

# Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?

## Executive Summary

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*“Article 6 ECHR guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme constitutes one of those means but there are others such as, for example, a simplification of procedure.” (ECHR Airey v. Ireland, 1979)*

# Executive Summary

## Aim of this research

The research institute of the Dutch Ministry of Security and Justice (WODC) commissioned comparative research about legal aid in nine countries: France, Germany, Belgium, England & Wales, Scotland, Ireland, Poland, the Netherlands and Finland. This report addresses two questions: 1) How are state-financed legal aid systems organised in these countries? 2) Which minimum requirements for state-financed legal aid can be deduced from the European Convention of Human Rights (ECHR) and from case law of the European Court of Human Rights (ECtHR)?

## Methodology

Data collection was done by desk research based on a questionnaire, which was validated by the board of advisors for this research established by the WODC and to key members of the International Legal Aid Group. Reports available on the internet were used from all countries in native languages. Interviews were conducted with national experts from legal aid boards (Netherlands, Finland, Germany, Belgium, Ireland) or from academia (Belgium, Germany, Poland). These specialists also verified information collected through desk research. For France, Scotland and England & Wales, recent reports and public sources provided sufficient information.

## Organisation, expenditure and services

England & Wales, Scotland, Ireland, Finland and the Netherlands have centralised legal aid systems. France, Germany, Belgium and Poland have more decentralised systems. Scotland, Ireland and the Netherlands have independent legal aid boards. In France and Belgium legal aid councils situated at the courts decide on legal aid entitlements. In Germany and Poland the courts decide. The costs of legal aid systems are born by the central government, except in Germany where the 16 *Länder*/States are responsible for the costs.

We found large variations in expenditure, and even higher variability in expenditures for specific problems. Legal aid expenditure per capita is highest in England & Wales (€39), followed by Scotland, the Netherlands (€29), Ireland, Finland, Belgium, Germany (€7), France and Poland (€ 0,6). France and Belgium have closed budgets (and Ireland for civil legal aid). All other countries have mostly open ended budgets. Criminal law takes up to 50% of the legal aid budget in many countries. In some countries, complex criminal cases are still paid by the hour, and not by way of fixed fee. This is usually connected to high levels of expenditure for such cases. For family law, England & Wales spends 15 times as much per capita in 2012 than Belgium. Differences in the complexity of procedures may be the explanation. These, and other data, suggest that there may be huge gains available from zooming in on the supply chain around common and frequent legal problems.

Legal aid is typically available for all areas of law relevant for individuals. All countries apply financial and merits criteria for legal aid eligibility. Recently, England & Wales has excluded entire areas of law such as divorce, personal injury, clinical negligence, employment and housing, but offers (tribunal) procedures for some of these areas that are more easy to navigate without a lawyer.

There is typically a broad range of state-subsidised services for information and advice. All countries have many other sources of legal information and advice outside the 'public' legal aid system. For negotiation and interaction with the other party, there tend to be (subsided) services from lawyers and from mediators (low usage). Procedural assistance by a lawyer during litigation at courts and tribunals is available everywhere.

In France, Germany, England & Wales, Scotland and Finland, it is obligatory to use other means of legal

assistance before receiving legal aid. Legal expenses insurances are most prominent in Germany, followed by the Netherlands, Belgium, France, Finland and Poland.

There are no data which allow comparison between countries as to the quality of legal assistance. Comparative data on the quality of (access to) justice suggest that Germany and Finland achieve the same quality as England & Wales for a fraction of spending. Belgium and France may have to step up their access to justice efforts. Their access to justice can be improved whereas they spend little on legal aid.

### **Minimum requirements of Article 6 of the European Convention of Human Rights**

Legal aid is only one way to guarantee access to justice. The ECtHR is open to alternatives, such as simplification of procedures. Methods to achieve this include help by social workers, paralegals, court forms, court directions and guidance from judges during the procedure. When the procedures mandates representation from a lawyer, a lawyer must be made available by the state (if the applicant cannot afford one and the case has sufficient merit).

In civil proceedings, the right to legal aid is not absolute and may be subject to legitimate and proportional limitations. Determining factors are the interests at stake, the complexity of the procedures, complicated issues of law and fact, and the emotional involvement of the applicant. Categorical exclusion of civil justice problems is allowed, if self-representation is a realistic option.

Legal aid has to be provided when a defendant faces incarceration. Determining factors are the seriousness of the offence, the severity of the expected sentence and the complexity of the case. Access to assistance by a lawyer must be guaranteed before and during police station interrogations.

### **International trends in legal aid reform**

All countries in this research are working on legal aid reform. Most changes are incremental and oriented on cost savings, not improving the quality of access to justice. Countries are introducing tighter eligibility criteria. A clear trend in reforms is to make litigants pay higher contributions. Except Scotland, the countries studied appear to have difficulties in formulating a broader access to justice strategy.

The following nine variables may have a (major) positive impact on costs and/or quality: 1) Reducing complexity of procedural routings for problem categories; 2) Further developing specialised procedures for frequent and urgent problems; 3) Services integrating legal analysis with other disciplines; 4) Reducing the services that are a monopoly of the legal profession; 5) Improving legal information/advice; 6) Fixed fees instead of hourly fees for legal aid lawyers; 7) Fixed fees on the market for legal services; 8) Closed budget; 9) Rates paid to lawyers.

Five variables seem to have little impact on budgets, and varying impacts on quality: 1) Availability of legal expenses insurance; 2) Preventing justiciable problems; 3) Mediation; 4) Raising own contributions and income level for eligibility; 5) Recovering legal aid money from applicants, defendants or other funding sources.

Variables with uncertain impact on costs and quality that deserve further study are: 1) Products and incentives for negotiation and settlement; 2) Reducing the types of problems for which legal aid is available.

In conclusion, the procedural setting and the availability of legal services on the market are among the main variables that policy makers can influence in order to guarantee access to justice. The data in this report, and the examples set by neighbouring countries, suggest how systems can be innovated in a more substantial and holistic way by improving the interaction with other elements of the justice system so that access to justice becomes less costly for citizens and governments, and leads to better outcomes for citizens.

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