public defender system was established." **

1 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967) p. 117.

2 There is every reason to expect that in a free society, members of the legal profession shall share the burden of protecting the innocence of those accused of a crime unless and until proven guilty. A lawyer's code of ethics demands such. A system of government based on liberty and justice can demand no less. * Op. cit., p. 117.
* 110 Cong. Rec. 455 (1964), (remarks of Representative McCulloch).

3 Participation of the Bar should be broadened rather than limited. * The Attorney General's Report on Poverty and the Administration of Federal Criminal Justice is unequivocal in its support of the assigned counsel system :

"Positive values are gained from the widespread participation of the Bar in these cases... Many problems in the administration of criminal justice both at the Federal and State levels, result from absence of involvement of most lawyers in the practice of criminal law. An almost indispensable condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the Bar as a whole... The committee believes it is highly important that the system of adequate representation should encourage rather than obstruct such participation." **

The public defender system will entrust the task of safeguarding our rights from public officialdom to public officials. Who will watch the watchers ? *Op. cit.*, p. 117.
* Christesen, supra note 60, at 743.
** As quoted in 110 Cong. Rec. 455 (1964), (remarks of Representative McCulloch).

> Congress chose to reject the public defender system and to compensate assigned counsel instead. *** [1].

This obviously raises the spectre of collusion between the various parties. The fact that the participants are so close to each other, implies, say the lawyers in private practice, that no public defender would dare venture to the extreme limits of his efforts and means, to secure for the indigent, a defence equal to that which would be given to him by a lawyer who is not a civil servant. In other words, the defence, if made by the public administration, would become emasculated.

Furthermore, those attacking the public defender system are of the opinion that a direct intervention of the State, in the defence of indigents, will aggravate the sense of *alienation* already felt by the citizens. The accused would find it difficult to understand the part he would play in a drama in which the State enacts the roles of prosecutor, defender and judge :

> There is another, more subtle but nonetheless quite real, difficulty with the public defender system. One of the greatest problems facing us today is the increased alienation of segments of our population from the society in which we live, and the exploitation thereof by demagogues. Regardless of how effective a defence may in fact be provided, this feeling of alienation cannot help but be intensified when the state prosecutes a defendant with one hand and purports to defend him with the other [2].

122. Notwithstanding these criticisms of the Bar, which are intended to put society on guard against the risks of an ubiquitous government, the Bar admits,

a) *that society itself must assume the financial responsibilities of a system of legal aid ;*

> The conclusions of all those studying a problem similar to that with which the Committee has been charged is that at the present time and having regard to the present attitude in these matters throughout the Anglo-American world of law, the demand for legal aid cannot be adequately met by purely voluntary services of the profession. The conclusion of this Committee is the same. The legal profession cannot and should not continue to carry a burden that is the responsibility of society as a whole [3].

If any system of legal security receives a financial contribution from the government, it is no longer possible to think of it as legal security offered benevolently and exclusively by legal associations.

1 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967), p. 115.
* 110 Cong. Rec. 448 (1964) (remarks of Representative Willis).
** 110 Cong. Rec. 455 (1964) (remarks of Representative McCulloch).
*** Criminal Justice Act of 1964, 18 U.S.C. & 3006A (1966 Supp.).

2 *Op. cit.,* p. 111.

3 *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 97.

b) That *none of the systems of legal security,* even amongst those which have been formed according to the methods laid down by the Bar, *have been able to answer the needs of a public such as ours without engaging a number of lawyers on a permanent basis.*

In Ontario for example, the Bar is very strongly opposed to the introduction of a public defender system, but the legal security system of Ontario already includes a number of lawyers on a full time basis.

> While the Bar of Ontario is overwhelmingly opposed to the inauguration in Ontario of a Public Defender system of the type now operating in certain American cities, it is clear that in Toronto in particular, and probably in two or three other centres, the *fulltime Local Directors could and should handle a great many matters* for which a Public Defender's office might be responsible such as minor offences, bail, remands and pleas of guilty, *where the accused is satisfied with the advice given him by the Local Director or a member of his legal staff.* However, the Society strongly holds the view that the applicant for legal aid, civil or criminal, should be entitled to choose his own counsel from the roster of those available under the legal aid plan [1].

It is necessary, moreover, to weigh the objections made against the system of public defender. The same author who at one time feared that a defender paid by the state would not assure an independent defence, now fears that the public defender is too successful in his defence of the guilty :

> How much greater is his indignation when he learns that a civil servant remunerated with his own money, has secured the acquittal of an individual he knows to be guilty [2].

Financed by the State, any legal security system becomes an undertaking in which society itself is involved. Unless we return to a period when the philanthropy and benevolence of private lawyers were sufficient for the defence of indigent citizens, we must expect to see the State at the side of the accused indigent. This does not mean, however, that the presence of the State will deprive the citizen of a full and complete defence. Finally, even the experiences within the plans conceived by the Bar show that legal security systems must include a number of lawyers engaged on a permanent basis in the defence of indigents, particularly so in the more populous centres.

Almost all the analysts are in agreement with these first conclusions.

2 — The state can maintain the high standard (123-124)

123. There is nothing to justify the conclusion that the permanent public defender would be less likely to defend the interests of an accused than an assigned lawyer or a lawyer chosen by the accused himself.

1 *Op. cit.*, p. 95.
2 LEWIS C. GREEN, *State v. State,* in *Journal of the Missouri Bar,* 23 (1967) p. 109.

Even if the number of guilty pleas made by public defenders are proportionately higher than in the case of lawyers chosen by the accused, (proof of this has not been established) this could result simply from the fact that the public defenders have more guilty persons to defend. It is not difficult to imagine that the accused who is innocent would be prepared to make a greater financial effort to retain and pay for the services of a lawyer than would a guilty person. This argument may not be altogether valid, as it could just as easily be said that the innocent person, confident that establishing the facts will vindicate him, will refuse to pay anything at all.

The essential is :

a) that at the present time it cannot be established that a team of public defenders working under normal conditions and with a sufficient budget defend indigents with less interest and effort than lawyers in private practice ;

b) that it is much easier to check the behaviour of the public defenders than to evaluate the constancy and efficiency of a group of private practitioners.

124. The quality of the professional services rendered by the public defender warrants a careful examination [1].

At the present time there are scarcely any scientific methods of evaluating in an equitable manner the professional output of a group of lawyers.

> Reviewing the quality of professional representation is probably the most difficult part of an evaluation. All lawyers have their share of dissatisfied clients. Although it is tempting to sit and second-guess past decisions, any experienced lawyer knows that many decisions are made under pressure and result from judgments made at critical points in rapidly-developing situations.
>
> Recognizing these factors does not dispense with the need to judge the quality of service. If programs are going to achieve high standards of performance, critical judgments on the quality of representation must be made [2].

1 Although "Legal Services" is a national program with uniform national standards, evaluations must take into account regional and local obstacles and problems and the size and age of a program. The two-lawyer rural program cannot be judged by the same standards as the large urban program with law school affiliation, and the program that has been operating for only six months has a different set of needs, problems, and potentialities than the program that has been in existence for a number of years. Finally, techniques of evaluation are constantly undergoing revision and refinement. WILLIAM M. BARVICK, *Legal Services Program Evaluations,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 195.
2 *Op. cit.*, p. 197.

We believe that the system of legal security utilizing the public defender on a permanent basis, could better than any other, provide for periodic evaluations of the professional services rendered by the legal personnel.

Far from playing a harmful role, the State could equalize the odds amongst all the accused. Undoubtedly, the Bar could theoretically do this by exercising strict control over the professional ethics of its members, but this would always be of a negative nature and limited to serious abuses [1].

In still another way, the direct intervention of the State on behalf of the defence, could contribute to improve the quality of the services offered. It would seem to be much easier, as we have already indicated, to make a number of specialists available to the public defender, which would not be the case for the lawyer in private practice [2]. By the force of circumstances, the State would do this more willingly within the framework of a system controlled by a budget.

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1 After discussions with the local bar, staff attorneys are interviewed regarding their standards of practice. Pleadings and briefs that are matters of public record are reviewed along with memoranda of law that do not contain privileged information. In this phase of the review, the principal questions are: How well does the lawyer prepare for trial? How well does he use the rule of civil procedure, and how well does he investigate the facts and the law? Is he too quick to negotiate and settle, or does he press the opposition on behalf of his client?

The second phase is, how well does he know the law? Needless to say, no lawyer can be expected to carry all of the law around in his head; however, in areas where his clients have frequent problems, he should be able to discuss the law accurately. Evaluators will discuss the law with the staff attorney and attempt to judge his general knowledge and understanding, his ability to identify issues, and his awareness of recent developments in the law. He should be aware of the issues being raised and the decisions handed down in cases reported in advance sheets and similar publications. Finally, the evaluators review the staff attorney's ability to interview clients creatively. This may be done with hypotheticals or by discussing cases handled. Other people in the poverty community with first-hand experience of the office will provide valuable clues. *Op. cit.*, p. 198.

2 For the proper preparation and trial defence of the accused, it is particularly necessary that funds be made available for the proper investigation of the case and, if necessary, substantial funds for retaining qualified expert testimony.

Under the circumstances as they exist in this state, which is unique, it seems that the establishment of a public defender system would better provide for adequate, experienced, and competent defence counsel for indigent accused persons. Some defence attorneys felt that, due to what they thought to be a basic distrust on the part of indigent accused, of the public defender, these persons would make more effort to secure funds to obtain retained counsel if a public defender system were established, rather than resorting to free counsel because of alleged indigency. Be that as it may, it seems that something in the nature of the public defender system could well be utilized in the Clark and Washoe County areas. As to the rest of the state, it would not be economically sound, since the population is too small. JOHN P. FOLEY, *Nevada*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 3: *Missouri-Wyoming*, p. 455.

Whether one agrees or not, the fact remains that the public defender is in a better position to make use of specialists on behalf of the indigents than can be done by the lawyer in a private practice. This is an area in which State participation can raise the level of the defence.

3 — Independence is possible in a State service (125-127)

125. One of the criticisms is that the presence of the State at the side of the accused indigent, takes away from the defender, the independence so essential for a full and satisfactory defence of his client.

In our opinion, this objection has no validity if the Act establishing the service of legal security provides the necessary precautions for selecting the Director of the service. In other words, if there ever was danger of intimidation, it is reduced to nil if the public defender does not owe his employment to an authority or an individual who could exercise pressure on him.

This criticism which is advanced in theory is not proved in actual practice. In the United States we see a wide range of public services of legal aid which have shown these fears to be unfounded, even though the public defender is in every instance, like the prosecutor, a public employee.

In those jurisdictions where he has been named by, and is responsible to, an authority other than that which administers the State prosecutors, the Director of the public service of legal security has retained his complete freedom.

As examples:

In Massachusetts it is the magistrature which selects and supervises the Director of the service.

In San Francisco, the Director of the service is elected by the population of the county.

In Los Angeles, a civil service commission establishes a list of the three best candidates and leaves the final choice to the executive of the *County*.

Whatever the formula used, it can be seen that it is not difficult to prevent the government authority from making nominations to suit itself [1], and possibly on the basis of favouritism.

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1 The statute provided for a Massachusetts Defenders Committee of eleven members to administer a statewide system under which counsel are provided to indigent defendants required by statute or by rule of court (Rule 10) to have counsel. Under Rule 10, as amended in June, 1964, counsel must be made available for every defendant charged with a crime for which a sentence of imprisonment may be imposed. As originally passed, the appointment and overall control of the Committee was lodged in the Judicial Council but has now been given, as was at first

126. However, it is not sufficient for the *nominations* to be made sensibly : it is necessary to add to this the greatest freedom of *action*.

Generally speaking, as is the case in the *county* of Los Angeles, the American legislation grants the Director of a public service of legal security a great deal of discretion in the administration of his service. [1]

We propose giving the Director of the service, complete independence from the moment of his nomination. Not only should he be independent of the authority which administers the activities of the Crown prosecutor, but he should not receive his nomination from the magistrature. We do not think that it is fully reassuring for the *public defender* of Massachusetts to owe his position to men whom he is called upon to convince and even contradict.

127. On the financial basis the public defender promises an even greater guarantee of independence than any other formula of legal security, by reason of the fact that at no time, nor from any point of view, does he depend on his client for his remuneration.

Undoubtedly as is always the case, an individual may find a way to abuse the law, but there appears to be agreement that the formula of the public defender reduces the risks of exploitation of the accused indigent to the minimum.

> Institution of a defender system eliminates the likelihood of the undesirable practice sometimes found in assigned counsel systems, whereby the attorney attempts to get a fee from the defendant or his family, and if he receives none or only a small amount, he does little work for the defendant. Although the present survey did not uncover any reports of this practice, the literature indicates that it used to be a problem in several large cities. Advocates of a defender system have asserted that elimination of this practice is an advantage of the system [2].

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proposed, to the Supreme Judicial Court which appoints and may remove its members and must approve its rules and regulations. LARUE BROWN, *Equal Justice under the Law*, in *Massachusetts Law Quarterly*, XLX, 1965, p. 60 .

1 The County Charter, under which the office of Public Defender was created, provides :

Section 23. Upon request by the defendant or upon order of the court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offence. He shall also, upon request, give counsel and advice to such person, in and about any charge against them, upon which he is conducting the defence, and he shall prosecute all appeals to the higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in reversal or modification of the judgment of conviction. ERLING J. HOVDEN, *Biennial Report, Public Defender of Los Angeles County*, p. 3.

2 LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 1 : *National Report*, p. 48.

128. *All things considered,*

1. The public defender shows itself to be an economic and efficient formula for the defence of accused indigents ;
2. On condition that the independence of the Director of service is assured by a specific procedure with regard to nominations, which will also allow him full freedom of action, the public defender has as much independence as any lawyer in private practice ;
3. He can count on a greater cooperation from Crown prosecutors [1], with whom he can establish excellent relations without losing any freedom of action ;
4. In favour of the public defender, it is important to stress the speed with which he can intervene and the uniformity of the defence he can assure the indigents.

> A full-time defender supported either by private philanthropic or by public funds, or a combination of both, is the most desirable method of handling the problem of indigent defendants in the criminal courts. This system assures a fully professional treatment of the problem of the indigent defendant and makes possible supervision by the courts and the bar of the quality of the representation given to indigents. It gives some assurance to the defendant that his representation is in the hands of a person who is fully trained and competent in the criminal law.
>
> The great defect of the assigned counsel system is the enormous variation in the quality of representation given by counsel assigned on an individual basis [2].

Reference to this problem will be found in the following works. Wood, *"The Place* of the Public Defender in the Administration of Justice," Nov. 19, 1914 (Los Angeles) ; Dimock, "The Public Defender : A Step Towards a Police State ?" 42 A.B.A.J. 219 (1956) (New York).

1 The liberality with which the district attorney disclosed his evidence to assigned counsel varied considerably. Generally, the smaller the county, the more liberal the district attorney's policy. In the large urban counties the district attorneys indicated that they disclosed evidence only on court order. The responses indicated no difference in attitude between assigned counsel and retained counsel, except that some of the district attorneys who were interviewed indicated that, where the defendant was handicapped in preparing for trial by a lack of funds, his assigned counsel might be informally given greater access to the prosecutor's information.

The prosecutors' assessment of the way the present system functions revealed that generally the organized systems, whether wholly or partly supported from public funds, were thought to be more effective than the individually assigned counsel system. ROBERT KASANOF and PAUL I. BIRZON, *New York* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming*, p. 540.

2 *Op. cit.*, p. 542.

These are the principal reasons in favour of the public defender [1]. It only remains to choose the administrator (State, Bar, Board, Council) of the system.

We should emphasize that the rapid sociological evolution which we are undergoing today, has surprises in store for our administration of justice. The defence of indigents, in particular, demands a rapidly and constantly renewed dynamism in our legal security services, both public and private [2].

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1 For these reasons, it is recommended that the assigned counsel system in its original form be replaced by some other plan, and that consideration be given to the adoption of a public defender plan or a mixed private-public defender plan, along the lines of the Essex County plan in substitution for the assigned counsel system.

The public defender plan commends itself for a number of reasons. It can

a) provide experienced and competent representation ;
b) provide adequate investigatory and other facilities ;
c) operate at a sufficiently early stage of the proceedings and thus afford *optimum* representation ;
d) provide undivided loyalty to the client by zealous lawyers.

In many respects, such a plan is highly desirable and should be supported by public funds. The larger counties (Essex, Camden, and others) could maintain full-time staffs ; the smaller counties could hire part-time lawyers. It is interesting and important to note that the greatest enthusiasm for the public defender type of representation is exhibited by those who have tried it and have had experience with it.

There are also sound arguments to be presented on behalf of a mixed program, especially in New Jersey, which has a tradition of participation by all members of the bar in the representation of indigent defendants. Such a mixed program might well provide some of the better features of the public defender program while retaining and preserving some of the unique qualities of the assigned counsel system. The mixed plan the committee has in mind, would require the hiring of staff lawyers plus a panel of lawyers who would be called upon from time to time to take a case on a modest fee basis. The panel would make use of the services of lawyers who are interested in handling occasional criminal cases and who would like to develop an expertise in the area. In this way, it is hoped that a competent criminal bar would develop which would represent a wider cross-section of the bar than is presently the case. Experience in Essex County has indicated that in spite of an opportunity to excuse themselves by the payment of a nominal fee, a substantial number of able lawyers have continued to accept their responsibility under the assigned counsel system and have taken assignments.

