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Legal Aid Systems Compared
A Comparative Research into Three Legal Aid Systems

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Summary

1. Introduction

According to Article 6 of the European Convention on Human Rights and Fundamental Freedoms, each European state has the obligation to ensure its citizens an actual access to justice. In particular, access to justice must be guaranteed for citizens who are depending on social benefits or who have low incomes otherwise. However, the way the states want to organize access to justice is left to their own discretion. Therefore, we can find various ways of guaranteeing legal protection in European countries.

This research looks into the legal aid systems of three European countries. We have selected legal aid systems that differ from the Dutch legal aid scheme. More specific, we have examined the Swedish ‘insurance’-system, the German ‘loan’-system and the ‘contribution’-system in the United Kingdom.

Our main research question is: *‘how are the legal aid schemes of Sweden, Germany and the United Kingdom, organized?’*

This research intends to support the development of the Dutch legal aid system in the medium long term. Therefore, the results do not see to the current review of the Dutch legal aid system.

2. Three legal aid systems examined

The legal aid systems of Sweden, Germany and the United Kingdom (England and Wales) are our main research subjects. Also, we briefly have a look at variations on these schemes, which can be found in Finland, Northern Ireland and Scotland.

A. Sweden: Legal Expenses Insurance

The most important characteristic of the ‘insurance’-system is the government’s principal choice for the primary role for private legal aid insurances. Since the 1996 review of the Legal Aid Act (*Rättshjälpslagen 1996:1619*), the Swedish citizens can no longer depend on publicly funded legal aid. Instead, they are obliged to take out a private legal expenses insurance policy (LEI). There are only a few exceptions to this obligation.

Nevertheless, actually 97 % of the Swedish population has a legal expenses insurance policy, which means an almost complete coverage of LEI. This can be explained by the historical background: since the sixties of the last century, legal expenses are – for free - included in insurance policies which are often taken out

by families. Because of this specific background, the Swedish scheme cannot easily be implemented in the Dutch context.

The expenditure for public legal aid has dramatically decreased since the legal aid reform; meanwhile the insurer's expenditure did not increase much. Two explanations can be found. Firstly, publicly funded legal aid is no longer available in family law cases (including divorce), nor does the LEI policy cover family law. Instead, the Swedish government offers a free alternative to people who want to separate: 'cooperation talks'. Secondly, in the new Legal Aid Act it is compulsory to seek legal advice before an application for public legal aid will be granted. However, neither the government, nor the LEI policy is funding the costs of this mandatory advice.

The 1996 review did only affect the publicly funded *civil* legal aid. Other forms of public legal aid, like the Public Defense Counsel and the Assigned Counsel for Children, were left out of the reform.

B. Germany: legal aid contribution by way of a 'loan'

In Germany, an applicant who qualifies for legal aid has to make a contribution according to a sliding scale. The contributions are designed as a loan. When the applicant's financial circumstances allow a contribution, he has to re-pay the legal aid by monthly installments (the '*Ratenzahlung*'), to a maximum of 48 months.

Two national laws regulate the legal aid system: the *Beratungshilfegesetz* for legal advice and the *Gesetz über Prozesskostenhilfe*, which is incorporated in the civil procedure law (*Zivilprozessordnung*), for civil legal aid for court proceedings. However, this is the only involvement in the legal aid system on a national state level. The sixteen federal states (*Bundesländer*) are exclusively responsible for their own legal aid policy and for the way they fund and organize the system. In practice, the courts are accountable for the organization, execution and administration of the legal aid scheme, including the collection of the contributions. The judges themselves deal with all applications. They do not only have to decide on the legal merits of the case, they also have to carry out the means test and, if the applicant is eligible, they have to decide whether he has to pay a contribution.

During our research, we experienced difficulties in collection relevant data and statistics on the German legal aid system. This is due to the fact that there is not 'one' national legal aid system in Germany, but sixteen. The federal states are strictly autonomous in policymaking. Moreover, there are over eighty legal aid budgets in Germany, and on top of that, the budgets are not all administered by the Department of Justice, but also by other ministries, e.g. the Financial Department and the Labour Department. Neither the Department of Justice of the

federal states, nor the national Department of Justice could provide us with precise information.

