

The importance of structure and context in legal aid comparisons – a study in North-West Europe

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Abstract

The legal and administrative structures of legal aid provision are fundamental to its functioning. In examining cost and affordability, it is therefore useful to look beyond individual examples of good practice projects to the basic construction of the legal aid scheme in a jurisdiction. The architecture is provided by the public and administrative law elements of legal aid which vary substantially, as shown by a recent large-scale comparison of nine jurisdictions in North-West Europe (the Nordic countries, the UK jurisdictions and the Republic of Ireland). The research considered the legal foundation for civil and criminal legal aid, in particular the decision-making and appeals structures, scope and merits tests, and found that these vary radically between jurisdictions, including between jurisdictions where similarities might be expected, such as Finland and Sweden. Surprising similarities were also found, such as those between Norway and England & Wales, and Finland and the Republic of Ireland. The large scale of the examination enabled a search for patterns and revealed links between policy and practice, outlined in this paper, which are less evident in smaller comparative studies.

The presence of many structural variables which interact in complex ways has an important consequence for inter-jurisdictional learning; great care must be taken when attempting to transfer elements of legal aid provision between systems. The paper concludes with a proposed framework for the analysis of legal aid systems, to enable systematic evaluation and meaningful comparison between jurisdictions. Use of such a framework can improve the prospects of successful borrowing of ideas by enhancing the understanding of both familiar and unfamiliar legal aid schemes.

1. Introduction

Legal aid schemes are, in many countries, a funding battleground. Governments commonly insist on expenditure remaining steady or decreasing, whilst the legal profession and consumer groups call for more resources. Some argue that the public purse cannot afford to pay for legal aid, others that the opposite is true and that the wider public savings from ensuring that individuals have proper assistance with legal matters mean that society can't afford not to fund legal aid.² All sides of the debate seek new delivery methods which could increase the amount of assistance provided for a given budget.

Questions of cost and affordability are, thus, central to discussions of legal aid and give rise to two major types of comparison between jurisdictions. Firstly, macro

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² Law Society of Scotland, *Social Return on Investment in Legal Aid*, Edinburgh, Law Society of Scotland, 2017.

comparisons of cost take place when the overall legal aid spend of two or more jurisdictions are considered and contrasted. Usually, the results of such comparisons are used to suggest that the country or countries spending more could reduce the costs of their legal aid scheme.³ Secondly, micro comparisons occur, with particular elements of a legal aid scheme, often innovative or unusual delivery methods, being held up as a useful model for other countries to learn from. These examples are sometimes then proposed as suitable alternatives to current provision in the second state⁴ and on occasion adapted in that legal aid scheme.⁵

These types of comparison can be useful but, it is submitted, provide limited opportunity for genuine improvement in cost effectiveness of legal aid, because of the unique complexity of each justice system. Greater advantage can be found from deeper analysis of legal aid schemes and their legal and cultural context, in a way which enables 'a strong measure of objective neutrality and critical self-assessment'.⁶ Without such understanding of the complexity of one's own, and other, systems, individual examples of good practice may be little more than a distraction.

Such a comparison of the Nordic countries, the Republic of Ireland and the jurisdictions of the UK⁷ has recently been completed at Åbo Akademi University in Finland. The unusually large number of comparators enables an appreciation of the intricate variation to be found between legal aid systems; even in very similar, neighbouring legal systems such as Finland and Sweden, the machinery of legal aid varies considerably. The extent of the differences in legal aid schemes is often overlooked when comparative assessments of cost and affordability are made, with the result that the usefulness of other models can easily be overstated.

This paper proposes a new understanding of a legal aid scheme as a complex web of interacting factors, which may be incapable of change without ramifications for other elements of the structure. In order to make meaningful comparisons between jurisdictions, and to be able to successfully borrow ideas from other legal aid schemes, it is necessary to establish a method of analysis which can be consistently applied to these very different systems. Such a tool will be presented at the end of this paper, in the form of a framework for the mapping and analysis of legal aid schemes and their contexts.

³ See e.g. in Norway, St.meld. nr. 26 (2008-2009) *Om offentleg retts hjelp — Rett hjelp*, 17 April 2009, para. 2.5.1, and in England & Wales, Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, Consultation Paper CP12/10, November 2010.

⁴ E.g. Johnsen, Jon T., *Might Norway learn from Finnish legal aid? A comparison of legal aid in Norway and Finland*, Summary Report, International Legal Aid Group Conference, Wellington, 2009.

⁵ In Northern Ireland, the introduction of standard legal aid fees for guilty pleas following a review comparing the situation with England & Wales. Department of Justice Northern Ireland, *Access to Justice Review Northern Ireland: The Report*, 2011. Available at <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/access-to-justice-review-final-report.pdf>.

⁶ De Cruz, Peter, *Comparative law in a changing world* (3rd edition), 2008, p. 18.

⁷ Barlow, Anna, *The Machinery of Legal Aid: A critical comparison, from a public law perspective, of the United Kingdom, the Republic of Ireland and the Nordic countries*, Åbo Akademi Press, 2019, available at <https://www.doria.fi/handle/10024/168020>.

Firstly, though, the paper will summarise some key differences between the criminal and civil legal aid schemes in the nine jurisdictions of North-west Europe considered in the Åbo Akademi University study. This overview is intended to both illustrate the extent of variation which might be found when comparing legal aid schemes, and to encourage the reader to question aspects of their 'home' system which might, without the benefit of comparative information, appear self-evident and which might therefore be overlooked in policy discussion.

In this paper, a narrow definition of legal aid is used: the provision by the state of legal help and representation by lawyers, either through the provision of state employed lawyers or by paying for private lawyers. Other studies of legal aid have taken a wider definition and include the assistance provided through insurance and by volunteer advice services;⁸ however, the Åbo Akademi University study drawn on here is focused on instances where three criteria are met: assistance is provided by lawyers; those lawyers are paid for their work; and payment is by the state (albeit potentially with client contributions). Whilst in the Nordic countries publicly funded legal assistance for criminal defendants is not called 'legal aid', their public defence schemes are included in the comparison.