The proposed plan would continue to maintain the tradition held in view when the assigned counsel system was originated. Under such a plan, the bar, in general, would not divorce itself from experience in the criminal law or from concern for the underlying sociological causes of crime. Op. cit., p. 502.

2 In conclusion, certain lessons have been derived from this episode (a riot) :

First, under the leadership of the LAB, volunteer attorneys have shown their initiative and desire to respond to a crisis. Through their efforts the essentials of due process were ultimately retrieved.

Secondly, governmental agencies, including judicial and administrative personnel, the public defender and the state's attorney demonstrated either a lack of preparation or concern.

Finally, to rectify these abuses and to promote respect for « law and order », it is clear that all groups concerned, including public officials and private attorneys, must undertake a prompt reform of present policies so that justice in times of crisis deals with all defendants fairly and expeditiously. PHILIP H. GINSBERG, *Volunteer Lawyers Retrieve Due Process in Chicago,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 210.

As for the public defender, he would not be doing full justice to his social role if he were content to merely fulfill his functions in conformity with the requirements of procedure. His status as a civil servant should never prevent him from being courageous and imaginative in the defence of the less favoured classes.

SUMMARY

129. The following summarizes our analysis of the objections made to the formula of public defender :

A) *Unjustified criticisms of the public defender.*

1. Not only is there no danger of connivance or collusion between the public defender and the State prosecutor, but the former could make available to his client the benefit of the excellent relations which he has with the State prosecutor.

2. The public defender registers guilty pleas only slightly more often than his confrères in private practice, even though it is quite likely that he is more often dealing with the truly guilty.

3. The establishment of the public service of legal aid will not cause the private defence lawyers to disappear, as they will retain what can be considered as the more lucrative part of the clientele. Moreover, social evolution will increase the legal needs.

4. The public defender can enjoy complete freedom and independence if sufficient precautions are taken with regard to the procedure for his nomination, and in defining his functions.

B) *Particular advantages of the chosen lawyer*

1. The system based on the free choice of the lawyer by the client, respects in theory more than any other, the sense of freedom and confidence so desirable between the accused and his defender. However, full freedom of choice is very rarely the case, whether it be because the accused does not know any lawyers and accepts in

good faith the suggestions of the police or any other civil servant, or whether it be because the specialist asked for by the accused is already in too great demand by those who wish to use his services. The close relationship is also somewhat theoretical.

2. The Ontario system which shows great respect for the freedom of choice of lawyer by the accused, makes it possible to avoid any publicity with regard to the indigence of the accused. It is possible to approach this ideal by broadening the criteria of eligibility to a service of legal aid based on the public defender.

C) *Disadvantages of the systems based on designation or choice.*

1. The youngest members of legal offices are called on most frequently to carry on the work required for the legal security service.

2. Nothing prevents the designated or chosen lawyer from needlessly prolonging the duration of a case.

3. The cost of a system of legal security which shows absolute respect for freedom of choice, is much higher than is the cost of a service utilizing a team of public defenders.

On this matter of cost our conclusions are similar to those of the Advisory Council of the Administration of Justice in Quebec, set forth in its report to the Minister of Justice dated June 3, 1968 :

The members are of the opinion that the principle of free choice of his lawyer by a person detained or accused has not much significance in a system of aid, and in any event, it must give way before the imperatives of a monetary nature, (the system of public defender can be much less onerous) as well as for professional reasons (the specialists in criminal law still being so few).

The full text of this report is reproduced in Appendix 20. It is our intention to refer to other recommendations in this report of the Advisory Council.

IV — THE QUEBEC PUBLIC DEFENDER

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A — THE QUEBEC CONTEXT (130-141)

130. Even if the formula of public defender has given excellent results in other areas, it cannot be introduced in Quebec without a thorough analysis and many adjustments.

It is important in the development of any strategy of reform to take into consideration the particular needs of the Quebec population, the legal facilities available, the differences between regions, the powers and duties of the Bar, the actual abuses...

Without such an analysis of the situation there is danger of establishing in Quebec a regime which does not at all fit in with our aspirations and characteristics. It is also essential to endeavour to foresee the impact of any proposed legislation. For example, it would be necessary to visualize the influence an overall system of legal security would have on the number of pleas of innocence, and on the number of cases.

It is our intention now to undertake an examination of the Quebec situation, as it is, and as it could be.

131. It is not easy to compare the Quebec situation with those in European countries or in an American state. By reason of the great differences in customs and cultures, the importation of idealogies is always a sensitive matter [1].

The Ontario study committee, as we have already seen found great difficulty in predicting the cost of a system of legal security although it had already been tried in other countries. We find ourselves in the same quandary, even though we are limited merely to recommendations concerning legal security on criminal and penal matters.

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1 America has still much to learn from Europe in the domain of the administration of justice, and Europe in turn, could benefit by the examples of the utilization of the social sciences in the analysis of the criminal phenomenon which researchers have developed on our continent. DENIS SZABO, *Criminologie en action,* Bilan de la criminologie contemporaine dans ses grands domaines d'application. Les Presses de l'Université de Montréal, 1968, p. 8.

The difficulties are many. First of all statistics are almost entirely lacking with regard to the specific needs of the Quebec population ; second, the systems which we have been able to observe abroad, function in an absolutely different context from that of our own.

On the basis of geography, for example, Massachusetts, which has a population comparable to that of Quebec, did not encounter any of the difficulties which are created by the physical geography of Quebec. California, a State much larger than Massachusetts, does not even approach the physical dimensions of Quebec, but it has a population equal to the entire population of Canada.

In every domain, similar differences are found, calling for extreme care in the procedure to establish a plan as important as that of a legal security system.

1 — The legal resources available (132-133)

132. A network of permanent public defenders cannot be started and developed unless it is possible to recruit the number of lawyers needed [1].

At the present time, the Bar of Quebec, has approximately 3,000 members, which is far from being excessive for this liberal profession. Quite the contrary.

There are other factors which complicate the situation resulting in a dearth of legal competencies. A large proportion of the lawyers are concentrated in the Montreal metropolitan zone ; and the great majority of the lawyers are only interested in the civil sector and leave the responsibility for criminal and penal cases to a handful of their confrères.

Undoubtedly, the rural Bars include a greater proportion of lawyers interested in the criminal sector as well as the civil. However, here again an examination of the different regions, shows that the real practitioners of criminal and penal law in any region can be counted on the fingers of one hand. The "confrères" only handle criminal cases in a sporadic manner, and basically their practice is civil.

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1 One excellent method for increasing the number of lawyers in court without further salary expenditures is adoption of state Supreme Court rules allowing law students to practice under certain conditions. The rule in Michigan, for example, allows an upper-class man who is a member of a *bona fide* legal aid society to represent clients. The student must be under the supervision of a member of the bar, who usually is one of the full-time legal aid staff attorneys. The judge presiding for any case exercises quality control by having complete discretion to disqualify a particular student or a particular type of case. CHRISTOPHER B. COHEN, *Increasing Effective Legal Manpower,* in *The Legal Aid Briefcase,* XXVI, 1968, p. 245.

In Table VII will be found the distribution of lawyers in the different judicial districts of Quebec, according to their years of experience. This Table will confirm the preceding remarks.

To these tangible elements there should be added a tendency which we had begun to suspect in recent years, and which can now be confirmed. The Quebec universities emphasize, to a much greater degree, the teaching of civil law, and the research related to it, rather than the training of future criminalists.

These different elements place the problem of legal security in its true perspective. If we add to this the observations of Mr. Jean T. Loranger (see Annex) we are led to the following paradox :

a) one lawyer out of 10 is interested in criminal and penal law ;
b) a case of a criminal and penal nature requires six times the steps (transfer, appearance, trial) than a civil case.

133. We therefore find ourselves in a vicious circle. The specialists in criminal law are few in number and are constantly faced with a surplus of work. In the law faculties there is not enough time devoted to education in criminal law to make it interesting to a greater number of students. The result ? In the absence of a dynamic education in criminal and penal law, the number of students interested in this domain continues to be very limited.

This chain of unfavourable circumstances has unfortunate consequences; some of them are :

- A marked deficiency in the number of criminalists ;
- The difficulty the Bar has to develop the Code of Ethics for the criminalist as thoroughly as for the civil lawyer ;
- The professionnals interested in civil law often show contempt for their confrères engaged in criminal law.

As a consequence, it is difficult to hope that it will be possible to engage a satisfactory number of permanent public defenders without a progressive salary plan and an expanded effort by the universities in the training of criminalists. One thing is certain - as far as the volunteer is concerned, he has proved that he is unable to cope with the situation.

2 — The regional disparities (134-135)

134. Taking into consideration the marked differences amongst the various regions of Quebec, it would require an almost superhuman effort to develop a system of legal security in all the regions at the same rhythym. The Advisory Council of the Administration of Justice (Appendix 20) has also observed these differences.

In replying to the criticisms made by the Ontario Committee with regard to the different American systems of legal aid, an analyst has made special reference to the importance of similar regional disparities : not only must the organization itself be more flexible in the less populated zones, but each region must be able to define its own procedures to establish sound relationships between lawyers and their clients. The Ontario Committee does not seem to know that the formula of a public defender, by reason of great regional differences, has produced different systems and of varying effectiveness.

> The joint committee considered the public defender concept at length and ended by recommending against it. This is the only part of the report to which one can take serious exception. The committee seems to have had a narrow and doctrinaire conception of public defender systems. For example, in the mail questionnaire that was sent out, the committee put the question in this way :
>
> > Public defender schemes operate in certain parts of the United States. None has been introduced either into England or Canada. Broadly speaking, the Public Defender is an office maintained by the government or municipality whose function it is to represent needy persons accused of criminal offenses. The staff of Public Defender's office are thus lawyers who are engaged on this work as a full-time occupation. What are your views on the desirability of establishing a Public Defender office in Ontario ?
>
> Obviously the committee was unaware that many public defender offices in the United States operate with part-time lawyers, especially in smaller cities. This misconception is understandable, since the committee visited only the public defender offices of Los Angeles and Chicago and the Legal Aid Society Criminal Branch in New York. The committee also reported that the public defender *system* "tended to make completely impersonal the relationship between the public defender and his client". This again appears to be a generalization based upon observation of big city offices only [1].

135. After reviewing the objections which we have previously summarized, the author of this critical study reproaches the Ontario Committee with not having sufficiently understood the characteristics of the *Public Defender's System* in the United States [2].

We believe that a Quebec system of legal security, must, without sacrificing the principle that all citizens should be on an equal footing, take into practical consideration the regional characteristics : needs, initiatives, resources, etc.

Such flexibility is even more necessary if we expect the public defender to assume a role of a more social nature which will necessarily vary according to the regional needs.

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1 LEE SILVERSTEIN, *The New Ontario Legal Aid System and its Significance for the United States,* in *The Legal Aid Briefcase,* Vol. XXV, February 1967, p. 87.
2 *Op. cit.,* p. 88.

> "In its own appraisal of the public defender, the committee accepted all these arguments and also seemed to be disturbed by "the bureaucratic nature of his office and employment" and "the lack of any real incentive to strain to the limit of his ability in every case and the practical impossibility of doing so". The committee also reported that "it appears that well over 90 percent of all persons represented by the public defender plead guilty or are convicted, "whereas experience in at least two cities in Ontario was that 50 percent or more of cases undertaken by volunteer attorneys resulted in acquittals. (On the matter of guilty pleas and convictions, the American Bar Foundation study found no significant difference between defender systems and assigned-counsel systems considered as a whole, although wide differences were noted within each type of system)."

3 — The powers of the Bar (136-137)

136. A system of security cannot be introduced without the cooperation of the legal profession. Even after the introduction of a legal security system, the Bar would have sovereign authority over the professional acts of its members and it is essential that it be so.

It must not be assumed that under the pretext of becoming employees of the state, and therefore civil servants, such lawyers are not required to observe their professional code of ethics, and are only responsible to the government authority. There should be no doubt on this matter: the legal security service must at all times observe the code of ethics of the legal profession.

The permanent public defender is like any other lawyer, first and foremost, at the service of his client, for whom he must utilize all his resources. He must do so even if the public or politicians sometimes bring pressure to bear on the grounds that public funds should not be used for the defence of a criminal making the headlines.

> "Public Defender, as a licensed attorney, is guided by the same ethics and standards of conduct that govern the private attorney." [1]

137. The public defender realizing that his duties and responsibilities are similar to those of any other defence lawyer, will utilize the much greater resources available to him to defend the indigent with better results both

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1 EDWARD T. MANCUSO, *The Public Defender System in the State of California,* National Legal Aid and Defender Association, American Bar Center, Chicago, March 1963, p. 6.

for the citizen and for the entire society [1].

There is no reason for it to be otherwise, from the point of view of the evaluation of professional qualities, he is in as good if not a more favourable position than private practitioners with regard to, the speed of intervention, knowledge of the law, and the benefits for his client [2].

Even if a Quebec Act removes Crown prosecutors from the jurisdiction of the Bar (as has been done in many European countries) it is not at all certain that the public defender should be freed of the professional ethics established by the Bar.

4 — The actual abuses (138)

138. The establishment of a network of public defenders in Quebec is even more important because of the shameful abuses which now exist in the administration of criminal and penal justice.

We deplore the fact that some members of the legal profession do not offer the public sufficient guarantees of responsibility and stability. We are referring here specifically to those who by sad custom have come to be designated as hangers-on of the court-house (ambulance chasers). These are lawyers who "carry their office in their hat" and who solicit clients in the "salle des pas perdus" of our most important court-houses, and particularly that of Montreal.

This form of solicitation, quite obviously, is not in accord with professional ethics. Actually it gambles on the good faith and credulity of the

1 EDWARD T. MANCUSO, *The Public Defender System in the State of California,* published by National Legal Aid and Defender Association, American Bar Center, Chicago, March 1963, page 6.

2 The growing complexities of modern life and the resultant appearance of so many helpless, poor, ignorant, and uninformed persons before our criminal courts everywhere create a real problem in the administration of criminal justice. The Public Defender system and how it contributes toward solving this problem in California is herein set forth.
Since the Public Defender is experienced in the handling of criminal cases and is available to serve when and where needed, it is generally possible for him to proceed to trial promptly, without the continuances and delays which frequently result when private attorneys are assigned on an *ad hoc* basis. Availability, experience, and promptness are especially important to indigent defendants. They are usually confined in jail, being unable to make bail, and it is important that the trial or other disposition of their cases proceed promptly. The community also benefits, as the prompt handling of these cases by experienced lawyers avoids inconvenience to jury panels and witnesses and improves the administration of justice generally.
The confidence engendered between the Public Defender and District Attorney and their mutual respect for each other's integrity and capabilities, usually extends to the court itself, and the court need have no fear of being misled by misstatement of fact or law. They are not only familiar with the facts, but are also abreast of the law and decisions relevant to the particular case and, therefore, in a position to save much of the court's time. *Ibidem,* page 3.

accused who in most cases, are having their first contact with justice ; without offering them any of the normal guarantees of fair dealing. It is hardly necessary to emphasize that the defence offered under such conditions is only a poor improvisation which discredits justice.

We believe that a network of public defenders would very quickly put an end to such questionable methods. The activities of the *public defender* in San Francisco has made it possible to eliminate this plague entirely. The public service of the legal security of that city distributes folders daily to those who enter the court-house : those who are not able to pay the cost of their defence, are asked or invited to call the office of legal aid. The accused including the indigent, can, from that moment on, count on a worthwhile defence, and he is constantly in the hands of an experienced lawyer.

We have already indicated that the summonses should include information of the services of legal security available to all accused persons. This, added to an extensive information service in the police stations, would very quickly correct the problem.

5 — The probable clientele (139-141)

139. To be able to adapt the American form of public defender to our Quebec needs, it is necessary to visualize the volume of the demands which will have to be met. The introduction of a system of legal security, would automatically develop new needs, and would necessarily result in a rapid increase of demands for assistance.

Ontario has gone, and is still going, through this experience. All other systems have known the same evolution. Quebec should also foresee an increase in the number of pleas of innocence, and in the number of trials resulting therefrom.

However, this is a price which has to be paid if our Quebec administration of criminal and penal justice wishes to respect the minimum standards fixed by the President's Katzenbach Commission :

> "The provision of Counsel entails costs beyond the expense of paying for their services. Counsel can be expected to require that the Court deal deliberatively with his client ; in many respects lawyers complicate the process. A Court that has been adjudging men guilty and fixing their punishments in a matter of a few minutes is unlikely to continue to be able to do so when the accused persons before it are represented by lawyers.
>
> However, the Commission believes that the burdens which Counsel may impose on the System are burdens that have too long been avoided and must be borne if there is to be an effective adversary system. The role of the Defence Counsel, serving as a prod, vigorously challenging existing practice, is an important benefit to the operation of the administration of Justice. While in

many cases the presence of a lawyer will be a factor contributing to delay, in some cases Defence Counsel will press the Courts to early consideration of matters that eventually have to be considered, and in some instances early consideration may result in foreshortened proceedings. The cost of Counsel can be minimized by firmer controls on delay and by simplified procedures ; they probably can't be eliminated. However, they are clearly worth paying" [1].