However, with help from literature and the data we did receive, we could estimate the German expenditure for legal aid. Compared with the other two legal aid systems, the overall costs for legal aid in Germany can be considered as low. This cannot be explained by the re-paid contributions, because only 15 percent of the applicants actually have to re-pay the legal aid. A probable explanation can be found in the high coverage of private legal expenses insurance in Germany. Also the way lawyers are paid – a statutory and binding scale of lawyer's fees – has very likely an influence on the expenditure.

C. United Kingdom: contribution system

In England and Wales, a reform of the legal aid system took place in 2000, when the Legal Aid Act 1988 was replaced by new regulations in the Access to Justice Act 1999. In the current legal aid scheme, applicants have to pay a contribution when legal aid is granted. However, the new scheme has more eye-catching marks.

First of all, a new executive body, the Legal Services Commission (LSC), is responsible for the development and administration of both the civil and criminal legal aid schemes. In cooperation with local authorities and legal aid suppliers, local networks ('partnerships') are established. This Community Legal Service provide for various kinds of advice, legal help and representation. However, only the partnership members who received the LSC 'Quality Mark' are qualified to offer legal aid. This quality standard assures citizens best value services. The Criminal Defence Service provides services to people who are accused of crimes.

A second important feature of the new scheme is the use of contracts. Only the suppliers of legal aid who have contracted with the LSC are funded for legal aid work. With contracting, the LSC can secure the provision of competent, best value work by private legal aid suppliers.

Thirdly, the civil legal aid scheme also provides for ADR, especially in family cases. For instance, in family matters, first family mediation will be offered.

Finally, some fields of law are no longer publicly funded by the LSC. However, in these cases alternative arrangements are available. Personal injury claims for instance can be pursued under 'conditional-fee agreements' between lawyers and clients.

The spearheads of the LSC policy are closely allied with the priorities and the actual need of citizens. Yet, because of its comprehensive nature, the English legal aid system is expensive.

3. Trends and findings

1. *A secondary role for publicly funded legal aid in the near future?*

In Sweden and the United Kingdom, citizens first have to use alternative financial sources before they can apply for publicly funded legal aid. In some cases, public legal aid is no longer available. The mandatory use of legal expenses insurances and the exclusion of some field of law indicate to a more secondary role for the publicly funded legal aid systems in the near future.

2. *Remarkable differences in expenditure per capita.*

The public expenditure for legal aid in Germany is low: €4 per capita. However, this does not include criminal legal aid. Sweden, with an expenditure of €10 per capita, takes a moderate position, especially when compared to the United Kingdom, where the costs for legal aid amount to €34 per capita. The Dutch overall expenditure - €20 per capita – can be considered as average.

3. *Possible positive effect of statutory binding fees.*

The way German lawyers are paid may have a positive effect on the expenditure for legal aid. Costs are more predictable and the bills for citizens and government might be less high.

4. *More variation in legal aid services.*

The schemes we have examined offer a broad range of legal services. Legal aid seems no longer to be limited to legal aid in a strict sense, but includes other alternatives like mediation.

5. *Increasing differentiation in legal aid in relation to field of law.*

Criminal legal aid shall remain funded by public means. Civil legal aid however, will increasingly be funded by legal expenses insurances and alternative agreements between lawyers and clients, like ‘no cure no pay’ and conditional-fee arrangements. Another differentiation will probably occur in the area of family law, where an increasing role for ADR can be expected.

6. *Conclusion*

None of the examined systems can easily be implemented in the Netherlands. The Swedish ‘insurance’-system can only be understood by taking its historical background into account. In Germany, due to the fact that there is no uniformity between the sixteen legal aid systems, we could not find an effectively working example of the ‘loan’-system. The legal aid scheme in the United Kingdom looks like the Dutch system, but offers a broader range of legal services. On the other hand, the English system is far more expensive, compared to the Dutch and other

foreign systems. The trends we have spotted do provide us with useful directions for the improvement of legal aid services and show us ways to a better cost control.