2. Variation of legal aid schemes in the Nordic countries, the UK and the Republic of Ireland

2.1. Criminal assistance

All the Nordic jurisdictions offer public defence attorney schemes, administered by the court, to provide state-paid assistance to defendants in cases considered sufficiently serious. There is no means-testing for the services of such an attorney, but defendants who are subsequently convicted may be required to repay a proportion of the costs incurred. Provision for legal assistance at the police station, required for compliance with the European Convention of Human Rights, is also made through the public defence attorney schemes. Appeals against refusals of a public defence attorney can be made to the relevant higher court.

The public defender services in the Nordic jurisdictions are provided almost entirely by private practitioners rather than a cohort of state-employed public defence lawyers. The only exception is in Finland, where a public legal aid attorney may be appointed as the public defender; however, private practitioners can also be so appointed, and the choice of lawyer is for the defendant. Elsewhere in the world, for example Philadelphia and New South Wales, public defender schemes are operated by salaried lawyers and this characteristic of employing full-time lawyers is sometimes taken as part of the definition of a public defender system.⁹ However, the Nordic approach shows that this is a false assumption: criminal defence assistance in those countries is described as public defender schemes, administered separately from legal

⁸ E.g. Halvorsen Rønning, Olaf and Hammerslev, Ole (eds.) *Outsourcing Legal Aid in the Nordic Welfare States*, Open Access, 2018.

⁹ See e.g. Republic of Ireland Criminal Legal Aid Review Committee First Report 1999, p. 9.

aid, and the schemes share characteristics which are absent from criminal legal aid schemes, in particular, a lack of means testing.

The alternative model for state funding of criminal defence is that of legal aid, which is the only comprehensive source of state funding for criminal defence in the jurisdictions of the UK and in the Republic of Ireland. Unique among the jurisdictions considered is Finland, where despite the existence of a public defence attorney scheme, a person charged with a criminal offence may instead choose to apply for legal aid for representation. If legal aid is the chosen course, in Finland, initial decision-making is in the hands of the lawyers in the State Legal Aid Offices, rather than in the hands of the court as is the case for the appointment of a public defender. Refusals of legal aid can be submitted to court for 'reconsideration'¹⁰ in a specific process outside the normal appeal process for administrative decisions. Legal aid reconsideration decisions made by courts can be appealed in line with the usual routes for appeals of decisions.¹¹

Although the majority of criminal legal aid work in Scotland is carried out by private practitioners, there is also a limited government-employed service which contributes to provision. The Public Defence Solicitors' Office was established as a pilot in 1998; following positive evaluation,¹² the office was maintained and expanded to seven offices. The intention is that the PDSO should meet unmet need in some geographical areas but also to try to keep costs down in some areas where there is sufficient supply. PDSOs also enable the government to have a window into how legal aid and the justice system are working. In England & Wales, there is also a small employed Public Defender Service with four local offices, set up to provide comparative information on the costs and performance of such a service and not intended to cover any significant proportion of criminal defence work.¹³ These schemes represent a very small minority of criminal defendants; the vast majority are assisted through criminal legal aid. In Northern Ireland and the Republic of Ireland, there is no public defence attorney scheme at all.

Criminal legal aid is thus the only or main option for those seeking publicly-funded legal assistance when arrested or charged with a criminal offence in the UK and Republic of Ireland. In England & Wales and in Scotland, criminal legal aid is administered by the relevant legal aid authority which also oversees civil legal aid. However, in Northern Ireland, the courts administer criminal legal aid, with the Legal Services Agency only responsible for administering civil legal aid. Likewise, in the Republic of Ireland, the legal aid schemes for civil and criminal matters are very different. The Legal Aid Board administers and pays for the Garda (Police) Station Legal Advice Scheme which provides advice to those who have a legal right to be

¹⁰ Rättshjälpslag, 2002, 11 §, para. 1 and 24 §.

¹¹ Rättshjälpslag, 2002, 26 §.

¹² Goriely, Tamara; McCrone, Paul; Duff, Peter; Knapp, Martin; Henry, Alistair; Tata, Cyrus; Lancaster, Becki and Sherr, Avrom, *The public defence solicitor's office: An independent evaluation*, Glasgow, Strathclyde University, 2001.

¹³ Ling, Vicky and Pugh, Simon (eds.) *Legal Aid Handbook 2017/18*, London, Legal Action Group, 2017, para. 18.41.

advised at a police station but whose means are insufficient to enable private payment for a solicitor.¹⁴ However, decisions on legal aid for criminal representation are made by the courts. Whilst, under the establishing legislation,¹⁵ criminal legal aid is administered by the Department of Justice and Equality, “the Department [...] has no involvement in the day to day running of the scheme, the granting of free legal aid or assignment of lawyers. These matters are handled entirely by the courts”.¹⁶ The judge conducting the first hearing of the case in question makes the decision on granting a legal aid certificate and will allocate a solicitor from the panel administered by the Department.

The appeal possibilities against refusal of criminal legal aid in the Republic of Ireland are very limited. Legislation expressly states that no appeal lies against a decision on an application for a legal aid certificate in the District Court¹⁷ and no provisions at all concerning appeal are present in relation to legal aid certificates for trial on indictment. However, for appeal certificates, case stated certificates and Supreme Court certificates, an applicant may renew his application to a higher court if the District Court refuses the certificate. Not only is there no general right of appeal for applicants, there is also no possibility for the Department of Justice and Equality to challenge legal aid decisions of the court, which reduces government control over criminal legal aid expenditure.