140. There is a tendency, particularly in groups related to the legal professions, to consider the introduction of a system of legal security as a luxury. Amongst the lawyers, there is a great deal of reluctance to allow the State to take part in the field of legal security. Even though the general public as well as specialists in human sciences and social services agree that there is a continuously growing need, there are judges and members of the Bar who state that the legitimate needs of the public are being looked after.

We have already observed this in the case of the initiatives of the Bar of Saguenay, and we can find corroboration from different analysts (paragraph 86) :

> No doubt, in thinly populated areas, this "present" form of legal aid will continue to be used with little hardship to the individual, and to the general satisfaction of the profession. No one should inhibit the philanthropy of those members of the bar who are happy with the present system and are doing good work within that framework. Many kindly lawyers will continue to do free work whether there is "Legalcare" or no scheme at all. In the larger centres the voluntary method of providing legal aid is not satisfactory because the expense (largely due to increased numbers of applicants) is growing much faster than the funds of the local law society can bear. Furthermore a certain section of the senior men, particularly in criminal matters, is forced to carry a disproportionate amount of free work.
>
> The profession is jealous of its rights and the independence which has engendered those rights. It does not readily accept Governmental influence and the extremists see the Government subsidy as an incursion, as the thin end of a wedge which heralds further interference which may be more sinister. To these practitioners the idea of a public scheme of legal aid achieved by the appointment of Public Defender and Public Solicitor is anathema.
>
> This attitude is typically legal. It is not helpful to the lawyer and certainly contrary to the public good. The lawyer is not in the best position to appreciate how many people are really in need of legal aid. The lawyer only hears of those cases which come to his notice. The opening of a full time legal clinic shows that there have been many people who need help who did not previously know that such a service was available. Of course there are some who will seek legal advice unnecessarily but the policy of the scheme must not be lost sight of merely because there are those who will abuse it. In any case, the English system has shown far fewer abuses of the scheme than have arisen under the medical plan [1].

[1] *The Challenge of Crime in a Free Society,* A Report by the President's Commission on Law Enforcement and Administration of Justice, Washington, February 1967, p. 150.

The number of accused who appear without a lawyer (Tables 1 to VII, par. 86 and 87) proves most eloquently to anyone interested, that there is urgent need to create a public legal security system. Even though some abuses might develop through "non-indigents" securing legal aid, it is still true that the present administration of justice is lacking in equity.

Nobody is able to state definitely that the number of innocent pleas are going to double or triple. We might even arrive at the following situation : the number of cases increase by almost 100% but the number of adjournments *(postponements)* reduce proportionally ; that is the experience which has become evident in different judicial districts.

141. In describing the Quebec situation, we should also take into consideration the considerable supplementary costs which must be added to the defence of an indigent. These are so high today that they made the total cost excessive no matter what kind of legal security system is in effect.

We are thinking here particularly of stenographic transcripts which call for highly qualified personnel, important monetary outlays, and is another of the reasons for the slowness of our judicial procedures [2].

In fact, in a number of cases, delays have been granted because the official stenographer was not available at the time when both parties and the court were ready to proceed. In other cases, it is the transcription of the stenographic notes which have made delays necessary. We have already alluded in our general introduction, to the case of a man who was detained for four years in a Montreal prison while waiting for the hearing of his appeal, for the only reason that the stenographic notes of his trial had not yet been fully transcribed and made available to the court of appeal.

Knowing the economic impact which court stenographers will have on any kind of Quebec system of legal security, we believe it necessary to state here that the custom of having a stenographic transcript for the entire

[1] GRAHAM E. PARKER, *Legal Aid — The Canadian Need,* 1963, pp. 179 to 197. Similar remarks concerning England will be found in the Widgery Report (see Section 145).

[2] The cost of the transcript is, of course, a deterring factor in the ordinary case and the expense tends inevitably to reduce the number of appeals and to prevent ill-considered or frivolous appeals by private persons. The danger exists that if the transcript is furnished at no expense to an appellant in an extended legal aid plan, no such deterrent will exist and a temptation might arise to initiate frivolous appeals. The existence of the appeal committee should provide an effective barrier against these. *Report of the Joint Committee on Legal Aid,* Province of Ontario, March 1965, p. 68.

judicial procedure is exceedingly costly, often useless, and nearly always excessively slow. We will discuss this problem further on (par. 189-204).

B — THE QUEBEC OBJECTIVES (142-204)

142. There is no doubt that a system of legal security should always endeavour to place all citizens on an equal footing in the eyes of the law and the administration of justice. Such results can only be achieved if the system of legal security is able to find solutions to particular problems in a given country. A Quebec system would not be satisfactory unless it was able to remove the specific Quebec difficulties which we have pointed out : a poor distribution of the legal talent available, insufficiency of criminalists, appearances without lawyer . . .

In defining the objectives to be attained by the Quebec public defender, we are endeavouring to put forth the basic principles of a legal security system which will be as close as possible to the ideal, *on the basis of principles, and adapted as much as possible to the realities of Quebec.*

For example, the Quebec public defender system should :

- make legal services available in as uniform a manner as possible in the various regions of Quebec ;
- adopt a salary scale and a method of training which will attract to the system of a permanent public defender, a higher percentage of young lawyers, who are today being absorbed into private practice ;
- benefit from a method of administrative control which will give sufficient latitude to the legal security service, while preserving the rights of the executive power, the prerogatives of the magistrature, and the jurisdiction of the Bar.

1 — The universality of the system (143-144)

143. Notwithstanding the regional disparities, the Quebec system of legal security should be available to all citizens from its very introduction.

This ideal is not easily achieved. At present it is difficult for the Minister of Justice to recruit a sufficient number of permanent Crown prosecutors. Nevertheless, unless legal security is to be refused to some of the Quebec people, which would be an injustice, it will be necessary for a network of public defenders to spread rapidly, and be available in every judicial district of Quebec.

It is generally agreed that the judicial districts such as Montreal, Quebec and St. Jerome will have need, at the outset, of offices employing many

lawyers [1]. However, it will be necessary to start with at least an embryo of the service in the other less populated judicial districts.

In some districts it will be necessary to visualize transitional periods. For many years we have been accustomed to the system of a Crown prosecutor on a part-time basis, and we believe, notwithstanding the obvious disadvantages of this formula, that it should be used in those judicial districts in which a permanent legal defender on a full-time basis would not be justified. We would much prefer that several of the less populated judicial districts or those covering small areas, join together to use a common office [2].

144. In the Quebec system of legal security the judicial districts of lesser importance should always take advantage of the technical and professional resources of the larger office. In this way, if the public defender of one region has not the human resources, and the professional specialization necessary to satisfactorily defend an accused person, he could have recourse to the services available in the offices of the more important centres.

The formula of a public defender remunerated by the case should never become the rule. Even during the initial phases of the system, this practice should only be applied under exceptional circumstances.

The public defender, as already indicated, should assume all the responsibilities related to an overall service of legal security. This includes

1 The professional defender, whether full or part-time, is obviously justified only in those counties having a significant criminal docket. However, in view of the large number of criminal defendants who are indigent, we believe that a professional defender is justified in a larger number of counties than is generally thought. It would seem that where the district attorney's office includes several full-time attorneys, it would be appropriate to use at least a part-time public defender. ROBERT KASANOF and PAUL I. BIRZON, *New York,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 544.

2 The Act, instead of establishing a defender in every county or circuit, establishes a defender system in each of twenty regions. Most are agreed that it would not be feasible to establish a defender system in each of the 114 counties of the state, and that such a system would not be necessary. Similarly, because of the relatively light caseload in some circuits and the practical impossibility of obtaining an attorney to accept the office of public defender, * the drafters decided to establish the defender system on a regional basis. Hence, the proposed Act creates twenty regions throughout the state and authorizes the appointment of a public defender in each of the twenty regions.

* In a memorandum to the Board of Governors, Chief Justice Storckman and Judge Hyde commented that: "There is some feeling that the defender system would be on a basis of regions or combinations of circuits rather than on existing circuits. The amount of criminal cases and the number of lawyers in some circuits makes it doubtful that the proposed system can be properly organized and operated in the smaller circuits." JOSEPH P. SIMEONE and T. E. LAUER, *Proposed Public Defender System for Missouri,* in *Journal of the Missouri Bar,* 23, 1967, p. 127.

much more than the defence of indigents before the courts. It would be the duty of the public defender to introduce a service of legal information and to organize consultation clinics on a no charge basis particularly in the smaller judicial districts. He should be prepared to carry on considerable social work, whether it be efforts to reform the laws affecting the districts, or whether it be direct action with regard to regional ills. Within such a context, it is obvious that the great majority of judicial districts can, even now, utilize on a full-time basis, one or more public defenders.

One need only think of the number of occasions the public defender will be called upon to give advice to the indigent, if all summonses were to give information about the service. Reference will be made to this matter which is covered in the 32nd recommendation of the Widgery Report.

2 — Sound training of personnel (145-146)

145. The public defenders, if they are to be successful, must have an excellent basic training. This however, does not mean that the service should recruit only lawyers of experience [1].

It is our opinion that the legal security service should carry on a programme of recruitment both from those who graduate from university, and from lawyers who are already engaged in private practice. It would be the duty of the Director of the service to assume responsibility for the recruitment of his personnel, and to arrange for any supplementary training of lawyers who would assist him, or who would represent him in the different judicial districts of Quebec.

We have observed, particularly in Massachusetts and California, that a well-organized service develops defence lawyers of the highest quality very rapidly. Similar results would be achieved in Quebec much faster and with less effort, if the training given in the law faculties concentrated even a little more on criminal and penal law.

146. To satisfy the needs of Quebec, it would be necessary to establish a team of public defenders almost equal in number to the Crown prosecutors.

As indicated in our general introduction it is hoped that there will develop an intelligent and enlightened collaboration between the Crown prosecutors and the representatives of the defence. Without running any risk of collusion between the Crown and the defence, it is quite possible for the representatives of the prosecution to agree with the representatives of the accused, to reduce the number of adjournments and the periods of delay, to encourage the exchange of information obtained by the police, to present to the court on the same day a series of cases being handled by the public defender . . .

If the cooperation continued to be lacking, it would become necessary to provide the system of legal security with elaborate investigation services so that the defence could be on an equal footing with the Crown. It would be necessary to retain the "ritual dance" of postponements, of procedural arguments, which often delay and complicate the administration of justice without helping the defence of the accused.

Intelligent discussions are called for, otherwise our judicial apparatus cannot escape from this alternative :

— either to refuse legal security which increases the demand, and creates bottlenecks ; or
— simplify the procedure by using common sense, and acting with maturity.

In any event, the public defender is called upon to fulfill an educational role which demand great efforts on his part.

3 — Stabilization of personnel (147-149)

147. It is not only a matter of having as effective a personnel as the prosecution. Stability is an important factor.

It is quite obvious that the Minister of Justice finds great difficulty in stabilizing the legal personnel of the Attorney General's office.

In the course of recent years, in spite of the marked efforts to provide each of the legal districts of Quebec with permanent Crown prosecutors, there have been numerous resignations and an abnormal rotation of personnel.

In some judicial districts, it is quite likely that apart from the question of adequate remuneration the general working conditions have also been a discouraging factor. The major factor however, is this : the lawyers made available to society and the public are not remunerated as well as their confrères in private practice. If this difference becomes too great, there follows instability, which has a direct impact on the quality of the service offered : cases are not followed through, clients are shuffled from one lawyer to another, delays become the rule . . .

148. In San Francisco, the permanent lawyers of the legal security service received exceedingly attractive salaries. Their rate of remuneration com-

[1] Any uniform rule so devised should make provision for the utilization of young, inexperienced attorneys, but limit their appointment to cases commensurate with their experience. Joint appointments of a senior attorney with a junior attorney should be considered in capital and serious noncapital cases. LLOYD F. BAUCOM, *North Carolina,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming, p. 564.*

pare favourably with that of private offices so that the State is able to engage lawyers, who have already had considerable practical experience. Moreover, until recently the Director of the service was not permitted to engage a public defender with less than five years experience as a lawyer. This resulted in a situation quite the opposite to that of ours : instead of training a lawyer so that he became a valuable asset sought after by private offices, San Francisco reversed the procedure and took excellent lawyers from the private legal offices.

As we have already said, this must not be inferred to mean that the legal security should close its doors to the young lawyer graduates. It emphasizes the need of a stable set-up with facilities to train the newcomers along definite lines.

We are stressing the need for a competitive scale of salaries which would permit the Director of the service to engage the most qualified candidates. There is little real economy of public funds by restricting excessively the number of lawyers. The lack of legal talent, whether it be in the prosecution or the defence, leads most frequently to adjournments and to many delays which have as a direct consequence, the slowing up of, and making more costly, the administration of criminal and penal justice.

149. The starting salary although important is not the only factor in arriving at stability of personnel ; serious consideration should be given to the rate of progression in the salary scale.

We find that Massachusetts has been able to stabilize its legal personnel without offering starting salaries on a higher basis than our own. The major difference in favour of the American system seems to be the fact that the scale of salaries is very specific, and provides for definite rapid increases. Thus the young lawyer who was engaged in 1967 as public defender in Massachusetts received a basic salary of $6,900 ; in seven years he reaches the maximum of the scale and then receives a salary of $17,000.

Quebec, in order to stabilize this essential service, should visualize a similar salary policy so that not only the public defenders but also the Crown prosecutors will be on a competitive basis with private offices.

This stabilization of personnel is even more essential when it is realized that the service of legal security may be called upon to supply judges for the highest courts of criminal and penal jurisdiction. In Quebec, unfortunately all too often, judges are called upon to undertake the responsibilities of a court of criminal jurisdiction without having had any training other than in civil matters. The establishment of a team of public defenders and the permanence which could be given to the Crown prosecutors would be two reassuring factors. They would justify the belief that Quebec might in the future be able to have experienced criminalists as judges in every one of its highest courts of criminal and penal jurisdiction.

4 — Independence of the legal security service (150-153)

150. In Quebec, as elsewhere, the legal security service should enjoy full freedom of action with regard to the Crown, the government, the Bar and the magistrature. On this point no half measures should be tolerated : it concerns the freedom of thousands of citizens.

> I am keenly interested in the office of public defender and feel that wherever it may be established it should be on a firm and honorable basis. It should be an independent branch of our government, that is, the public defender should not hold office purely at the will of a judge or district attorney. He should have the freedom of action in the exercise of his judgment as a private attorney. I think the great weakness of the public defender system in some areas springs from the fact that he serves at the will of the particular judge before whom he must appear. He has to second guess the judge in order to stay in his good grace. This is wrong because a public defender and a judge may disagree. Reasonable men do disagree. He should be guided by the rules of ethics as laid down by the American Bar Association, the State Bar Association, and the State Business and Professional Code [1].

The procedure according to which the Director of the legal security service will be chosen should be spelled out in detail (paragraph 125) ; he should enjoy full freedom with regard to the choice of his personnel and the administration of the service.

151. We have already made mention of different American formulas for selecting the senior officer of the legal security service (Par. 125) and our preference is for the method used in the county of Los Angeles in which the Director of the service is selected by the executive authority, from a list of three candidates submitted by the Civil Service Commission, following examinations.

We believe that this formula has more merit than any other.

> Being fully aware that there is no perfect system, still I believe there is universal feeling among our heads of departments that civil service is the best method yet devised. I do not wish to go into the merits of elective officers and civil service, other than to say that I think under a good civil service system there is a better chance of recruiting and retaining trained and efficient employees. This is very desirable in the administration of good government [2].

In Quebec, the preparation of the list of candidates should be the responsibility, not of our Civil Service Commission, but of an organization as representative as the Advisory Council of the Administration of Justice,

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1 ELLERY E. CUFF, *How the Public Defender System Works in Los Angeles County*, p. 6.

2 *Op. cit.*

which, if reorganized in depth so as to satisfy the criteria of independent representation and competence, could undertake the selection of candidates.

152. The Director of the legal security service should not be appointed for life. The period he is in office should be sufficiently long for him to be able to establish a basic philosophy in the entire network, and to secure the respect of every sector of the administration of justice.

At the end of his mandate, the director of the service could retain his position on the condition that the organism responsible for preparing the list of candidates again includes his name.

As Director of the service he would have the right to veto the engagement of the lawyers recommended by the civil service commission, and likewise no discharge could be made without his approval.

Such powers may appear to be excessive, but it should be kept in mind that the Director and the staff of this legal security service is called upon to guarantee the defence of thousands of accused persons. To have him named by the magistrature does not seem to us to permit of all the freedom which a public defender should enjoy : such a procedure would place him in a state of inferiority vis-à-vis the Crown prosecutor. If he were to be chosen by the executive power alone, it would multiply the risk of intervention or political pressure. To leave the entire responsibility to the choice of a civil service commission means minimizing the professional evaluation of the Bar and the Advisory Council of the Administration of Justice.

We have therefore endeavoured to build into the method of selection, *the maximum precautions*. Obviously it would not be realistic to build in such safeguards for the selection of the Director, and not grant him the necessary powers to carry on. The Commission is strongly convinced that during the period of his office, the Director should enjoy the *fullest freedom*. We know that he will need it. (We cannot resist drawing attention to the fact that every magistrate or judge enjoys a similar latitude without anyone being too concerned up to the present, with the method of selection.)

153. At first glance it might seem that the Bar will not participate as much as it should in the selection of the Director of the service. This, however, is only on the surface : the Advisory Council of the Administration of Justice normally has twenty members, of whom eleven represent the legal professions ; which means that the views of the Bar made known to its representatives would be of major importance in preparing the list of three candidates from which the executive power would make its final choice. The Bar in this way, could have a strong voice on the Council.

The recommendations which will be made in a subsequent report dealing with the composition and role of the Advisory Council of the

Administration of Justice, will further strengthen the precautions surrounding the selection of the Director of the legal security service.

5 — Availability of the system (154-171)

154. Any system of legal security hopes to make justice available to all. This availability is only there if the legal security service, at least in its own domain, eliminates the consequences of poverty. Thus to be available to all indigents, the legal security service should :

a) not exclude anyone by reason of the crime with which he is charged ;
b) intervene from the first step of the judicial procedure ;
c) simplify to the extreme any verification of the revenue of an individual ;
d) offer the possibilities of appeal similar to those which the citizen able to pay, could secure for himself.

a) NO GENERAL EXCLUSIONS (155-158)

155. Objections will be made to the use of public funds to defend criminals. We believe that no legal service can respect the minimum standards, unless its personnel defends every accused person without discrimination.

Unless we are to jeopardize the entire philosophy of our judicial customs, every accused person must be considered innocent until his guilt has been established in a court of law; and this, even for the repeater with a criminal background, faced with a new accusation.

On this point we are not altogether in agreement with the recommendation made by the Ontario Joint Committee :

> Legal aid is thus not to be the tool of the persistent or professional criminal whose interest is not so much in establishing his innocence as in delaying the course of justice. To permit the legal aid plan to be perverted to such uses would be to expose it to quite proper public contempt. The plan must thus be protected against such abuse. There must, therefore, be a discretion to refuse legal aid to persons with criminal records whose applications are without merit in this sense. In the opinion of the Committee, the local director should be empowered to require an applicant to demonstrate, such circumstances, the merit of his application [1].

156. Our preference is for the conclusion reached by the English Widgery Committee :

> The Widgery Committee makes some specific recommendations toward achieving greater uniformity : For trials on indictment, legal aid should be granted as a matter of course (subject to a means test) except in those rare cases where

[1] *Report of the Joint Committee on Legal Aid,* Province of Ontario, March 1965, p. 62.

the court, for exceptional reasons, believes legal aid is not desirable in the interests of justice. * *The committee does not consider it a waste of public money to grant legal aid for guilty pleas and mitigation of sentence ;* it recommends that the probable plea should not be considered in granting legal aid and that a defendant should have assistance in presenting anything that can be said on his behalf ** [1].

In other words, the presence of a lawyer beside an accused is important even if the accused pleads guilty. The prime purpose of a system of legal security is not to defend the *innocent* before the court, but to make available to an indigent the same kind of defence which can be secured by the better provided citizen.

With this in mind the English Committee has set forth some of the criteria which would call for the intervention of the legal security service [2]. However, they do not go so far as to recommend that the services of legal aid be made available in cases of minor offences which do not involve any serious risk to the accused [3].

157. Here we find a number of specific problems for the legal security system which wishes to be available to everyone without, however, wasting public funds. The line of demarcation is not easy to establish :

> It is, therefore, recommended that legislation be enacted to provide counsel for every indigent person accused of committing an offence which may subject him to imprisonment for more than a minimal term or to other serious criminal sanction. As an alternative, it is suggested that consideration be given to the practice in Lane County of appointing attorneys as counsel for indigents in misdemeanor cases despite the absence of express statutory authorization [4].

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1 THOMAS FITZPATRICK, *Legal Aid for Criminal Cases in England : Part II*, in *The Legal Aid Briefcase*, vol. XXVI, June 1968, p. 233.

* The Widgery Committee Report, p. 41.

** Id. at pp. 39-40.

2 Rather, it specified a number of criteria (in addition to financial eligibility) that make a grant of legal aid desirable : a) that the charge is a grave one in the sense that the accused is in real jeopardy of losing his liberty or livelihood or suffering serious damage to his reputation ; b) that the charge raises a substantial question of law ; c) that the accused is unable to follow the proceedings and state his own case because of his inadequate knowledge of English, mental illness, or other mental or physical disability ; d) that the nature of the defence involves the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution ; e) that legal representation is desirable in the interest of someone other than the accused as, for example, in the case of sexual offences against young children when it is undesirable that the accused should cross-examine the witness in person. *Op. cit.*, p. 235.

3 The committee recommends that all courts use the standard information leaflet drafted by the Home Office which should not, however, be distributed indiscriminately because many defendents charged with minor offences will not be granted legal aid and should not be misled about their chances of obtaining it. *Op. cit.*, p. 235.

4 GEORGE L. KIRKLIN, *Oregon*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming*, p. 634.

As we have seen, the general tendency is to increase the occasions when the legal security service is used to help indigents. The public defender will be called upon to act more frequently, even in cases which were formerly considered to be of minor importance. Even summary convictions could under certain circumstances call for the intervention of the public defender [1].

The sentence resulting from a summary conviction could be as severe for the condemned as a sentence which would have followed an elaborate trial : it is hard to say which summary convictions should call for the intervention of the legal security service, but it is acknowledged that it would be unfair to exclude them entirely from the field of action open to the public defender.

> The question that was not developed to any extent before us was what test might be adopted to differentiate between those summary conviction offences to be included and those to be excluded.
>
> In the view of the Committee the major considerations are loss of liberty through imprisonment or loss of economic status or the means of earning a livelihood. An example of the latter might be the loss of driving privileges which in the case of a truck driver might mean the loss of his ability to support his family [2].

158. The legal security service therefore, should not decide on exclusion by the nature of the crime or offence, nor by the age of the delinquent. It should concern itself with minors brought before the Social Welfare Courts, just at it does with adults [3].

It is apparent that the lawyers for the defence rarely appear before the Social Welfare Courts. Although the Crown shows an increasing interest, the defence is, all too often, noticeable by its absence.

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1 It appears to us that the proper test should be the gravity of a conviction in the circumstances of the accused. Thus the Committee takes the view that legal aid should be available in respect of summary conviction offences where there is a prospect of loss of liberty or of economic status which would be serious in the circumstances of the accused. Not every summary conviction offence where the indirect consequence of a conviction might be imprisonment is intended to be included. The mere fact that every summary conviction offence might carry the consequence of imprisonment simply for default in the payment of a fine does not, in our view, constitute a valid ground for automatic inclusion in the plan although there might be circumstances where legal aid would be justified. *Report of the Joint Committee on Legal Aid*, Ontario, March 1965, p. 61.

2 *Op. cit.*, p. 61.

3 A number of Juvenile and Family Court judges appearing before the Committee expressed the view that a solicitor should be appointed by the municipality to assist the Court in certain cases, this is somewhat characteristic of the position of the Clerk of the Justices' Court in England. *Report of the Joint Committee on Legal Aid*, Ontario, March 1965, p. 60.

Up to the present, the judges of the Social Welfare Court, and the different social workers and probation officers, could, if they so wished, take into consideration those elements in a case which could favour a juvenile. The proceedings of this Court have moreover, been held traditionally in camera, and it would certainly not be desirable to introduce into the Social Welfare Courts the abuses of procedure which are often found in the adult courts [1].

However, to fully respect the spirit of a system of justice based on contradictory evidence, the juvenile should be offered the advantage of a more satisfactory defence.

> The judge or clerk shall first read the petition to those present and upon request to the minor upon whose behalf the petition has been brought or upon the request of any parent, relative or guardian, the judge shall explain any term of allegation contained therein and the nature of the hearing, its procedures, and possible consequence. The judge shall ascertain whether the minor or his parent or guardian has been informed of the right of the minor to be represented by counsel, and if not, the judge shall advise the minor and the parent or guardian, if present, of the right to have counsel present.
>
> If the parent or guardian is indigent and desires to have the minor represented by counsel, the court may appoint counsel to represent the minor, and in such case the court must appoint counsel if the minor is charged with misconduct which would constitute a felony if committed by an adult. The court may continue the hearing for not to exceed seven days, as necessary to make an appointment of counsel, or to enable counsel to acquaint himself with the case, or to determine whether the parent or guardian is indigent and unable to afford counsel at his own expense [2].

b) SPEED OF INTERVENTION (159-162)

159. A system of legal security must not only help the accused who are incapable of defending themselves, it should also intervene as early as possible in the course of the legal procedures, if all the fundamental rights of the accused are to be respected.

> All judges were asked: "Under an ideal system at what stage do you think the indigent person should first be provided with a lawyer if he wants one ?" A total of 26 thought the appointment should be at an earlier stage than it is at present; 7 of these judges thought appointment should be made between the arrest and the first appearance, and 14 thought it should be made at the first appearance before a magistrate. Eight judges thought the present practice of appointing attorneys at the arraignment on the information was satisfactory. One judge did not answer [1].

Such answers are far from satisfactory, and they do not reflect the ideal system. In actual practice it has been evident that the slightest delay in securing representation by a lawyer hurts the rights of the accused. On the other hand we cannot expect the police, involved in a thousand and one problems, to know at what point legal aid is necessary, when the theoreticians themselves have not yet been able to establish on paper, the exact guidelines.

160. Undoubtedly the ideal would be for a legal advisor to be able to help the indigent from the moment of his arrest, and advise him of his rights with regard to the police interrogation. We are far from achieving this, because in Quebec as elsewhere, the legislative texts are absolutely ineffective when the time comes to make it obligatory for a lawyer to be at the side of the accused [2], and this is so even at the trial.

The majority of specialists and observers agree that the rights of an accused are seriously affected if he appears without the help of a lawyer [3]

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1 In the Juvenile Court legal aid should be available for those accused of juvenile delinquency where this charge involves serious offences, such as murder, and where the informality of the Court may not be effective adequately to protect the interests of the juvenile. We are aware of the philosophy underlying proceedings in the Juvenile Courts and we do not wish to be interpreted as desiring to change or affect it in any way. By statute these proceedings are intended to be concerned not so much with the punishment but with the welfare of the juvenile offender. *Op. cit.*, p. 62.

2 EDWARD T. MANCUSO, *Information to Assist Attorneys and Students Interested in Serving in the Public Defenders Office Under the Provision of Ordinance No. 126-60 of the Administrative Code. p. 11.*

1 DUANE R. NEDRUD and Jules B. GERARD, *Missouri,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American States Courts,* American Bar Foundation, *1965,* vol. 3 : *Missouri-Wyoming,* p. 45.

2 At the present time no statute or court decision in the state commands that counsel be appointed to represent indigents at the preliminary hearing, even if requested. In practice, however, in Douglas County, the public defender appears in some preliminary hearing stage, although such cases are rare. No way exists to compensate counsel from public funds for such representation.
Throughout Nebraska the formal charge against the defendant is made by filing of an information in the District court. Grand jury indictments have not been used for many years. In the vast majority of cases counsel for an indigent is appointed after the information has been filed but before he is arraigned in the district court. JAMES A. LAKE, *Nebraska,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, *1965,* vol. 3 : *Missouri-Wyoming,* p. 439.

3 More than two thirds (111 of 161) of the persons contacted during this survey agreed that appointments should be made no later than at the preliminary hearing. It is recommended that a Supreme Court rule be adopted requiring committing magistrates to make appointments in time for the lawyer to decide whether there should be a preliminary hearing. It is also recommended that the rule require that transcripts be made of all preliminary hearings, and that indigent defendants be furnished free copies of them. It is recommended that consideration be given to reimbursing appointed counsel their out-of-pocket expenses. The burden upon the bar is becoming heavier now that counsel must be appointed in all appeals and in some misdemeanors, and may be appointed earlier in felony proceedings. The burden is particularly heavy in rural counties with few lawyers. It also falls heavily on some lawyers in

and American jurisprudence has indicated on many occasions that it is to the advantage of the indigent to be helped by a lawyer even from the moment of official police identification (line-up).

Specific corrective steps could be :

- to preclude a prison sentence if the accused has appeared in court without having been able to consult a lawyer ;
- to prohibit harsh economic punishment if the accused has appeared in court without having been able to consult a lawyer ;
- to purely and simply ignore confessions, or the guilty plea, if the accused is left alone to face a charge which could result in a prison term...

161. Until the laws are changed to provide such protection, the legal security service should certainly be able to count on the cooperation of the different authorities, from the magistrates to the police forces.

The most important precaution, however, is to have a legislative text which clearly establishes the right of an accused to the services of a lawyer. If this were done the courts would not be permitted to proceed with a case in which the accused under a serious charge appears before them without being given the opportunity to use the services of a lawyer.

> The Committee concluded that legal aid should be made available at the first appearance in Court while conceding that this was the latest point at which it should be properly made available. The Committee thus placed the responsibility of notifying an accused of legal aid facilities upon the presiding judicial officer in the Court in which the accused first appeared [1].

On this point, the majority of opinions are in agreement : if an accused has the right to the services of a lawyer, that lawyer must be at his side at the earliest possible moment [2].

The majority of these observers state, moreover, that the public defender system allows the lawyer to make contact with the arrested indigent sooner than any other system of legal security.

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populous counties where there is not, a regular system of rotation among counsel selected or appointed. DUANE R. NEDRUD and JULES B. GERARD, *Missouri, op. cit.*, p. 423.

[1] *Report of the Joint Committee on Legal Aid, March 1965, p. 72.*

[2] Since an attorney should be available soon after arrest to consult with the defendant, investigate the facts, prevent unreasonable detention and bail, and develop possible defences, it is recommended that legislation be enacted requiring assignment of counsel whenever an indigent person appears before a magistrate charged with an offence punishable by imprisonment for more than a minimal term. If the defendant desires to proceed without aid of counsel, his waiver should be accepted only after he has consulted with an attorney. GEORGE L. KIRKLIN, *Oregon,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, Vol. 3 *Missouri-Wyoming,* p. 634.

In the hierarchy of principles *this speedy intervention is probably worth more than a theoretical freedom of choice.*

162. Legislative precautions are not always sufficient ; they can, at most, create a moral obligation. For the system of legal security to be accepted and available to everyone, a programme of education and public relations must be developed. If such a programme were carried out much more would be achieved through collaboration than could be hoped for by the law itself :

> Many will resent the institution of a Public Defender office. Attorney will resent the loss of income from existing appointments or future loss of trade. Taxpayers will view with alarm the increase in the burden of support of the indigent population. In our county, we had the wholehearted blessing of the court and bar association. Much of this we attribute to a comprehensive eligibility policy adopted well before our starting date. This statement, together with our basic philosophy, was presented to every judge, justice of the peace, and the general bar. The board of trustees of the bar adopted the statement and canvassed the membership for lawyers willing to screen borderline cases to work out a fee arrangement for clients with some assets and income but without funds for a case retainer. We presented our philosophy, financial program, and plan of action to dozens of civic groups in luncheon speeches, and the newspapers printed our written statement of philosophy in its entirety. As a consequence, by opening date, we were well accepted by the community at large. We found it fruitful to draft a form letter to each judge in the community, setting out the date our operations were to start, a comprehensive statement of jurisdiction, and a suggestion of how the services of the Public Defender could be made available to the indigent accused. We also wrote to all police departments and to the larger detention facilities about our services and how these could be requested. We invited suggestion from the court and the police authorities and met with the juvenile authorities and parole and probation departments. We discussed problems with court clerks, and we informed the district attorney of our general approach [1].

The cooperation of the police forces is particularly important if the public defender is to intervene at the first step in the legal procedure. Notwithstanding a programme of information and publicity, it will frequently happen that the accused indigent does not know his rights. The only satisfactory answer to this would be from an enlightened cooperation between the legal security service and the police forces.

c) SIMPLIFYING VERIFICATION (163-169)

163. As in the case of all social security measures, the system of legal security would hope to find the point of balance between faint-heartedness

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[1] R. DONALD CHAPMAN, *Setting Up a Public Defender Office and Philosophy of a Public Defender,* in *The Legal Aid Briefcase,* June 1965.

and laxity, between the mania for verification and systematic credulity. All agree that it is important to help the needy, but it becomes evident very quickly, that it is difficult to distinguish between the indigent and the parasite. This creates problems for the public administrator : how to make a legal security service available to the impecunious accused, and at the same time prevent abuse ?

With regard to intention there is no disagreement :

> Following the standards for defender systems adopted by the National Legal Aid and Defender Association, the proposed Act establishes a system which will provide legal representation for every person who is without financial means to secure counsel when charged with a felony, misdemeanor, or other charge where there is a possibility of a loss of liberty. It provides for representation immediately after the taking of a person into custody or arrest and at the first and every subsequent court appearance at every stage in the criminal proceeding [1].

But how to define indigents, and how to identify those who do not have sufficient financial resources ?