Once charges are brought in a criminal case in Northern Ireland, an application must be made to the Legal Services Agency for a legal aid certificate. Whilst there is statutory authority for regulations to be made allowing the Legal Services Agency to award and withdraw legal aid in criminal cases,¹⁸ no such regulations have been made and thus, decisions on grants of criminal legal aid are made by the courts, who assess both financial eligibility and merits. Appeals against refusals of legal aid for criminal representation are to be made “to such court or other person or body as may be prescribed”.¹⁹ However, no such prescription has been made and there is therefore no formal route for appeal against decisions.

In Scotland, the Scottish Legal Aid Board deals with all applications for legal aid: criminal, civil and children’s legal aid. The organisation of criminal legal aid is complex and includes several different categories of assistance. Criminal legal aid is automatically available to an accused person in certain situations, non-means tested and without application.²⁰ Automatic criminal legal aid provides, *inter alia*, non-means tested assistance whilst a person is in custody at a police station, whatever the gravity

¹⁴ For details of the scheme, see the online Garda Station Legal Advice Revised Scheme Provisions and Guidance Document 2014.

¹⁵ On the 1 April, under the Criminal Justice (Legal Aid) Act, 1962 (Commencement) Order.

¹⁶ Department of Justice and Equality website, accessed on 12 March 2018.

¹⁷ Criminal Justice (Legal Aid) Act, 1962 s. 2(2).

¹⁸ Access to Justice (Northern Ireland) Order 2003, s.27.

¹⁹ *Ibidem*, s. 28.

²⁰ Legal Aid (Scotland) Act 1986, s. 22.

of the offence. The processing of a guilty plea in summary (less serious) cases can also be covered by automatic legal aid if the other circumstances for such legal aid apply,²¹ or by a category of assistance called ABWOR (Assistance by Way of Representation).²² To defend an accused person at trial, full legal aid can be applied for and the Legal Aid Board will apply means and merits tests.²³ Appeals against refusals of criminal legal aid in Scotland are possible by way of an application for a review, which is considered internally by the Board.

In England & Wales, representation orders are the main method of funding criminal proceedings in the Magistrates' and Crown Courts. Applications for Representation Orders must be made to the Legal Aid Agency, which applies a financial eligibility test and an 'interests of justice' merits test. If funding is refused on application of the interests of justice test, a reconsideration by the Agency may be requested, with reasons, in writing.²⁴ If the result of this administrative review is still negative, the applicant can ask for an appeal to the court and a judge will consider whether the test is met.²⁵ There is no right to review or appeal of a refusal of criminal legal aid on grounds of financial ineligibility.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems address the issue of appeals and state that there should always be the possibility of a court overturning a refusal of criminal legal aid when the interests of justice so require.²⁶ Whilst the Nordic public defender schemes do comply, the criminal legal aid schemes described above do not meet this benchmark, other than in Finland and to a limited extent England & Wales. The Guidelines also make it clear that there should always be the possibility of appeal against refusal on the grounds of means,²⁷ an impossibility in the English & Welsh system as well as in Northern Ireland.

In all the jurisdictions studied, there are restrictions on the criminal cases for which publicly-funded assistance will be given. Complex combinations of factors constituting the merits test for criminal legal aid and for the appointment of a public defence attorney result in different emphases in the various jurisdictions. In particular, there are differences in how the severity of the potential penalty can trigger a right to publicly-funded legal assistance without the need for additional exacerbating factors. The likelihood of a custodial sentence, of any length, is a factor to be considered in England & Wales. However, this does not mean that legal aid will be granted for any prosecution of an offence which may result in imprisonment; court sentencing guidelines and the likelihood of imprisonment being ordered in that particular case are

²¹ Scottish Legal Aid Board *Criminal Legal Assistance Handbook* Part III para. 8.8.

²² *Ibidem*, para. 11.1.

²³ Legal Aid (Scotland) Act 1986.

²⁴ The Criminal Legal Aid (General) Regulations 2013, Regulation 27.

²⁵ *Ibidem*, Regulation 29 and 30.

²⁶ UNODC, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/RES/67/187, 2012, Guideline 1(e).

²⁷ *Ibidem*, Guideline 1(d).

the relevant factors.²⁸ Legal aid should not be automatically granted where imprisonment is only a theoretical possibility, but regard must be had to the specific facts alleged in the case. This approach of considering the likelihood of a custodial sentence in that particular case is echoed in Scotland, Northern Ireland and the Republic of Ireland. However, in all four jurisdictions it is the likelihood of a custodial sentence of any length which is in issue. All the legal aid schemes, including the Finnish, count the likelihood of imprisonment, of any length, as one factor to be considered but leave open the possibility that other factors might make legal aid unnecessary in the interests of justice even if imprisonment is likely.

Conversely, all the public defender schemes except Norway and Denmark fix a level of potential imprisonment for the offence in question (rather than for that defendant in particular) which will automatically lead to entitlement to public defence counsel whatever the surrounding circumstances. Denmark's public defender system shares the characteristic with the legal aid schemes that it is the likely penalty in the particular case which is relevant, but unlike those schemes, if imprisonment of any length is likely a public defender must be appointed however able the defendant might be to achieve a fair trial without representation. In Norway, the general presumption is that counsel will be provided during time in police custody or pre-trial detention and at the main hearing, regardless of the severity of the offence or the characteristics of the defendant,²⁹ although in the District Court, defence counsel is not required for some road traffic offences, cases concerning only confiscation and optional penalty writs.³⁰

2.2. Civil legal aid decisions and appeals

The Åbo Akademi University research identified private lawyers, government agencies and courts as the three groups of first-instance decision-makers in civil legal aid and found that these groups were used in different configurations in the jurisdictions. In particular, it was found that the extent to which courts make legal aid decisions varies dramatically. There is also great diversity in legal aid appeal and oversight processes, with consequences in particular for the independence of the review. Independence is important to protect against arbitrariness by minimising possible inadvertent bias arising from vested interests affecting the outcome of legal aid applications.