164. Faced with these difficulties of identifying and determining indigence, some legal security systems require the judges to make the decision [2]. This shifts the responsibility to the courts, but it still does not resolve the problem.

In some judicial districts if an accused person puts up bail, he cannot hope to have the support of the legal security service [3]. In other cases, the judge, the Crown prosecutor and the *public defender* are each expected to ask a series of questions [1] !

These methods only serve to emphasize the basic problems : that of defining indigence precisely, and the reluctance to see a request for help result in a series of invidious questions.

There is abundant and divergent documentation on this matter.

165. If we leave aside for the moment the methods and the yardsticks already used, and examine the various suggestions which have been made, the confusion persists. Apparently the difficulties were not only beyond solution in the past, but appear to persist in the hoped for remedies.

The Ontario Study Committee wishes that the government would establish standards of eligibility but that decisions regarding eligibility would be in the hands of the local social welfare organisms and the local Bars [2].

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1 JOSEPH J. SIMEONE and T. E. LAUER, *The Proposed Public Defender System for Missouri*, in *Journal of the Missouri Bar*, 23 (1967), p. 127.

2 Assigned counsel were generally rated by the justices as comparable in experience and ability to retained counsel. In most instances appointed attorneys were considered equal to the prosecutors and in some instances more experienced and possibly more able.

The judges, in determining indigency, consider the overall situation. A series of questions may be asked in open court. In some instances, the clerk may ask these questions. Such items as salary, ownership of personal and real property, cars, stocks, bonds, bank accounts and resources of parents, spouse, and other relatives may come to the court's attention at that time. If the defendant has raised a very substantial cash bail, that fact will also be considered. There is no uniform system, and it very rarely, if ever, happens that a request for counsel is refused on the grounds that the defendant is not indigent. In making this determination, a judge must sometimes consider appearances which do not lend themselves to the record. Thus one said : "Difficult to determine sometimes. Had a young man plead poverty and after looking him over - beautiful clothes, wrist watch, car, etc. - refused him, whereupon his father stood up in court and said he was able to take care of expenses, as well he was." JOHN P. COONEY, *Rhode Island*, in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts*, American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming*, p. 461.

3 A number of counties indicated that the amount of the premium actually paid to the bondsman, the source of funds used to pay the premium, the question of whether the surety is a bonding company or a personal surety such as a friend or relative, and the principal amount of the bond are all considered in determining whether a defendant is indigent. Other counties consider only the amount of the premium actually paid to the bondsman and the source of funds used to pay the premium. ALEXANDER D. BROOKS, *New Jersey, op. cit.*, p. 479.

1 The district judge asked a series of questions to determine indigency. In Douglas County more care is taken. The defendant is sometimes questioned in a private office and occasionally the county attorney investigates by telephoning various agencies and individuals in a position to know the financial resources of the defendant. Moreover, the public defender in Douglas County frequently concerns himself with an applicant's eligibility for his services, and upon occasion has reported his findings to the judge and urged that the defendant be found ineligible. Except in Douglas County, the questions directed to the defendant are merely (1) whether he has retained a lawyer, and (2) whether he has any funds to hire one. The defendant's conclusion that he has no funds to employ counsel is generally accepted. Judges and county attorneys agreed that the following factors are used to determine indigency : wages of the accused, ownership of real estate, stock, bonds, or bank accounts. In several counties the fact that the defendant is out on bail is important, but not an absolute bar. In the case of a minor the financial resources of the parents are relevant. Affidavits of indigency are not used generally at the trial level, but a poverty affidavit is used for appeals. JAMES A. LAKE, *Nebraska, op. cit.*, p. 439.

2 The delineation of eligibility qualifications, and the policy to be followed in making decisions thereunder, would primarily be matters of governmental responsibility under an expanded plan. In larger centres, trained personnel could doubtless be found to deal with eligibility decisions, and to refer to other agencies problems which are not really legal in nature. In smaller centres, it might be helpful if the local Bar assisted in making decisions as to eligibility, within the framework of governmental policy. There, too, the local Bar could be helpful in sorting out the problems which are not legal in nature. *Report of the Joint Committee on Legal Aid*, Ontario, March 1965, p. 96.

Elsewhere authorization was to be through local committees on legal aid [1].

Another theory was that the probation officers should undertake the necessary verifications. There was one rather unusual experiment: the investigations ware undertaken by a retail credit agency [2].

166. The variety of solutions tried and suggested, proves that indigence remains a multi-form idea: it is difficult to say when it begins and when it gives place to being in comfortable circumstances. It cannot be evaluated purely in monetary terms, as similar financial responsibilities have not the same impact on a bachelor as on the father of a family.

The analysts have first of all indicated the difficulty of establishing *national criteria* [3]. The cost of living varies from one region to the other to such an extent that an insufficient revenue in Montreal might be quite adequate in a rural zone. Then, it is necessary to take into consideration the fluctuations in the cost of living itself [4]: that which was sufficient yesterday, is today only on part of what is needed. Finally, indigence is not total destitution [5].

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1 The court is responsible for granting legal aid. The major alternative, proposed by the law society, is that its local legal aid committees should be authorized to grant legal aid in both civil and criminal cases. THOMAS FITZPATRICK, *Legal Aid for Criminal Cases in England: Part II,* in *The Legal Aid Briefcase,* vol. XXVI (1968), p. 231.

2 The attorney general has recommended such investigations in connection with applications for release of defendants on their own recognizance, the investigation to be made, at least for the time being, by probation officers. The investigation could also serve the purpose of determining whether the defendant is eligible for assigned counsel. The Essex County Legal Aid Society is experimenting with the use of a retail credit agency for purposes of evaluating the financial capacity of the defendant. ALEXANDER D. BROOKS and STEPHEN N. MASKALERIS, in LEE SILVERSTEIN, *Defense of the Poor in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 478.

3 There are three basic difficulties in determining indigency within the scope of our definition, and these difficulties account for the confusion which often exists in establishing realistic standards for a new service.

The first difficulty is the impossibility of a nation-wide standard. Wide fluctuations from State to State and even from city to rural community within the same State in costs and adequacy of income must be recognized. JOHN W. CUMMISKEY, *The Problems posed for the Legal Profession,* in *National Conference on Law and Poverty,* Washington, 1965, p. 121.

4 A second difficulty is that even within a specific community, indigency is a variable. Any hard and fast rule is unduly hard on potential clients and fast with the economic truth. *Op. cit.,* pp. 121-122.

5 The third difficulty in identifying indigency for our purposes is that it is far different from pennilessness. *Op. cit.,* p. 122.

The following indicates the attitude which a large majority of legal aid services adopt.

> Most of the 250 Legal Aid societies permit the interviewing attorney discretion in determining eligibility. This permission is born of collective experience in the legal aid field that each applicant must be evaluated not only on his income but on his outstanding obligations [1].

In the same way, the former legal aid system of Ontario after having carefully defined a number of yardsticks, left (Par. C in note) the door open to a more flexible interpretation and just as individualized as most of the other formulas [2].

167. Most of the systems of legal security are so flexible that they willingly agree that a citizen may be *partially indigent.*

> It is finally suggested that the defendant should be called upon to contribute whatever he can afford toward a counsel fee. If a county-supported public defender plan is in operation, the contribution should be made payable to the county [3].

Some systems, anxious to retain full administrative control require the *partially indigent* citizen to make a contribution at the very start of the legal

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1 *Op. cit.,* p. 122.

2 *Eligibility.*

The Law Society, after conferring with welfare authorities, established a schedule of entitlement to legal aid based on income and disposable assets as follows:

Eligible Persons:

A person is eligible for legal aid who has insufficient capital to pay for legal services and, if single, an annual income of less than $1,200, or, if married, an annual income of less than $1,800 (plus $200 for each dependant). A person not so qualified may still be eligible for legal aid where requiring him to pay legal fees would impair his ability to furnish the essentials of living for himself and his family, or where a matter is urgent for the preservation of his legal rights.

These limits were later amended as follows:

"(b) Any unmarried person having annual earnings or other means of subsistence of less than $1,700, and any married person having annual earnings or other means of subsistence of less than $2,500, together with an additional amount of $300 for each dependant, and having insufficient disposable capital to pay for legal services.

(c) Where, although not qualified under... (b) above, in the opinion of the Provincial Director on recommendation of the County Director the applicant, if required to pay for legal services, would impair this ability to furnish himself and his family with the essentials necessary to keep them decently fed, clothed, sheltered and living together as a family. *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 11.

3 ALEXANDER D. BROOKS and STEPHEN N. MASKALERIS, *New Jersey,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 504.

proceedings. After which, the court proceeds to a more thorough evaluation of his financial resources, to determine whether he should increase his contribution [1].

By contrast some systems which practice the rule of all or nothing complain bitterly that they are unable to arrive at case-limits. Here again the work of Mr. Loranger explains in an eloquent manner the disadvantages of a formula which applies too strict criteria of eligibility. One of the worst results is that of hurting the pride of the accused who are not absolute indigents and who because of this, are deprived of assistance.

168. We believe that the Quebec system of legal security should go as far as possible along the road to availability of the system. And we therefore recommend extreme simplicity in the procedures of verification, even to the extent of eliminating entirely enquiries having to do with the financial resources of the accused.

We recommend establishing minimum limits : below a certain level of income, the legal security service *must* intervene. Above this level, the decision to intervene will be the responsibility of the legal security service [2]. The policy of the service should be to act quickly, often and without fear.

Even at the local level, the general policy should be to make the legal security service available in a generous manner to all those who ask for help. The reasons for our attitude are very clear : first, verification often costs more than the defence itself ; second, those who conceal a part of their income, have usually concealed very little [3].

1 The recommendation is for there to be a written statement of means and provision for the applicant to be required to make a contribution if he can pay something but cannot meet the whole of the cost : he could be required to make a down payment and at the conclusion of the case the court would assess the contribution, if any, so that his financial position can be reassessed in the light of a conviction and any sentence that may be imposed. As regards eligibility other than financial, the Committee considered that the present test of whether legal aid is "desirable in the interests of justice" should continue but that the courts should have some guidance. R.M. JACKSON, *Enforcing the law,* New York, 1967, p. 89.

2 The general practice appears to have been for the local director to make the decision himself when the question arose. In doing so, in criminal matters, some local directors made no investigation at all into the accused's financial circumstances. There was frequently no real opportunity to do so, having regard to the speed with which a criminal case might proceed through the Magistrates' Courts in large urban centres. *Report of the Joint Committee on Legal Aid,* Ontario, March 1965, p. 39.

3 The existing method of determining indigency is lenient but works satisfactorily and should be retained unless the possibility of providing free counsel to « all » accused persons is to be given serious consideration. Presently, if an accused claiming indigency has some source of income it is usually limited, and if the indigent were forced to use these limited funds it would not be unusual for this to create added strain on the county budget at some other point, e.g., the welfare department in attending to the needs of the accused's family. As long as the state population remains small and widely scattered it is doubtful that the system of determining indigency will need modification or tightening. LARRY ELISON, *Montana,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 435.

169. Generally speaking, every effort should be made to avoid emphasizing the indigency of an accused, and to eliminate as far as possible, all the distasteful procedures of investigation.

Any enquiry into the economic resources of an accused should be the exception and should only take place in cases of serious abuse. We rather visualize a policy analogous to that used by the public defender of San Francisco : he takes the declaration of the accused at its face value.

Our comparative tables have already shown that the cost to the legal security service of San Francisco is less than $11 per case, and that it is just about the same in Montreal. It becomes evident that a detailed investigation of the resources of each accused would cost more than the defence itself. The Quebec system of legal security could adopt a procedure of a simple sworn statement.

Detailed verification would be restricted to those cases in which one has reason to suspect deliberate and serious mis-statements. This appears to us to be more in conformity with the new policy adopted by the Provincial and Federal Ministers of Revenue.

1 — Compulsory intervention below certain income levels ;
2 — Discretionary intervention, above certain levels ;
3 — Possibility of partial compensation ;
4 — No systematic investigation of financial resources.

170. To make the system of justice available to everybody, the legal security service must *also* permit indigents to take their cases before the appeal courts. This does not mean that the public defender will appeal every case [1].

1 The judges express very strong views in favor of the assignment of counsel to indigent defendants in almost every type of criminal proceeding and at a comparatively early stage. Among those interviewed, practically all favored representation in every category of criminal proceeding. The most notable qualification related to the feeling that in post-conviction remedies there should be some showing of merit before counsel is assigned. Among those responding to mail questionnaires a significant majority favored representation for indigent defendants in every category except that of civil commitments. ROBERT KASANOF and PAUL I. BIRZON, *New York,* in LEE SILVERSTEIN, *Defense of the Poor in Criminal Cases in American State Courts,* American Bar Foundation, 1965, vol. 3 : *Missouri-Wyoming,* p. 535.

Most of the different systems of legal security believe that the defence of indigents under appeal should not be undertaken automatically. Almost all of them wish to make an evaluation of the case before reaching such a decision.

> Providing counsel in every instance would be an enormous burden upon the bar. The tendency in the New York courts to make counsel available only when there is some suggestion of merit seems reasonable, although we feel that care must be exercised so that truly meritorious applications will receive the benefit of counsel. In any event, where there is such a finding of merit, the appellate defender, assisted by individually assigned counsel, would once again appear to be the best solution. Some better approach to the finding of merit should be developed [1].

The Ontario Committee made a rather negative recommendation on this matter, but finally came to an almost identical conclusion [2]. In fact, it recommended only appealing the cases of indigents in which there appeared to be, in the first instance, a serious denial of justice.

In some systems, the appeal seems to take place almost automatically. Generally, these systems are the ones which have shown the greatest care in granting an accused the benefits of legal security. As they have already made a careful check of his financial resources before assuming his defence in the court of first instance, a decision can be made quickly in case of appeal [3].

171. In our opinion the public defender should not be required to take every one of the verdicts and sentences rendered against accused indigents to the appeal court. However, the public defender should always be careful to register the appeal so as to preserve the rights of his client. He himself should defend the case in appeal, not only if he is of the opinion that there has been a denial of justice, but also at the point he feels there is some real

1 *Op. cit.*, p. 547.

2 Appeals in both criminal and civil matters are excluded except where in the opinion of the Provincial Director, on the report of a County Director, there appears to have been a miscarriage of justice. *Report of the Joint Committee on Legal Aid*, Ontario, March 1965, p. 13.

3 As mentioned earlier, legal aid for the hearing of an appeal is granted almost as a matter of course, subject only to a means test. The practice exists even at quarter sessions, which hears appeals from convictions at magistrates' courts. The committee believes that the grant of legal aid at this level should not be automatic but should be based on the specific criteria for a grant of legal aid in magistrates' courts. *

For appeals to the Court of Appeal, legal assistance may be required at three different stages: advice on whether to appeal and on formulating the grounds of appeal; presenting the application for leave to appeal (or giving notice of appeal on a question of law); and the hearing of the appeal itself. THOMAS FITZPATRICK, *Legal Aid for Criminal Cases in England: Part II*, in *The Legal Aid Briefcase*, vol. XXVI (1968), p. 236.

* Id. at p. 73.

hope for his client: in fact, he would act as would his colleague in private practice.

The public defender should even take charge of the appeal in some cases he has not handled in the first instance. For example, he would act on behalf of the accused who had sufficient resources to be able to look after his own defence at the first trial, but who unable to finance himself in the higher court.

If it is the Crown which contests the verdict of the court of first instance, the public defender, without any question, remains with his client in the higher courts.

In the early stages of the service, it would be preferable to have the decisions to act in appeals ratified by the Director of the service, or by the regional Director.

In our opinion the public defender should, in this matter of appeals, also interpret the criteria established, in a generous manner.

> It is the duty of the Public Defender, in any case wherever a conviction, is had, where in his opinion an appeal to a higher court will or might reasonably be expected to result in a reversal or modification of the judgment of conviction, to take such appeal and follow through with all the resources at his command. Appeals are always taken when the Public Defender feels that error has been committed which would entitle his client to a new trial, or where it is felt that the client has been deprived of his constitutional or statutory rights during the course of a criminal proceeding.
>
> Appellate work sometimes constitutes a considerable part of his work, varying in volume with the shift of circumstances [1].

6 — Equilibrium between Administrative Control and Freedom of Action (172-188)

a) REJECTION OF A BOARD OR A COMMISSION (172-173)

172. To arrive at a balance between the administrative control and freedom of action the Commission gave considerable thought to the question of whether or not the legal security service should be administered by an independent body.

Notwithstanding the many arguments presented in favour of this, we cannot see the necessity of creating such an organism:

> There are many reasons for the establishment of a regional commission. Many who have had experience in this area believe that the public defender should not be directed and supervised by a judge or judges who may have the power to supervise or discharge the defender from office. They feel also that

1 EDWARD T. MANCUSO, *The Public Defender System in the State of California*, Chicago (American Bar Center), 1963, p. 7.

the system must be free from political domination. A board or commission which supervises the work of the defender system gives to the defender a sense of freedom and responsibility which is in the interests of justice. Hence, the Act provides for an independent commission which shall have as its members "no judge of any court, or clerk or other employee of any court, and no circuit or prosecuting attorney". The Act further provides that the Commission shall appoint a public defender for the region, thus tending to eliminate the political ramifications of the office. The Commission does, however, have the power to remove the defender from office after "due notice and hearing and upon a finding of wilful disregard or nonperformance of the duties or wilful abuse of the powers of the office" [1].