With the exception of Iceland, all the civil legal aid systems under consideration provide or contribute to the costs of advice as well as casework and representation in court. Generally, the decision to grant a particular client advice level assistance under legal aid is taken by the lawyer who has been approached for help, who applies financial eligibility, scope and/or merits tests. In all the jurisdictions other than Finland and the Republic of Ireland, this initial publicly-funded assistance is from a private practitioner, who in most cases is authorised to grant legal aid at the advice stage and

²⁸ Legal Aid Agency, *Guidance on the Consideration of Defence Representation Order Applications*, p. 5.

²⁹ *Straffeprosessloven*, 1981, § 94.

³⁰ *Ibidem*, § 96.

sometimes also for assistance with court hearings (although never formal representation).

The Finnish system places initial legal aid decision-making in the hands of the lawyers in the State Legal Aid Offices in both civil and criminal cases, and in advice as well as representation situations. Legal aid advice work must be initiated at the Legal Aid Office, although it can be referred out to private solicitors in certain limited circumstances; representation cases may originate by a client going to see a Legal Aid Office or a private lawyer but in the latter case an application for legal aid will be made to the Ministry of Justice and decided by a Legal Aid Office. However the client makes first contact, and whoever will be dealing with the case, all legal aid grants are made by the State Legal Aid Offices.³¹

Likewise, in the Republic of Ireland, civil legal aid claims are assessed by the public offices which also deliver most legal aid services; in this case the Legal Aid Board. Unlike in Finland, however, the Irish Legal Aid Board operates two separate arms: a Head Office which deals with policy, administration, grants of legal aid certificates and payments under civil legal aid, and a network of Law Centres which deliver most of the services funded under legal aid. Under the provisions of the relevant secondary legislation, legal aid certificates are to be granted by the Board.³² Many decisions on the grant of legal aid are made by the Head Office, but some are within the remit of Law Centres, which have delegated authority to: grant legal advice given by a law centre solicitor;³³ refuse legal aid for any case on financial grounds;³⁴ grant legal aid for clients who will be represented by a Law Centre solicitor in certain family cases commencing before the District Court³⁵ and to decide applications for legal aid where the client will be represented by a private solicitor (in some family, asylum, housing and inquest cases this may be pertinent).³⁶ Within the Law Centres, the responsibility for such decisions rests with the Managing Solicitor, resulting in a situation which, for these cases, is very similar to that in Finland.

All three jurisdictions within the UK have public bodies which take responsibility for all decisions of legal aid grant or refusal for representation (as opposed to advice) in civil cases.³⁷ The precise nature of the bodies varies: in England & Wales, the Legal Aid Agency is an executive agency of the Ministry of Justice; the Northern Ireland Legal Services Agency is an executive agency of the Department of Justice; and the Scottish Legal Aid Board is slightly further removed from government, being an executive non-departmental public body of the Scottish Government. Despite these

³¹ Rättshjälpslag, 2002, 11 §, para. 1.

³² Civil Legal Aid Regulations 1996, Regulation 5(2).

³³ Legal Aid Board Circular on Legal Services 2017, Part 2, p. 2-3.

³⁴ *Ibidem*, Part 3, p. 3-2.

³⁵ *Ibidem*, Part 3, p. 3-3. Cases under the Guardianship of Infants Act 1964, Family Law (Maintenance of Spouses and Children Act) 1976, or Domestic Violence Act 1996 where the proceedings will be taken in the District Court or on appeal to the Circuit Court.

³⁶ *Ibidem*, Part 3, p. 3-4.

³⁷ There is a minor exception in respect of delegated power to solicitors to grant emergency legal aid in England & Wales.

differences, it can be seen that in the UK jurisdictions the legal aid bodies are public bodies within or closely tied to government. In all of the jurisdictions, these agencies make (*inter alia*) all decisions on civil legal aid for representation.

A very different approach is taken in Iceland, where legal aid is decided by a committee set up by the Ministry of the Interior, composed entirely of lawyers. The chairman is appointed freely by the Minister; one of the other two members is nominated by the Association of Judges and the other by the Bar Association.³⁸ Applications for legal aid are forwarded directly to the Legal Aid Committee, which decides financial eligibility and applies the scope and merits tests. The Committee return their decision to the Minister, who then grants or refuses legal aid. Whilst in theory the Minister can refuse legal aid even if the Committee recommends a grant, this has never happened in practice. This system has similarities with Finland and the Republic of Ireland in that legal aid decisions are made by lawyers working under the auspices of government. However, unlike in those jurisdictions, the Committee in Iceland is not also employed by the state to carry out legally-aided casework.

In Denmark, Norway and Sweden, civil legal aid decision-making is shared between government agencies and the courts. Uniquely in the jurisdictions within this study, Norway places the role within regional, rather than central, government. The lead governmental body in civil legal aid in Norway is the Civil Affairs Authority, a subordinate agency of the Ministry of Justice and Public Security, which is responsible for policy and makes recommendations to the Ministry of Justice on, for example, legislative changes. However, it does not have a decision-making role itself but acts as a support to the decision-makers, who are the courts and the County Governors' offices. The Danish legal aid system is organised such that decisions on applications for help with legal representation are decided in some types of case by the court and in some types centrally by government,³⁹ formally by the Minister of Justice.⁴⁰ In practice, decisions are made by the Legal Aid Office within the Department of Civil Affairs. In Sweden, most cases are decided by the courts. The Legal Aid Authority, a relatively small department, decides only applications for legal aid in cases which will not involve court proceedings. The Legal Aid Authority does not have any policy role or any budgetary responsibility, although all grants of legal aid, changes to legal aid certificates and taxations of bills are reported to the Authority for collation and analysis.⁴¹

As referred to above, Sweden, Denmark and Norway all rely heavily on courts for assessing applications for civil legal aid, in addition to the public bodies which make decisions on some types of application. The strongest reliance on courts as legal aid

³⁸ Lög um meðferð einkamála, 1991, Chapter 5, Article 125.

³⁹ Retsplejeloven, 2017, § 327(1), (2), (3) & (5).

⁴⁰ *Ibidem*, § 328(5).

⁴¹ DVFS 2012:15 Domstolsverkets föreskrifter om rättshjälp, §§ 17 & 18. Refusals of legal aid are not so reported, leading to a gap in the information available to the Legal Aid Authority.

decision-makers is in Sweden, where an application for legal aid in most civil cases will be made to the court which is or will be dealing with the substantive case.⁴²

In Denmark, the types of cases for which legal aid will be dealt with by the courts are prescribed in legislation,⁴³ although the categorisation is not always clear and in some types of matter such as child custody cases it can be difficult to judge whether the matter is to be decided by the court or not. The court is responsible for decisions in cases where there is a presumption in favour of legal aid and consequently, the merits assessment is minimal. This is seen as an important factor to ensure that courts are not involved in any pre-judging of merits. In cases where there is no such presumption, decisions are made by the Minister of Justice, as seen above.

A similar approach can be found in Norway, where civil legal aid decisions made by the courts are those where legal aid is automatic or where the lower threshold of 'not unreasonable' applies. The structure of the Norwegian civil legal aid scheme is such that the handling of the application is significantly affected by the nature of the case. The Legal Aid Act divides cases into priority non-means tested, priority means-tested and non-priority types, for both free legal advice⁴⁴ and free legal aid.⁴⁵ Free legal representation in the Supreme Court is always decided by that court and is not subject to a means test,⁴⁶ but other courts can only grant free legal representation in non-means tested priority cases⁴⁷ and also, by delegated authority, in means tested priority cases.⁴⁸ Other cases, which have a more involved merits test, are decided by the Norwegian regional government authorities (see above). No civil legal aid decision-making is undertaken by courts in Iceland, Finland, the Republic of Ireland, Scotland, Northern Ireland or England & Wales.

Oversight mechanisms are available for initial civil legal aid decisions in the jurisdictions considered. These vary according to the nature of the first instance decision-maker. In most situations where an initial decision to grant or refuse legal aid is made by a court, refusal of legal aid can be appealed to a higher court. The applicable instances are in Sweden, Norway and Denmark. Despite the different remits, in all three jurisdictions appeals against court decisions on civil legal aid are appealable to the relevant higher court.⁴⁹

In a small group of situations, legal aid decisions made by civil servants can also be appealed to court. The most straightforward example of this is Finland. Refusals of

⁴² Rättshjälpslag, 1996, 39 §.

⁴³ Retsplejeloven, 2017, § 327(1), (2), (3) & (5).

⁴⁴ Rettshjelploven, 1980, § 11.

⁴⁵ *Ibidem*, § 16.

⁴⁶ *Ibidem*, § 18.

⁴⁷ *Ibidem*, § 19.

⁴⁸ FOR-2005-12-12-1443 Forskrift til lov om fri rettshjelp, § 4-1.

⁴⁹ Rättshjälpslag, 1996, 43 § (Sweden); Rettshjelploven, 1980, § 27 (Norway); Retsplejeloven, 2017, § 327 (Denmark) specifies that refusals of legal aid are orders of the court, and thus appealable according to the two-tier principle. It is unclear from Danish praxis whether leave to appeal such refusals is required or not.

legal aid can be submitted to court for ‘reconsideration’⁵⁰ in a specific process outside the normal appeal process for administrative decisions. Within the jurisdictions under consideration, this is the only general right of appeal to court from administrative legal aid decisions. Elsewhere, the possibility is very limited. In Sweden, in immigration cases, Public Attorneys are appointed by the Migration Agency,⁵¹ which also processes immigration and asylum applications and from which appeals can be made to the Immigration Courts,⁵² which are specialist Administrative Courts. Scotland permits an appeal to court against a refusal of legal aid to conduct proceedings against the Scottish Legal Aid Board; such refusals can be appealed to the sheriff, who can overrule the Board and order a grant of legal aid.⁵³ The result is a grant of legal aid to cover the costs of applying for a judicial review to overturn the Board’s decision to refuse legal aid for the original case which led the client to seek legal aid. This is clearly a very specific set of circumstances and does not provide a general right to appeal to court against the refusal of legal aid.

The most usual types of oversight of legal aid decisions made by civil servants are non-judicial. However, these vary considerably in nature; some are completely independent from the original decision-making body and quasi-judicial; others are internal to the original authority. One of the most independent is in Denmark, where as seen above, legal aid applications which are not legislatively allocated to the court are to be decided by the Minister of Justice;⁵⁴ in practice the Legal Aid Office within the Department of Civil Affairs. Appeals against such decisions can be made on any grounds to the Appeals Permission Board,⁵⁵ which consists of a High Court Judge, a District Court Judge and a lawyer. The Appeals Permission Board is an independent body administered within the Danish Court Administration. Thus, whilst the appeal is in a strict sense bureaucratic, the nature of the oversight body is quasi-judicial and it is completely outside the legal aid granting body, with responsibilities that extend beyond legal aid.

In Sweden, as has been seen, the bulk of legal aid decisions are made by the courts and are appealable to the higher courts. The remainder of applications are decided by the Legal Aid Authority, from which appeals can be made to the Legal Aid Board (Rättshjälpsnämnden),⁵⁶ a public administrative body which falls within the remit of the Department of Justice. The Legal Aid Board is not a court, but shares buildings and administration with one of the regional Courts of Appeal⁵⁷ and is chaired by a judge. The Board president and four additional members, two of whom must be lawyers, are appointed by the government. Legal Aid Board decisions cannot be appealed

⁵⁰ Rättshjälpslag, 2002, 11 §, para. 1 and 24 §.

⁵¹ Utlänningslag, 2005, Chapter 18.

⁵² *Ibidem*, Chapter 14, 8 §.

⁵³ Legal Aid (Scotland) Act 1986, s. 14.

⁵⁴ Retsplejeloven, 2017, § 328(5).