The Commission believes that the risks of malpractice are extremely limited, provided, as already indicated, the necessary precautions are taken with regard to the nomination of the Director. Furthermore, the government in addition to controlling the funds for the legal security service, will also be at liberty to change the law governing this service ; so that if there were serious criticisms directed against the Director of the service, the executive and legislative powers could intervene.

It may even be necessary to limit this possibility of government intervention. For example, as is frequently the case for the Ombudsman, legislation could require that a two-third majority vote of the representatives in the National Assembly would be needed to ask for the resignation of the director of the legal security service.

This would assure independence of the service without losing legislative control.

The Commission believes that the Advisory Council of the Administration of Justice in its modified form, should be called upon to make a periodic evaluation of the work accomplished by the public defender system. This would enable the Minister of Justice and the Director of the legal security service to benefit from the counsel and suggestions of an independent body. A precedent for th now exists in the form of the Superior Council of Education which acts as an advisory body to the Minister of Education. .

173. We are conscious of the fact that such autonomy gives a great deal of latitude to the Director of the legal security service, but we are convinced that increasing the controls would deprive the defender of the accused indigents of essential freedom of action.

A study made by Prof. François Heleine (Appendix 21) defends the thesis of collegiality with a great deal of persuasion. He believes for example, that one cannot confide power to a single individual without utilizing appeal mechanisms — this we agree is substantially true. Mr. Heleine also says

[1] JOSEPH J. SIMEONE and T.E. LAUER, *The Proposed Public Defender System for Missouri*, in *Journal of the Missouri Bar*, 23 (1967), p. 127.

appeals invariably have the result of increasing procedures, which is also correct.

We would prefer that the public defender be enabled to exercise his powers with as much latitude as any other defence lawyer. However, we would not object to having a three party committee, with representatives of the Bar, the Social Welfare and Family Department, and the magistrature, study the complaints of those who wish to contest a refusal of the public defender to act, and that he be obliged to accept the decisions of such a committee.

b) REJECTION OF CONTROL BY BAR (174-187)

174. The participation of the Bar creates special problems. This is true everywhere in the world, but more so in Quebec where the Bar, up to the present, has had the entire responsibility for legal assistance.

A system of legal security cannot be established, nor can it develop without the cooperation of the Bar. In a number of cases it was found to be absolutely necessary to integrate the Bar into the administration of the legal security, or otherwise it would not have been possible to even start the service [1].

Notwithstanding this, we have rejected the idea of control of the administration of this service by the Bar. The Bar remains the arbiter of the professional conduct of all lawyers. We believe that it would be illogical and unfair to turn the public defenders into employees of the Bar while the Crown prosecutors are only responsible to the Bar for their strictly professional conduct.

An even more serious reason is that it is not normal for the state to delegate to others, its responsibilities in matters of social security. And legal security includes as practitioners know, innumerable social elements which cannot be handled by lawyers alone.

On these essential questions, the analyses and conclusions of Mr. Loranger (Annex) and Prof. Heleine (Appendix 21) are in conformity with our own views. A system of legal security should not devolve upon, nor belong to a small professional group.

175. The recommendation that the service of legal security should not be the responsibility of the Bar, is undoubtedly contrary to the wishes of the Bar itself. Evidence of this is found in the terms of reference given to a special sub-committee formed January 11, 1968 by the Bar of Montreal, which read in part :

[1] Some measure of official local bar association representation in the organization offering extended legal services may be the price of bar association cooperation. CHARLES J. PARKER, *The Relations of Legal Services Programs With Local Bar Associations* in *National Conference on Law and Poverty*, Washington, 1965, p. 139.

"to enquire into the necessity of legal aid in the Province, *its organization under the aegis of the Bar*, its financing, etc., for the purpose of making appropriate suggestions to the government of the Province" (appendix 22).

In forming this special committee for the purpose of evaluating the needs of Quebec in the matter of legal security, the Bar of Montreal made its own position very clear: it was hardly possible for this committee to recommend a system of legal security of which the total or partial responsibility would not be given to the Bar. The terms of reference indicated the degree to which the Bar wished to retain control of an eventual system of legal security in Quebec. We add here as supplementary documentation, the reports submitted by two other subcommittees formed within the framework of the same enquiry : that of the Bar of Quebec (Appendix 23) and that of the rural Bars of the Province (Appendix 24).

176. The special committee appointed by the Bar proceeded very quickly to an inventory of the modern written material in connection with legal security. It also consulted, as far as was possible, the different intermediate bodies who had up to that time shown an interest in this matter.

The committee at the end of eight full sessions, and after a great deal of individual work on the part of the members of the committee, summarized the situation in these terms :

> The preceding could be resumed by saying : in Montreal the intermediary bodies and the public, realize today that there is great need for a more adequate and more specialized legal aid system. It is evident, in the opinion of the public, that the legal aid bureau of Montreal is overburdened and can only respond partially to the real needs. The intermediary bodies and the public wish to see the elimination of delays in obtaining assistance. They also would like to see lawyers available immediately for consultation, and, for the civil procedures, for appearance before the criminal courts, for all urgent matters, for every stage of the procedure before any court, but above all in criminal matters. *They wish to have regular and continuing contacts between lawyers and social workers, etc. They would like to have a definition of what legal aid is, its qualities, its means.*
>
> They would like to see the legal aid office of Montreal make its services available *in those districts where the clientele is generally found, and that the services be made available at hours suitable to those who have need of aid.* They would like to see the state giving generous financial aid. They would like to see the state establish by law a provincial legal aid system. They would like this legal aid to be the right of the individual.
>
> They would like to see the verification of financial resources retained, and that payment by instalments be accepted from those who use the aid.
>
> The public has suggestions regarding the Bar, e.g. quicker action and more effectiveness of the syndic, and publicity, regarding the qualifications of lawyers [1].

[1] *Report of the Sub-Committee of the Bar of Montreal,* in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives of the Bar of Montreal for the purpose of studying legal aid in the province, pp. 18-19.

All in all, the declarations of the committee, as to the needs with regard to legal security were similar to the opinions then current on this matter. (The italics are ours.)

177. The sub-committee of Montreal has endeavoured to answer the opinions of the public and the intermediate bodies, with the point of view expressed by the legal security bureaus and several groups of lawyers.

Recognizing the importance which the Ontario system of legal security has achieved in two years, the sub-committee placed a great deal of importance on the evaluation of that system made by the Ontario Prime Minister himself, Mr. Robarts. After referring to the congratulations of Mr. Robarts to the legal profession for its considerable cooperation with the legal security service of Ontario, the sub-committee mentions the pride and also the fears expressed by him (Appendix 25).

> There will be no change in the basic philosophy. The objective of legal aid in Ontario is to insure that everyone will enjoy the right to obtain legal advice or be represented by the counsel of his choice regardless of financial ability to pay for a counsel. However, any program can become too great a burden upon society. If costs become intolerable, their programs will founder. I suggest there is a limit to what society will bear in the way of financing social programs, regardless of their benefit. It is incumbent upon the government and the legal profession to ensure that costs are held to reasonable levels... Legal aid will not be regarded as "legal care" in which everyone has a right to subsidize counsel. Legal aid is designed to help those who need to be helped. This must be borne in mind by the government, the legal profession and the people of Ontario if the "legal aid plan" is to enjoy a long and successful future [1].

The sub-committee quite correctly summarized the thought of the Ontario Premier when it said : "While rejoicing at the benefits obtained by the public, he was concerned with the exorbitant costs for the administration of the system".

Although it praised the merits of the Ontario system (satisfactory for the indigents and the lawyers), the sub-committee was reluctant to recommend the introduction in Quebec of a system so costly. This is in accord with the thinking of this Commission which, while recognizing the theoretical value of the Ontario regime in the limited area of lawyer-client relationship, believes it to be an unnecessary burden for the whole of society, and quite illogically under the control of a professional minority.

[1] Address by the Honourable John Robarts, Prime Minister of Ontario, to the Opening Session of the Mid-Winter Meeting of the Ontario Branch of the Canadian Bar Association, Toronto, Friday, February 2nd, 1968, pp. 7-8.

178. The sub-committee of the Bar of Montreal studied the different private agencies which have, up to the present time, carried the burden of legal security in Quebec. They placed, particular importance on the views expressed by those responsible for the legal security bureau of Montreal :

> The statistics of the Legal Aid Bureau of Montreal indicate that approximately 70% of the cases have been and should be dealt with by the lawyers employed permanently in the legal aid bureau of Montreal because the cases submitted can be resolved by one or more consultations, by direct interventions, or by longer and more urgent procedures. Approximately 20% - 30% of the cases on civil matters require referral to practicing practitioners because action to proceed appears to be necessary. Among the cases referred, half of them, i.e. 12% to 15% of all the cases of the Legal Aid Bureau of Montreal require *de facto* procedures. The other cases appear to have been completed by the practitioners without legal procedure.
>
> The statistics indicate that the office handles in the proportion of approximately 90% civil cases in the year, and 10% of a criminal nature, except at the end of 1967 to the beginning of 1968.
>
> The reports have shown that it is impossible to look after the requests for aid in criminal matters through the medium of volunteer services of practicing criminalists, as these cases call for immediate action, and the practicing criminalists who could supply their services free of charge are not sufficiently numerous in the district of Montreal. Also as soon as it had funds available, the administrative council of the Legal Aid Bureau of Montreal engaged criminalists as part of its office. These criminalists employed, the one in August 1967 and two others in December 1967 and February 1968, have already increased the effectiveness of the Legal Aid Bureau of Montreal in these several months by 120% [1].

179. After describing the situation very frankly, the special sub-committee of the Bar arrived at conclusions and recommendations which are somewhat surprising.

The committee came to the following two principal conclusions :

> 1. — *The establishment of a state service of legal assistance did not appear to be necessary and would probably not be a good solution ;*
>
> 2 — *The actual service offered by the Bar of Quebec and its office, once it was reorganized and improved would answer quite adequately the needs of the population for legal aid* [2].

It is astonishing that the Committee did not consider a government service of legal security to be necessary, as the same committee recognized :

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1 *Report of the Sub-Committee of the Bar of Montreal,* in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives from the Bar of Montreal for the purpose of studying legal aid in the province, pp. 36-37.

2 *Op. cit.*, p. 41.

> a) that the legal aid bureau of Montreal was hardly able to devote more than 10% of its time and its personnel to cases of a criminal nature ;
>
> b) that at least 50% of the accused did not have a lawyer when they appeared before the courts of criminal jurisdiction, and that too large a number pleaded guilty without the benefit of a consultation.

180. The information gathered by the sub-committee showed clearly that it was impossible to count on the benevolence of the criminalists who were very few in number, particularly in Montreal. The sub-committee of its own accord drew attention to the effectiveness of a formula wherein the criminal lawyers, made available free of charge to the public, are, in practice, permanent lawyers attached to the office of legal security. Provided with this information, the subcommittee should have concluded that *the only practical formula with regard to criminal and penal matters was to have recourse to lawyers remunerated on a permanent basis.* By any manner of reasoning the sub-committee *could not come to the conclusion* that a state service of legal security would not function in this manner, nor could it have concluded without any evidence, that it probably would not be a good solution. Nor could the sub-committee make the positive statement that the actual legal aid service offered by the Bar of Quebec and its office, would be adequate for the needs of the population once it was reorganized and improved. And more particularly the sub-committee was not able to state, based on its own premises, that the service in effect was the only, let alone the best solution. The sub-committee in arriving at these two principal conclusions and the recommendations therefrom, accepted from the very start the underlying intent of the mandate they received on January 11, 1968 from the Executive Committee of the Bar of Quebec : to enquire into the need of legal security in the Province of Quebec, *organized under the authority of the Bar...*

On October 11, 1968 the Executive Committee of the Bar of Quebec forwarded to its General Council, recommendations arising from the conclusions of the sub-committee referred to (Appendix 26).

181. However, it was the sub-committee formed by the Association of Lawyers of the Province, which submitted the strangest argument. Here again one has the impression that the committee formed by the Association of Lawyers of the Province has systematically rejected any formula of legal security which would cause the legal profession to run the risk, justified or not, of a full or partial socialization :

> This is why the members of the committee have first of all studied two preliminary questions :
>
> a) Is it necessary to establish a system of legal aid for the entire province ?
>
> b) In the affirmative, is the Ontario system a worthwhile formula, and is this formula applicable to Quebec ?

To the first question the members of the Committee do not hesitate to state that if the need for legal aid is clear for the district of Montreal and Quebec, the need is not acute elsewhere in the province. Are the members justified in believing that the lawyers of our sections have up to the present time, undertaken to those who by reason of indigency cannot pay for the services of a lawyer ? However, they are unanimous in recognizing that the rights of the indigents should not be subject to contingencies, such as the availability or merely the generosity of a lawyer, or again the sympathy which might develop between the indigent and the lawyer whom he consults : it is necessary to institutionalize legal aid in such a manner so that what has up to now been a favour becomes a right.

On the first question therefore, the members of the committee are unanimous in recognizing that it is necessary to establish the right of the indigent to legal aid, and the obligation of the lawyer to make this aid available.

This first answer being given, and as the letter of the General Secretary appeared to invite an examination of the Ontario system, the members then studied the Ontario Legal Aid Act.

They are unanimous in agreeing that if a legal aid system were to be established, financed entirely by the state, and under the sole control of the Bar, without any concern for the cost of operating such a system, the Legal Aid Act of Ontario is a model to follow. This model is even more interesting because the tariff forming part of it is of an extraordinary generosity.

But the members of the committee saw serious objections to the adoption of a system parelleling that of Ontario.

In the first place, knowing that the Ontario system had become much more onerous than was believed at the beginning, the members of the committee are of the opinion that such a system in Quebec could only be even more so. In their opinion it was necessary to avoid having the state carry so heavy a burden, if it were at all possible to avoid such a consequence.

In the second place they are of the opinion that a tariff of rates such as that in the Ontario system by its generosity would be too strong a temptation both for the members of the Bar and for those seeking aid in matters pertaining to justice. Inevitably the lawyers would consider such a tariff as an invitation to suggest to their clients to take advantage of the Legal Aid Act, and by its very structure the system would lead both those seeking justice and the lawyers to make the exception the rule.

The members of the committee are of the opinion that the introduction of a similar system would very shortly lead the public to demand that the profession be socialized, and that the members of the committee are unanimous in stating that this should be avoided at all costs, and that the Bar must pay the price called for, to avoid the socialization of the profession.

To the second question which they studied, the members of the committee therefore reply that they do not recommend the adoption of a system such as that in Ontario [1].

182. Here again some members of the legal profession endeavour to minimize the needs with regard to legal security. As against this, the

[1] *Report of a Sub Committee of Lawyers of the Province*, in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives of studying legal aid in the province, pp. 119-121.

statistics compiled by the Advisory Council of the Administration of Justice, and by this Commission, show that the number of accused who appear before the criminal courts without benefit of the services of a lawyer, remains very high even in the rural districts.

From this point of view it is certainly not possible to state that at the present time the Bar is satisfying the needs, by merely depending on the generosity of the members of the Bar. With so few lawyers specializing in criminal law, it would be utopian to hope that the Bar could satisfy the demands. Moreover, most of the statements made indicate that when the legal profession discusses the legal security needs, they are thinking of, and placing more emphasis on, civil matters.

The Association of lawyers of the Province have arrived at conclusions which are even further removed from the point under discussion. The Committee formed by that Association gives the impression that it is even necessary to have the judges indicate in advance, those of the accused who would be particularly in need of the services of a lawyer:

> In criminal matters the problem can be even more serious. In some districts, such as that of Joliette, for example, the lawyers have prepared a list in which the names of all the members of the Bar appear in rotation. With the cooperation of the judges, on every occasion that the latter believe that a prison term might be imposed, the designated lawyer, according to this list, is informed, and he makes his assistance available to the condemned, free of charge. The members of the Bar have even obtained the free help of social aid, and of psychologists, who interest themselves in the condemned to help the judge determine the sentence which he must pronounce. Up to now it would appear that the system has functioned satisfactorily for seeking justice, as well as for the judges and the confrères. None of the latter has found that the system imposes too great a load [1].

183. This Committee of the Association judged the formula of the *public defender* in different ways : it would be acceptable in the Social Welfare Court because the hearings are not public, but it would not be suitable in the Court of Sessions where the hearings are public !

> The Court of Social Welfare is possibly the only court where it might be desirable for the State to name not only a Crown prosecutor, but also a lawyer charged with the responsibility of pleading the case of the indigents.
>
> It would not be desirable to establish such a system in the court of Sessions, where the hearings are in public, because the condemned, or the person seeking

[1] Report of the Sub-Committee of Lawyers of the Province, in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives of the Bar of Montreal for the purpose of studying legal aid in the province, p. 125.

justice, could not possibly imagine that two lawyers named and paid by the same employer could have different points of view on the same affair [1].

184. Let us end this review. The sub-committee formed by the Bar of Montreal summarized the various opinions in the following manner :

1° — All the lawyers wish to have the financial support of the State.