⁵⁵ *Ibidem*, § 328(5).

⁵⁶ Rättshjälpslag, 1996, 44 §.

⁵⁷ Hovrätten för Nedre Norrlands in Sundsvall, as directed by Förordning 2007:1079, 5 §.

further.⁵⁸ This situation is very close to the Danish model, with the minor difference that the Legal Aid Board in Sweden only has jurisdiction in legal aid appeals, whereas the Danish Appeals Permission Board has a broader remit. Legal aid decisions of the County Governor in Norway are subject to appeal to the Ministry of Justice,⁵⁹ in practice the Civil Affairs Authority. Appeal from many civil legal aid refusals in Norway is thus to another public body, but in this case the appeal does not involve judges or have other features which imply a judicial character to the process.

All of the above bureaucratic appeal mechanisms involve other government departments or public authorities. However, some oversight mechanisms are administered from within the body making the original legal aid decision, albeit with attempts to allow the reviewers to remain independent.

In Northern Ireland, if an applicant or acting lawyer is unhappy with any decision concerning civil legal services they can request a review by the Legal Services Agency, the body which, as has been seen, also makes the initial legal aid decision.⁶⁰ If the decision is still not accepted, a further appeal is possible in cases concerning refusal of legal aid for representation in the higher courts.⁶¹ The appeal will be heard by an independent appeal panel consisting of one presiding member (a barrister or solicitor of at least 7 years' standing) and two others with relevant knowledge or experience, at least one of whom must be a lawyer. In the limited range of decisions which are appealable through the process, the panel provides a measure of independence; whilst panel members are paid for their time by the Legal Services Agency, they are not employees and the majority of their time is spent in independent legal practice. The decision of the panel is binding upon the Legal Services Agency.⁶²

England & Wales follows a similar approach, although the detail is somewhat different. Appeals against refusals of civil legal aid by the Legal Aid Agency are initially internal, by way of review. If the applicant is still dissatisfied, she may appeal to an independent adjudicator. These adjudicators are drawn from a panel of practising lawyers with at least three years' experience of legal aid work, appointed by the Lord Chancellor.⁶³ Adjudicators hear appeals against refusals or withdrawals of civil legal aid⁶⁴ and if the decision is that the original decision was unlawful or unreasonable the Legal Aid Agency must reconsider the decision.⁶⁵ Although the adjudicator's view is only binding in certain circumstances,⁶⁶ the Legal Aid Agency does usually follow the recommendations. Again, as in Northern Ireland, adjudicators are not employees of the Legal Aid Agency and are as such independent. However, the powers of the

⁵⁸ Rättshjälpslag, 1996, 44 §, para. 3.

⁵⁹ Rettshjelploven, 1980, § 26.

⁶⁰ The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Reg 14.

⁶¹ The Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, Reg 4.

⁶² *Ibidem*, Regulation 27.

⁶³ The Funding & Costs Appeals Review Panel Arrangements 2013, Schedule 1, para. 1.

⁶⁴ Civil Legal Aid (Procedure) Regulations 2012, Regulation 2, 'Interpretation' and Regulation 28.

⁶⁵ *Ibidem*, Regulation 46.

⁶⁶ *Ibidem*, Regulation 47.

independent adjudicators in England & Wales are more restricted than those of the Northern Irish appeal panel, as not all decisions are binding upon the Legal Aid Agency.

In the Republic of Ireland, initial decisions on civil legal aid are taken by the Legal Aid Board, either centrally or through delegated powers at the Law Centres. A negative decision can be reviewed⁶⁷ internally by the Board, in theory by the original decision-maker but in practice by a more senior decision-maker.⁶⁸ If the review is unsuccessful, an appeal may be made to a committee of Board members,⁶⁹ consisting of a chairperson and four other members of whom two were practising barristers or solicitors prior to their appointment as Board members. The placing of power to make appeal decisions with members of the Legal Aid Board itself prevents this appeal process being considered independent, although it is an opportunity for oversight by senior personnel who had no involvement with the original decision.

The internal review of decisions is the only available oversight option in some circumstances. The Scottish Legal Aid Board has a statutory duty to ensure a right to review of the decision upon refusal of civil,⁷⁰ children's⁷¹ or criminal⁷² legal aid. Reviews are conducted internally by the Board and no further appeal is possible, other than in a case of refusal of legal aid to conduct proceedings against the Scottish Legal Aid Board (see above). Similarly, as seen above, in lower court cases in Northern Ireland, only an internal review is possible. As such reviews are conducted within or close to the original decision-making teams, they do not add any element of independent oversight to the decision-making process. This is similar to the situation in Iceland, where the only way for a legal aid claim to be reconsidered is for the applicant to ask for the application to be reopened by the Committee; no formal appeal process is in place.

This short overview has revealed considerable variation in the civil legal aid appeal and oversight processes. Some systems are relatively simple, with review and appeal kept within the original decision-making bureaucracy, in some cases using outside legal expertise brought to conduct an 'independent' appraisal. Equally straightforward are the processes where court decisions on legal aid are appealable to a higher court. Whilst having the advantage of simplicity, these schemes do not necessarily provide a good balance between the various competing interests in the legal aid system, nor do they provide the best protection against arbitrariness.

⁶⁷ SI 273/1996 Civil Legal Aid Regulations 1996, Regulation 12(1).

⁶⁸ Legal Aid Board Circular on Legal Services 2017, Part 6, p. 6-2.

⁶⁹ Civil Legal Aid Regulations 1996, Regulation 12.

⁷⁰ Legal Aid (Scotland) Act 1986, s.14(3). The procedure is contained in Civil Legal Aid (Scotland) Regulations 2002, Regulation 20.

⁷¹ Legal Aid (Scotland) Act 1986, s. 28H.

⁷² *Ibidem*, s. 24(5) (summary proceedings) and 23A(4) (solemn proceedings). The procedures are found in the Criminal Legal Aid (Scotland) Regulations 1996, Regulation 7A(3)(b).

Sweden, in addition to the appeals processes outlined above, has an arrangement by which independent oversight is provided by the Chancellor of Justice (Justitiekanslern) who has locus standi to instigate appeals against any legal aid decisions to the higher courts.

2.3. Civil scope

One of the main objectives of a legal aid scheme is to limit public expenditure, whilst ensuring an appropriate and acceptable measure of access to justice for the indigent. This is not an easy balancing act, and how it is performed depends on political and public policy considerations. As expressed by the second Northern Ireland Access to Justice Review, “reducing the scope of legal aid is an effective way to make savings but can severely reduce access”.⁷³ Finland is the only one of the jurisdictions under consideration which does not use scope as a significant cost limiter; all the others, to varying degrees, delimit the reach and therefore the cost of legal aid by restricting scope. The most extreme restrictions are in Norway and in England & Wales, both of which severely limit the types of case for which civil legal aid are available. There are various methods for achieving scope restrictions, in organisational terms. The most common is the operation of an exclusion system whereby all cases are in scope unless barred; exclusion is then generally by case type. Alternatively, an arrangement can be made where cases are only in scope if positively identified by means of a list of included case types or venues. In several jurisdictions, venues are included and then subject areas excluded. It is also possible to combine all the elements, as in England & Wales, where there are included case types, excluded case types, excluded work types (advocacy) and included venues.

2.4. Civil merits tests

Even if a civil case is in scope and thus in principle eligible for civil legal aid, all the jurisdictions studied further limit legal aid by the provision of merits tests. These vary in complexity, content and structure. In some jurisdictions it is necessary to go through primary and secondary legislation to binding or non-binding guidance or even recommended interpretation to ascertain exactly which criteria will be applied to an application for civil legal aid. Furthermore, some jurisdictions have varying tests depending on the nature of the case. However, despite this variety, the overall number of different types of merits test is relatively limited, and in these jurisdictions can be summarised in the following groups: probable cause; reasonableness (including reasonable grounds to pursue case, reasonableness of the state funding the case and a reasonable privately-paying individual test); prospects of success; proportionality between cost and benefit; need for representation; significance of the case for the client and compliance with international obligations.

⁷³ Stutt, Colin, *A Strategy For Access To Justice: The Report of Access to Justice (2)*, Belfast, Department of Justice Northern Ireland, 2015, p. 10.

Reasonableness in some form is present within the merits tests in all the jurisdictions. Some jurisdictions take the approach of leaving this question itself as the selection criteria, and provide legal aid when it is judged overall to be reasonable to fund in the circumstances of each individual case. Other legal aid systems limit the discretion of the decision-maker by listing criteria which must be considered when assessing reasonableness, whilst some break down the reasonableness test into additional discrete tests which must be met. Several jurisdictions, such as Sweden, Scotland and Northern Ireland, have reasonableness as the main factor in merits testing, with other criteria serving largely to assist in deciding reasonableness. It is not surprising that reasonableness might be a unifying factor in merits tests in North-west Europe; the concept is an appropriate response to the realities of legal aid provision.

Another important merits test is the prospects of success test, but this test is far from omnipresent in the jurisdictions studied. Indeed, the jurisdictions can to some extent be grouped together at various points on a scale. Finland stands alone with no reference to prospects of success, followed by Norway, also alone in specifying that prospects of success cannot be decisive. Next, Sweden and Denmark can be paired as having very similar approaches. The phrasing that a case must be 'evidently hopeless' (Sweden) to rule out legal aid on grounds of chances of success is very similar to, and likely to cover the matters where it would be 'obvious that they will not succeed' (court determinations in Denmark). In other cases, prospects of success are to be taken into account in deciding whether there are reasonable grounds to litigate (administrative legal aid determinations in Denmark) and may be the starting point for a decision as to whether it is reasonable for the state to fund the case (Sweden).

Iceland also requires a decision on whether it is reasonable for a case to be funded by the public, which includes consideration of whether the individual 'seems likely to succeed at court'. This test goes further than Sweden and Denmark in implying that the case must be more likely than not to succeed, i.e. a 50% chance of success. However, this is just one of the factors to be considered and there is no explicit bar on granting legal aid even for hopeless cases although it seems likely that these would not be funded.

The Republic of Ireland and Scotland have comparable approaches to prospects of success. In the Republic of Ireland, civil legal aid will only be granted in cases which are reasonably likely to be successful and in Scotland prospects of success are an important factor and applications are likely to be refused if the prospects are 60% or under. The Irish test is stricter in providing an absolute bar on funding cases which are not reasonably likely to be successful but the Scottish test is harsher in setting 60% as the usual cut-off point. Northern Ireland can also be considered to be at about the same level of reliance on prospects of success; in most cases a 50% or higher chance will be needed for a grant of legal aid to be made. The test in England & Wales is the strictest as there is an explicit absolute bar on funding for cases with under 50% chance of success, in most case types.

The selection and arrangement of merits criteria for civil legal aid is the result of a compromise between cost and principle. However, some merits criteria, whilst effective in saving money, seriously undermine the principle of fair trial which legal aid is designed to defend.⁷⁴

⁷⁴ Barlow, Anna, *op.cit.* note 7, p. 222-240.

3. Patterns in legal aid schemes in the Nordic countries, the UK and the Republic of Ireland

One advantage of a comparative study covering a large number of jurisdictions is that it affords the opportunity to identify patterns in the structure of legal aid law. It has been seen that there is an extraordinary level of variation in the procedural and material elements of legal aid systems and public defence schemes. This is the case despite the similarities between the jurisdictions; they are all high spenders on legal aid, and spend a high proportion of their judicial budget on legal aid. It may be supposed that there might be similarities between the schemes in each of the two geographical sub-groups: the Nordic countries; and the UK and Republic of Ireland. However, the study revealed that the situation is far more complex than this.