2° — The lawyers of the section of the Bar of Quebec and those of the Association of lawyers of the Province, state that they are able to give sufficient legal aid through the voluntary and free services of practitioners. They express fears that the profession might be socialized.

3° — All the lawyers believe that it is necessary to have receptionist/consultation bureaus in charge of permanent salaried lawyers if possible.

4° — Moreover, the lawyers of the section of the Bar of Montreal consider that assistance in criminal matters should be given by permanently employed lawyers.

5° — The thoughts of the lawyers of Montreal with regard to the manner of giving assistance in civil matters was not expressed before the committee until today, in the drafts of the law of the Batonnier B. Bourdon, and Mr. E. Colas, and by extracts from the notes of the Assistant-Secretary of the Legal Aid Bureau of Montreal. The first two recommended the voluntary free services of practitioners, the other, permanently employed lawyers, only by reason of economy.

6° — The lawyers of Quebec and those of the province, judge that the management of legal assistance must be confided to the sections of the Bar.

7° — The law drafted by the Batonnier Bourdon makes the same suggestion. That of Mr. Colas confides the management to the provincial Bar supported by a notary and judges.

8° — In the comments of the Legal Aid Department of the Institute of Baron de Hirsh there is an ambiguous statement suggesting that the Bar take the iniative in giving assistance, and at the same time expressing the fear that if the Bar accepts full responsibility, *it* would run the risk of criticism and in addition it would be *assuming a responsibility which should rightly fall on the state.*

9° — Elsewhere in the extracts from the notes of the Assistant Secretary of the Legal Aid Bureau of Montreal is the suggestion that *the management should be shared by all the elements of the community* [2].

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1 *Report of the Sub-Committee of Lawyers of the Province,* in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives of the Bar of Montreal for the purpose of studying legal aid in the province, p. 127.

2 *Report of the Sub-Committee of Lawyers of the Province,* in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives of the Bar of Montreal for the purpose of studying legal aid in the province, pp. 46-47 (the italics are our own).

185. It is evident that the opinion expressed by the legal profession is far from being in agreement with the opinions expressed by the general public and the intermediate associations. The public considers the needs of legal security to be much greater than do the lawyers. The public moreover, complains of long delays in securing assistance, while the lawyers are content to recognize that delays do exist. In Montreal the public considers that the services of the Legal Aid Bureau of Montreal are absolutely insufficient at the present time. Even the sub-committee says, "the lawyers have not expressed themselves on this point, with the exception of the Assistant Secretary of the Legal Aid Bureau of Montreal, who is in agreement with the opinion of the public and the intermediate bodies". It will be noticed here that the sub-committee makes it clear that it does not know the opinion of the lawyers on this matter, although it has itself concluded previously, as we have seen, that the Legal Aid Bureau of Montreal could, on condition that it is reorganized and modernized, fully satisfy the needs.

186. The sub-committee then ended this phase of its work by a rather equivocal comment :

It can be said that up to the present, the committee has received an increasing demand for help and assistance from the public and intermediary groups. It can be said that two different thoughts are expressed in the comments from the lawyers. The one concerns itself more with the welfare of the Bar, the other gives first consideration to the welfare of those asking for assistance. These are the two options from which the committee must choose [1].

In our opinion the difference between these two concepts are much more than merely a nuance, and it should be quite easy to make a decision.

187. In their general conclusions the sub-committee emphasized, with good reason, the necessity of allowing the lawyers who supply the legal security, the greatest possible freedom. It however, appears to retain the impression that it is not possible to have a confrontation between the Crown prosecutor, and the lawyer for the legal security, if both of them were to be directly or indirectly paid by the same employer.

We admit, readily, as we have already explained, that it is important to jealously guard the independence of the legal security service. But it would be wrong to deduce from this principle, that a public defender paid by the

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1 *Report of the Sub-Committee of Lawyers of the Province,* in the report of a committee formed January 11, 1968 by the Bar of Quebec at the request of representatives of the Bar of Montreal for the purpose of studying legal aid in the province, p. 48.

state would automatically find himself not at arms length with the Crown prosecutor. It is quite likely that this same preoccupation led the committee of the Bar to recommend that the legal security service be placed under the jurisdiction of the Minister of Family and Social Welfare (Recommendation No. 14).

Here again it seems to us that the Committee has exaggerated the danger of collusion or connivance between the different groups of lawyers serving society. We believe that a legal security service cannot be integrated with the Ministry of Family and Social Welfare *without depriving the field of justice of a responsibility which belongs to it, alone.*

For the same reason we believe that legal security must be considered as a *right of every citizen.* And we recommend strongly that this right be under the authority of the Minister of Justice, recognizing at the same time that the Minister of Family and Social Welfare must also assure, with good will and justice, forms of social security.

The Commission does not believe that the recommendations made by the committee of the Bar of Quebec should be followed. It prefers that while the Bar should have the entire responsibility for all professional acts and ethics, the establishment of an adequate system of legal security should be entrusted to an independent organism, utilizing principally the formula of public defender, and administered by a Director who would be completely autonomous.

Although the Commission wishes to associate legal security with the Minister of Justice rather than with the Minister of Family and Social Welfare, as has already been clearly indicated, the public defender in each region must be closely associated with the everyday life of the people, and participate as much as possible with action groups in matters of social rehabilitation.

c) REJECTION OF A COUNCIL OF LEGAL AID (188)

188. We also discard the idea of a Council of legal aid as outlined in the recommendations of the Advisory Council of the Administration of Justice. Such a council, "intermediary between the Bar and the Minister of Justice" would place the public defender in a position of dependence to which the Crown prosecutor, as of now, is not subjected.

If a plan using such a Council were to be adopted, much would be gained by giving it many of the characteristics described by Pro. Heleine (Appendix 21). For our part we would be satisfied that :

1. — the Director be selected with great care ;
2. — the Director act in defence matters with the greatest autonomy;
3. — the Director reconsider his own refusal to act if asked to do so by the Ombudsman who should have the authority to scrutinize the decisions of the legal security service.

7 — Gratuity and simplification of procedures (189-203)

189. To assure the equality of all before the law, a system of legal security should make available to indigents at no charge, not only a defence before the courts, but also the related judicial procedures.

Many formulas of legal security make a clear distinction between the gratuity of the defence itself, and the gratuity of the judicial procedures attached to it. The Swedish procedure (paragraph 65-67) establishes different bases for the two categories of legal aid. Similarly the resolution voted by the executive of the Bar of Quebec in October 1968 (Appendix 26) mentions specifically, apart from the defence itself, different judicial procedures, which should be free of charge in the case of indigents.

190. In the examination of these "accessory costs" resulting from the present procedures, a most important place must be given to court stenography. An auxiliary of justice, the official court stenographer, plays a most important role, and also creates some of the problems. It is not our intention to make a scapegoat of this service, even though it is an outstanding example.

The comments on the official court stenography could have been delayed to the time of writing that part of the report dealing with the judicial system. However, the official stenography is a typical example of the related costs included in the overall system of legal security. The comments and recommendations on the official court stenography we intend making here, will also deal with its form, quality and usefulness, and will embrace problems much broader than that of legal security. We are consolidating our thoughts now to avoid useless repetition throughout the different volumes of our report.

191. The value of stenographers in the different departments of a general office, is well recognized, but even so it is difficult to imagine the quality of the work required from the official stenographers. While the capable office secretary might give satisfaction with a speed of 80 to 120 words a minute, court stenographers must frequently function at speeds of 200 and even 250 words a minute in the course of the discussions which develop suddenly when a case is being heard. The court stenographers must be considered as the true professionals of this skill.

However, the use of court stenographers results in costs having a direct economic impact, which in turn quite often prevents the accused indigent from obtaining full justice ; this is more evident in the case of appeal.

A number of the delays taking place in the judicial administration must be attributed specifically to the slowness in securing the transcription.

During our visits to the prisons, and in the study of particular files, it has been noticed that denials of justice take place all too frequently because the courts are unable to obtain within a reasonable delay, the transcript of the stenographic notes of the first part of a case, or of a case brought to appeal.

It is not our intention to hold the court stenographers entirely responsible for the slowness with which our judicial apparatus functions. However, we must recognize that in certain cases it is purely and simply the slowness in securing the transcript which causes innumerable postponements. In some cases, individuals have waited months under detention until the file for the appeal hearing is being prepared. In other cases, the lawyers for the defence have waited months for the transcript of the stenographic notes needed to undertake the necessary action on behalf of their clients.

192. The official stenographer therefore, creates the problems of efficiency and cost. Generally speaking, nobody questions the competency of the court stenographers. However, the cost and the delays arising from the transcript of the stenographic notes has become so serious that many of the officials involved in the administration of justice are asking themselves whether the time has not come to replace the court stenographer by equipment which will permit the tape recording of the hearings.

193. The efficiency of the different methods should be compared : the official stenographer versus a tape recorder.

The memorandum submitted by the association of court stenographers of Quebec was understandably, intended to prove to our Commission that the electronic equipment available at present is still not an adequate substitute for the work done by man.

What made the memorandum worthwhile was that it referred to a number of experiments which could be verified and which were of unquestionable value.

The court stenographers were able, for example, to study the results of an experiment conducted for five years in Alaska, where, by reason of the lack of qualified personnel, the American government had recourse to electronic equipment for recording the evidence and the court debates. The results of this enquiry indicate clearly the inadequacy of the equipment utilized [1].

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1 1) Transcripts are questionable with frequent notations of "indiscernible" and "inaudible", and the like, to be depended upon for the defence of life, liberty and property rights, and this inadequacy still exists despite more than five years of experience in Alaska with the system, and the building of expensive, accoustically engineered courtrooms.

No matter how great the fidelity of a blind recording apparatus may be, extemporaneous speech is at times imperfect — uttered indistinctly, slurred, swallowed, grunted and garbled — and to bridge the gulf from sounded utterance to word-for-word comprehension takes the on-the-spot coordination of the eye, the ear and the brain.

2) The art of truth-seeking through searching, slashing cross-examination is lost because of the necessity of having rigid control of speech and proceedings to avoid overlapping and interruptions.

3) Everyone in the courtroom — judges, counsel, witnesses, jury and spectators — must be extremely guarded in their actions, so that no noises are created that might, and at times do, interfere with recordings. The conduct of the trial, therefore, is subordinated to the limitations of the sound-recording machines.

4) There is the constant danger of privileged communications between lawyers and clients at the counsel table being recorded and later appearing in the transcript.

5) Replaying any portion of the proceedings during trial is discouraged by the Court for the reason it is cumbersome and time-consuming, and there is always present the danger that a previously recorded part might be accidentally erased, or that the machine might not be recording after such a playback which would not be discovered until a check is made some time later.

6) Distinguishing voices is a hit-and-miss proposition, especially so when the voices are similar. Overlapping speech makes it difficult, and generally impossible, to comprehend the proceedings, as more than one speaking at a time garbles the record, all of which adds greatly to the burden of the judges and lawyers in making a proper record.

7) The lawyers are deprived of the services of immediate and daily copy of transcripts.

8) Specially designed courtrooms must be provided and constructed to afford a proper environment for sound-recording.

9) Lastly, and always of great importance, it is not cheaper, no matter how its use may be contemplated. The cost study conducted by the certified public accounting firm disclosed that no monetary saving can be derived by the use of sound-recording *in lieu* of shorthand reporters to benefit litigants and/or taxpayers, either in the form of transcripts or in operating the courts ; that twice the number of employees is required to replace the shorthand reporter, thereby increasing the expenditure of funds for salaries, payroll benefits, office space, equipment, furniture etc. ; that the initial cost of the recording and transcribing machines, and their attendant supplies and maintenance, without taking into account periodic replacement by reason of obsolescence, is considerable ; that jurisdictions with heavy caseloads and/or accelerated dockets would experience further increased costs of operating the sound-recording system over the use of the shorthand reporter. HARRY L. LIBBY, Extract from *Report of Survey of the Alaskan Court System*, p. 56-57.

194. The results experienced in Alakas, were repeated in different American experiments.

In New York a scientific test showed the comparison between the "Soundscriber" and the services of a court stenographer. This enquiry, the

results of which were reported June 15, 1965, showed a definite superiority of the court stenographer over the electronic methods then available [1].

195. A number of experiments of a more limited nature, have been tried in Quebec, Montreal and Ottawa. Until there is reason to think otherwise, we are inclined to believe that these experiments have shown the superiority of the court stenographer over the electronic equipment in use. However, they have shown that the margin of difference is constantly growing narrower.

If the intention is to retain in our judicial procedures, the custom of taking in shorthand and transcribing the entirety of the evidence, the pleas, and the questioning, it will undoubtedly be necessary, as has been indicated by the study made in the State of New York, to move slowly and gradually in making changes, until the electronic techniques of recording give more satisfactory results. In fact the experiments carried on up to the present do not permit the premature discarding of the services of the court stenographer. They justify the belief that a court stenographer by reason of his training and judgment, can supply an accurate transcript, more likely to serve the best interest of justice, than any kind of electronic equipment.

It is quite likely, however, that the day is coming when electronic equipment could be substituted for the work of man.

196. Another one of the important conclusions established is that the use of electronic techniques does not at all guarantee a reduction in the cost of transcription. *If* our judicial system intends to retain the customs of full transcriptions, we must recommend *caution* and accelerated research work.

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1 The transcripts produced by the official court reporters are far superior to the transcripts made from soundscriber tapes.

2) Transcribing from Soundscriber tapes is much slower than from court reporter notes.

3) Mechanical recording may offer some savings in cost, especially where little transcription is necessary.

4) Mechanical recording does not yet have a method of protecting the confidential lawyer-client relationship from an inadvertent recording. Subject to this, where court reporters cannot be obtained or where they are not used and an official record is desired, electronic sound recording devices offer the best available method. Use of such recording should, however, be preceded by the selection of the best equipment available and the careful recruitment and training of monitoring and transcribing personnel.

5) We must remain alert to future improvements in recording equipment which may eliminate some or all of the present drawbacks.

6) We should watch for the perfection of computers for transcribing tape produced by court reporters. Such computers are now being evolved by IBM and by ITEK. (Staff Report on a test of Soundscriber Recording of Court Proceeding, pp. 4-5).

197. There is another side to this problem of the court stenographer. Admitting that court stenographers do work which is still without equal, it would appear that there are not enough of them to satisfy all the requirements, notwithstanding an improvement in the situation in recent years. It is regrettable, but nevertheless a fact, that court stenographers in many districts are much too busy to be able to supply the court and the lawyers with the required volume of work, and we have been able to determine that this causes all too frequent delays.

We hope *that within the framework of our present judicial system,* our courts will continue to use the court stenographer as much as possible, to retain the quality of the transcription. However, we must also recommend that there be a more regular use, as a substitute to the court stenographer, of the electronic methods which are already available. This substitution will take on increasing proportions as the electronic equipment begins to produce work of better quality. In civil matters, such substitutions are already permitted (Appendix 27) in the cases affected by Article 324 of the New Code of Civil Procedure (13-14 Elizabeth II Chapter 80).

198. The preceding thoughts arise principally from the American and Canadian experiences. The British system has reacted differently, and for a number of years has adopted the practice of utilizing electronic equipment for recording.

The changes in the British procedure resulted from recommendations made by a committee which made an intensive study of the various methods of recording. (The entire text of this study is found in Appendix 28.)

In England, as in Quebec, it was the lack of competent stenographers which resulted in this study of electronic methods. The British committee explained that it would probably never have thought of transcribing by means of electronic equipment if the official court stenographers had been able to fully satisfy the needs of the judicial system.

Once the experiment was made, the British committee indicated that it was satisfied with the services rendered by the mechanical equipment for recording. It did not say that the results were ideal, nor that the problem was fully solved : even today according to the committee, it is impossible to obtain a daily transcript without having recourse to court stenographers.

199. If we summarize the North American and British experiments we find certain constants :

a) almost everywhere the lack of court stenographers encourages recourse to electronic equipment ;

b) the electronic equipment is being constantly improved but it still does not permit a daily transcript nor any serious reduction in costs ;

c) from the moment that the electronic equipment begins to be used as a substitute for court stenographers, the number of individuals in this profession will begin to decline, and this in itself will create need for more electronic equipment.

In brief, there is reason to think that electronic equipment will gradually replace the court stenographer :

1 — the technical advances being made encourage the belief we will very shortly reach the point where the electronic recording will be satisfactory.

2 — As we have already indicated, the mere fact that the door has been opened to the utilization of electronic equipment, will in itself, accelerate the process of evolution.

200. There is nothing to indicate that it will be possible in the near future to reduce the cost of recording and transcription. Whether we retain the classic court stenographer, or whether we go on to electronic recording, an important part of the problem remains. After this digression with regard to the technical quality of the court stenography, we return to our principal topic : the security of indigents before the law, and the gratuity of the costs of justice.

The cost of stenography does not make the establishment of an overall system of legal security any easier. Actually the free defence of accused indigents already results in considerable costs to the State. To add to this, the gratuity of legal procedures related to it, will most definitely increase the budget for legal security. With this in mind, it is necessary to look for, while retaining the idea of gratuity of legal procedures, some reduction in expenditures.

It is interesting to note that most of the European countries have reduced to the minimum the use of court stenography in appearances and trials. In Sweden, tape recorders have been substituted for court stenographers for quite some time. In Denmark the legal procedure has been simplified to such an extent that even the tape recorder has become useless. There, the president of the court dictates a resumé of the sessions, which is approved by the lawyers of the two parties. The result is that instead of hundreds or thousands of pages of stenographic notes, the case ends up with a few pages of dictation, which in the opinion of the judge and the two lawyers, gives a fair summary of the discussions. In Sweden, only a part of the procedure, that is the questioning of witnesses, is registered on the tape recorder, eliminating entirely the lawyers pleas.

Similarly, Holland, Belgium and France have reached the point where they have reduced to a considerable extent, the recording of the transcript. In most cases they are satisfied to have the judge of instruction make a summary of the questioning, and dictate his conclusions.

201. Undoubtedly, many objections will develop the moment there is any question of doing away with the court stenographers. The objection which is the most serious, and causes the greatest concern, has to do with the problems that would arise in the Court of Appeal in the absence of stenographic transcriptions.

There is no doubt that the court of Appeal can have full knowledge of the evidence submitted in the court of first instance if it benefits from a full stenographic transcription. As against that, the moment that a case becomes more complex, the stenographic notes become voluminous and difficult to use. Furthermore, the Court of Appeal has the right to recall a witness of the first trial if it judges this to be necessary. Finally, it should be pointed out that appeals only affect a small number of cases.

202. We are not recommending doing away with the court stenographer immediately. But we would like to see the greatest simplification in the procedures which today have a dual consequence :

— that of delaying the hearing of the case,

— and of making our judicial system extremely costly.

Here again we believe that Quebec must spell out its priorities. By surrounding the hearing of an appeal with all the imaginable precautions, including that of the entire transcript, there is danger of the legislator becoming convinced that the cost of establishing a system of legal security would be too great. It is not our desire to make an appeal impossible, but we would not like to have relatively minor precautions result in our legal security becoming too costly and unavailable.

We recommend reducing the use of court stenography in a gradual manner. As a first step we could do away with its use for summary convictions. The field of indictable offences could then be dealt with in a progressive manner. During the period of experimentation, electronic recording could be used by limiting the transcription to cases of appeal. Little by little it would become possible to simplify procedures even more, in such a manner as to provide not only effectiveness, but also economy.

In our general introduction we recommended that Quebec reserve its best judicial talent for the higher courts. We believe that it is a poor utilization of human resources for a jurist to constantly deal with minor cases. In the same way it would be a poor utilization of human resources if in

a judicial system lacking sufficient court stenographers, the services of transcription are required which are not in the interest of the public, nor the individual for whom it is used.

203. By proceeding gradually it will be much easier to understand the real needs of the courts of appeal. For example, the judges of the courts of the first instance would have the time to become accustomed to new responsibilities, including that of dictating a resumé of the proceedings in the presence of the two parties. Little by little it would be possible to simplify the judicial procedure in the vast majority of cases. Court stenography would be eliminated in the cases of lesser importance, and would only be retained in those cases which could result in long terms of imprisonment. The recording of proceedings would play only a supplementary role. The entire administration of justice would be speeded up, and would be less of a burden on everyone.

More particularly, during the period of working in, it is quite likely that the Courts of Appeal will sometimes have to call one or more witnesses of the first trial. We believe, however, that such a procedure would be less onerous than the massive utilization of court stenographers in the hundreds and thousands of cases in which they have no useful purpose at all.

By thus reducing a large part of the auxiliary expenses, the executive power would be given an additional reason to introduce at the earliest possible moment, a global system of legal security in Quebec.

DECLARATIONS AND RECOMMENDATIONS

DECLARATIONS AND RECOMMENDATIONS

Having completed its enquiry into the relations between the citizens economically underprivileged, and the judicial system, the Commission believes that the State must come to the aid of indigent citizens so that everyone will be truly equal before the law and justice.

We emphasize that this State aid should be available to every indigent citizen. And we therefore recommend the formation of a system of legal security throughout the Province of Quebec.

It may appear strange that we should relate the service of legal security to the groups engaged in social animation. We are convinced, however, that it must be so. The experience of specialists in the field of legal assistance, repeated over and over again, indicates clearly that under-privileged citizens, even at the moment when they are confronted by the complexities of the judicial apparatus, are in need of help going far beyond that of purely and strictly judicial matters. The accusations brought against them are quite often involved with social security problems, the inability to find gainful employment, the family budget...

We have taken a long time to decide on the form which should be given to the Quebec system of legal security. We have finally decided that the formula of the public defender appears to us to be the one most adapted to the needs of Quebec. Up to the last moment of our studies, we had an open mind about the Ontario system, which is practically the opposite to that of the public defender. In the final analysis, however, we were not convinced that the weaknesses attributed to the formula of a public defender were justified, nor that there were overwhelming advantages resulting from a system of free choice.

We are definitely of the opinion that the permanent public defender can make available a service of the highest quality, and at considerably less cost. Moreover, we believe that the freedom of choice is not used by the accused indigents who, generally speaking, do not know any lawyer. We believe that the permanent public defender, even paid by public funds, can retain his complete freedom ; and no more proof of

this is needed than the traditional independence of judges who are, however, also remunerated by the State.

To make such full autonomy possible, it will be necessary to give the Director of the legal security service considerable guarantees. As a prerequisite to his nomination, the different intermediary groups represented on the Advisory Council of the Administration of Justice, should make a list of the three best candidates. Following this, it would be up to the executive powers to make a final selection.

Within the framework of the present report, we recommend that the Director of the legal security service have the entire responsibility for administrating his service. Other groups have, however, defended the merits of a more collegial formula. We admit having an open mind with regard to the most desirable form of administration. We believe that our proposal is worth trying, but it is our strong hope that public opinion, and the Advisory Council of the Administration of Justice, will show a great interest in this aspect of the Quebec system of legal security, and will not hesitate to recommend changes in the administration of the service if it is proved that a board or an administrative council will give better guarantees.

It is our hope that the Quebec system of legal security will be available to all economically weak citizens. For this reason, we have not established precise and strict standards. It would be the responsibility of organizations other than ours to determine the criteria from which it would be possible to establish, if not a definition, at least in an approximate manner who are the destitute, the impoverished, and those well-off. It is our belief that in practice it would be better to allow the service of legal security to exercise its own judgment. In the same way, by suggesting that the legal security service show the greatest caution with regard to certain offences (defamatory libel, breach of promise...), we have endeavoured to avoid indicating the exclusion of any specific category.

Without going into details, we have made it clear that juridical information should be made available to the general public. Here again, one must be guided by experience. For our part, we believe that it would be advantageous for the permanent public defenders to satisfy all the demands for information without enquiring in any way into the financial resources of the applicant. At the level of the defence, it would undoubtedly be necessary to look into the monetary aspects more closely. This brings to mind one of the most interesting aspects of the Ontario system, which permits the permanent lawyers to reply to all the questions of the public regardless of what they are, but makes the defence totally or partially free for the underprivileged citizens.

Organized and supervised in this manner, the Quebec regime of legal security proposed by the Commission, can be introduced quickly, economically and efficiently.

RECOMMENDATIONS

1. That Quebec through its National Assembly, define the fundamental rights of the citizens, including those who have been accused and are free, of the accused under detention, of those who are sentenced to prison and those interned.

2. That to ensure the integral respect of the fundamental rights of the individual, Quebec should declare in a legislative text the equality of all before the law, and the availability of criminal and penal justice to all those who are in need of it.

3. That in proclaiming the equality of all before the law, and the availability of criminal and penal justice, Quebec guarantees the necessary aid to any citizen who wishes, in this domain, to know, understand, affirm or defend his rights, but who is unable to do so through his own means and resources.

4. That the assistance made available by Quebec to underprivileged citizens who are involved with the law and the administration of criminal and penal justice, should include legal, educational and social help.

A SYSTEM OF UNIVERSAL LEGAL SECURITY, FREE, AUTONOMOUS

5. That to make this aid available to all deprived citizens in an efficient and economic manner, Quebec should establish a system of legal security.

6. That the Quebec system of legal security be the financial responsibility of the Province of Quebec.

7. That the Quebec system of legal security make available to the underprivileged — information and legal consultation, the defence before the courts, help at the time of sentence and support before the administrative or judicial powers authorized to modify the sentence.

8. That Quebec, except for the necessary verification of accounts and the approval of budgetary grants made annually, give the fullest possible administrative autonomy to the legal security service.

9. That two-thirds of the votes of the members in the National Assembly, be required to change the Act or the rules of the legal security service.

10. That Quebec assure the independence of its legal security service by establishing a detailed and careful procedure for the nomination of the Director and the Assistant Director of the service.

11. That the legal security service present its budget estimates and its financial reports to the National Assembly through the intermediary of the Minister of Justice.

THE PERMANENT PUBLIC DEFENDER

12. That the Quebec system of legal security adopt the formula of the permanent public defender — that is to say, the formula of the full-time lawyer remunerated from public funds, to act on behalf of the underprivileged citizens involved with the law.

CHOICE OF DIRECTOR

13. That the Director of the legal security service be named by the Lieutenant-Governor in Council from a list of three candidates submitted by the Advisory Council of the Administration of Justice, whose structure and functions will be along the lines of those of the Superior Council of Education.

14. That the assistant Director of the legal security service be named by the Lieutenant-Governor in Council on the recommendation of the Director of the service.

15. That the Director and the assistant Director of the legal security service be given a mandate renewable every five years, subject to the approval of the Advisory Council of the Administration of Justice (Recommendation 13) on the occasion of each renewal.

16. That at the end of a mandate not renewed, the Director and the assistant Director of the legal security service could, if they so desired, remain in the employ of the service as ordinary public defenders, without reduction of salary. They could, if they so preferred, leave the service with a full pension.

17. That the Director of the legal security cannot be removed from his office before the expiration of a mandate except by a two-third majority vote of the members of the National Assembly.

AVAILABILITY OF THE SYSTEM

18. That the legal security service give its aid :

1) to any person receiving social aid as defined by the Medical Aid Act of March 31, 1966, (Chapter 11, Art. 2) ;
2) to any person involved in a legal matter who makes a solemn declaration that he personally is unable to meet the cost of legal consultation or the cost of his defence.

19. That the advantages of the legal security service be available not only to those who are unable to pay anything but also to those who are only able to meet a part of the cost of consultation and defence.

20. That the legal security service should not make any preliminary and systematic investigation of the declarations of those involved with the law, but that it reserves the right to make a detailed check before the file is closed if there is reason to suspect that there has been flagrant abuse.

21. That the personnel of the legal security service include a liaison officer who will be responsible for all summary examination of the forms filled in, and who will establish the necessary contacts with the services of welfare under the Minister of Family and Social Welfare, and with social agencies.

22. That the legal security service should not establish a policy of exclusions with regard to the nature of the accusations and that it should not refuse its help to any category of accused.

23. That the objection of conscience be the only motive to prevent a public defender from acting on behalf of an accused otherwise eligible to the benefits of the legal security service.

THE PERSONNEL OF THE SERVICE

24. That the legal security service be established in each of the economic regions of Quebec in conformity with the regional divisions established by the Minister of Industry and Commerce.

25. That each regional bureau of the legal security service have a chief public defender appointed by the Director of the service, following a selection carried out by the Civil Service Commission through the medium of examinations or contests, based on the requirements.

26. That the recruitment of lawyers for the legal security service be made by the Civil Service Commission, according to the qualifications established in a general manner by the law creating the service, and in a more detailed manner, annually by the Director of service.

27. That the Civil Service Commission can neither hire nor discharge without the approval of the Director of the legal security service.

28. That the lawyers of the legal security service be assured of permanent employment following a period of probation not to exceed twelve months.

29. That the policy of recruitment for the legal security service be such that it will attract experienced lawyers to the service as well as those newly admitted to the Bar.

30. That the salaries and working conditions offered to the permanent lawyers of the legal security service be comparable to those offered to the Crown prosecutors, all on a basis similar to that adopted by the private legal offices.

31. That the members of this service be subject to the jurisdiction of the Bar of Quebec on matters concerning :

a) professional ethics ; and

b) disciplinary measures.

32. That the Director of the legal security service, consider as one of his important tasks, making available to the lawyers and all the personnel in his service, supplementary professional training and a programme of improvement.

33. That from its inception, the legal security service include several permanent public defenders in the more populous or overloaded judicial districts, particularly those of Montreal, Quebec, St. Jerome and Hull.

THE FUNCTIONS OF THE PERMANENT PUBLIC DEFENDER

34. That a member of the legal security service :

a) assume in the first instance, the defence of every citizen not provided with a lawyer, and summoned before a criminal and penal court ;

b) register an appeal on behalf of every individual condemned in the first instance, if the client asks that this be done ;

c) assume the responsibility of pleading the appeal when the client has good grounds ;

d) support the defence when the needy citizen is given a notice of appeal following registration by the Crown.

35. That the permanent public defender consider it his imperative duty to give an absolute priority to the defence of the accused who are under

detention, and to accept a postponement in the cases of such accused, only after the strongest protest.

36. That the Director of the legal security service and the Attorney General establish rules of procedure under the supervision of the Bar and the magistrature :

a) for the purpose of having cases judged with less delays and postponements ;

b) so that the discussions, reasons, justifications and the results with regard to the negotiated plea of guilty be made known to the court ;

c) so that the list of witnesses and the principal elements of the evidence be made known in advance to the court and the other party.

37. That the public defender enter into contact with the accused, deprived of his liberty, as quickly as possible, and definitely, before his appearance in court.

38. That the permanent public defender assume responsibility for the indigent accused who would be called upon to appear without having yet benefitted from a consultation with a lawyer.

39. That the permanent public defender who assumes responsibility for an accused indigent at the time of appearance, take the necessary time to familiarize himself with the case and ask, in case of need, for a delay of seven days.

40. That the legal security service make its services available to the young delinquents brought before the Social Welfare Courts.

41. That particularly at the outset, the decisions to represent the needy in courts of appeal be approved by the Director or the assistant Director of the legal security service.

42. That in the case of refusal of assistance by the legal security, the individual has the right of recourse to the Quebec Ombudsman whose powers will consequently be increased. Provision should also be made for appeal to the Ombudsman against decisions of the legal security service demanding full or partial contribution from the individual involved.

43. That the legal security service carry out the decisions of the Ombudsman.

44. That every summons addressed to citizens make known the existence, and all the functions, of the legal security service.

45. That all the police stations and houses of detention post notices prominantly and in many places, giving the fullest information regarding the legal security service, and the advantages which it makes available. That every detained person be given a copy of this information, and also of the charge against him.

46. That the police forces make it as easy as possible for the permanent public defenders to be able to contact the accused persons who are not being helped by a lawyer, and are deprived of their liberty.

47. That the legal security service and each of its regional bureaus, establish and maintain close regular contact with all the other agents engaged in social work and community action, so that the public defender is :

a) integrated into the social action groups ;

b) at the service, not only of the individual economically deprived, but also of the less favoured groups.

48. That the legal security service establish its administrative and reception offices so that the poorer citizens may have easy and constant access to them.

49. That the legal security service visualize at the outset the necessity of making their services available in accordance with the habits and timetables of the less favoured citizens whom they will be endeavouring to help.

50. That the legal security service establish its offices close to the court-houses, but not in them.

51. That the legal personnel of the legal security service make known the juridical aspects of the problems of indigents, to those with whom they will have to work, whether they be the non legal personnel within the service, or the polyvalent teams engaged in the social animation of the less favoured milieu.

52. That the total or partial gratuity of the legal security services, cover the entire cost of the procedures, including the official stenographic transcripts. That this gratuity include, if required the cost of the services of interpreters or experts previously authorized by the Director of the service or his assistant.

53. That the financial sacrifices called for by the introduction of a legal system in Quebec, be reduced to the minimum by gradually simplifying the procedures and in particular, reducing progressively the use of court stenography and the transcription of evidence. In the

near future, electronic tape recorders should be used for recording depositions.

54. That the Advisory Council of the Administration of Justice, reorganized along the lines of the Superior Council of Education, and given a permanent personnel, should make an evaluation every two years of the work accomplished by the legal security service.

55. That the Advisory Council of the Administration of Justice send to the Lieutenant-Governor in Council every two years, their written comments on the work accomplished by the legal security service, and that the public may after a brief statutory delay, be informed of this evaluation.

56. That there be a provision in the law prohibiting any discrimination at every step in the judicial process, i. e. any discrimination, exclusion or preference based on race, colour, sex, religion, ethnic or social origin, which would have the effect of destroying or changing the equality of rights or treatment in criminal and penal matters.

QUEBEC, February 6, 1969.

President

Commissioner

Commissioner

Secretary

APPENDICES

APPENDICES

All the appendices from 1 to 32 will be found in the French volume, a copy of which can be secured from the Quebec official Publisher. The Report of Mr. J.T. Loranger which covers ten years of activities of the Legal Aid Bureau of the Bar of Montreal will be found in its original French text in the Annex which forms part of this report. A copy of this can also be secured from the Quebec official Publisher.

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