The most obvious variation in the provision of publicly-funded assistance with criminal defence is in whether the jurisdiction operates a public defender scheme or a criminal legal aid scheme. There is a clear division here between the Nordic jurisdictions and the others, although Finland operates both systems. There is also an evident division by geographical group concerning the structure of the criminal merits test; the Nordic public defender schemes provide lists of circumstances in which public defenders must be appointed, whilst in the UK jurisdictions and the Republic of Ireland, an overarching interests of justice test is applied. In the provision of criminal defence assistance, then, there is a clear pattern of different provision between the two geographical groups, with the exception being Finland, which in addition to the Nordic-style arrangements also provides criminal legal aid.

In civil legal aid, whilst indirect public administration through practising lawyers is the norm for advice level work, at the level of further assistance and representation there is considerable variation in decision-making. The pattern here is much more complex than in criminal legal aid, and similarities exist independent of the geographical sub-grouping. Thus, for example, there are similarities in decision-making structure between Finland and the Republic of Ireland, and between Iceland and the jurisdictions of the UK; within the Nordic countries, only Denmark and Norway have similar decision-making processes. Independence of appeal processes is similarly good in Denmark, Sweden and Finland, and similarly poor in Iceland and Scotland. There is little geographical pattern to be found in civil scope restrictions, either: scope is heavily restricted in Norway and England & Wales, and moderately restricted in Sweden, Northern Ireland, Scotland and the Republic of Ireland. However, all the most generous scope provisions are to be found in the Nordic bloc: Denmark, Iceland and Finland. The prospects of success merits test is decisive in the UK and the Republic of Ireland but not in the Nordic countries.

A clear difference between Nordic and non-Nordic jurisdictions can thus be seen only in three areas: the organisation of criminal defence work; the structure of the criminal merits test and the decisiveness of the prospects of success test in civil merits assessment.

In addition to the geographical grouping into Nordic and non-Nordic jurisdictions, other combinations of jurisdictions are interesting to compare. The three jurisdictions of the UK might be expected to have significant similarities and indeed they share more elements of their legal aid schemes than do the Nordic jurisdictions. For the provision of assistance to criminal defendants, they all operate a criminal legal aid system with an overarching interests of justice merits test. Within the sphere of civil legal aid, the jurisdictions have similar decision-making structures and a decisive prospects of success test. However, they do not have similarly independent appeals or equivalent scope restrictions.

The similarity of Finland and Sweden might also be of interest, as these two jurisdictions share many similarities in other areas and have been classed as 'East Nordic', with different characteristics from the remaining 'West Nordic' nations. In addition to the elements shared between all the Nordic countries, Finland and Sweden have similar court structures and legal professions, but despite this they have very different methods of distribution of legal aid work within the legal profession and of legal aid decision-making. Unlike Sweden, Finland has, in addition to a public defender scheme, criminal legal aid which is more commonly used than public defenders. The scope of civil legal aid is also very different between the two.

There is a surprising amount of correlation between legal aid in Finland and in the Republic of Ireland. The distribution of legal aid work and decision-making structures for civil legal aid are strikingly similar, and very different from all the other jurisdictions under consideration.

4. Comparing legal aid

4.1. The challenge of diversity

The breadth and irregularity of variation in legal aid systems does not lend itself to simple explanation. It appears that legal aid schemes in general develop piecemeal, and that each jurisdiction is on its own path. The extent to which legal aid interacts with other aspects of the justice system, the legal profession and society as a whole makes explanations highly context-specific; thus, the considerable complexity of the legal aid provisions in England & Wales, whilst unfortunate, is in keeping with the generally lengthy nature of legislation in that jurisdiction and may have little or nothing to do with the fact that legal aid is the subject. The rationale for a particular aspect of a legal aid scheme can also sometimes be found in a specific, small-scale policy decision. For example, the requirement in Sweden that everybody must pay something towards their legal aid is a policy decision based on ensuring that legal aid recipients understand the value of the benefit they are receiving, but may have a considerable impact on access for the poorest members of society. In Finland, it is an element external to legal aid, the imposition of *inter-partes* costs against the losing side in a court case, which appears to have a great impact upon the legal aid scheme and allows a very generous system to be affordable.

The study undertaken at Åbo Akademi University has not revealed universally applicable explanations for the procedural and material solutions implemented in respect of legal aid, which is not to suggest that such explanations could not be found. However, significant further research would be needed to ascertain how the elements of a legal aid scheme relate to each other and how they influence outcomes, including cost, given the complexity involved. Furthermore, cultural differences and wider context must be borne in mind when undertaking a comparative exercise.

It is clear from the brief descriptions of nine jurisdictions in North-West Europe, above, that legal aid schemes are complex entities; comparison, whilst potentially very useful, is thus also very difficult. In attempting to learn from other jurisdictions it is important to not just consider selected details but to have an overview of the whole scheme and its place within the justice system. Delivery methods provide a good illustration of the difficulty. New approaches to legal aid service provision are interesting and often inspirational, but they are highly context-specific and care must be taken to ensure their context is understood before drawing conclusions as to their desirability. The other elements of the legal aid system such as financial eligibility rates and subject scope will have a significant impact on demand, and on capacity and ability to help. Factors external to legal aid will also be very significant; if, for example, family cases are diverted away from the judicial system, as is the case in the Nordic countries, a desirable delivery method may look very different to one in a jurisdiction where this is not the case. It is necessary to be aware of these contextual factors and their interrelationship with elements of the legal aid scheme before drawing any conclusions about the efficiency and cost-effectiveness of the delivery method and the possibility for transposing it to another system. Delivery methods are also often an appealing focus of comparative approaches because they can appear to be an easy way to resolve existing weaknesses in a system, however without changes at the policy level it is unlikely that alterations to delivery methods can be much more than a superficial solution.

It is thus crucial to acknowledge the presence of diversity, and to aim to understand the functioning of legal aid schemes, rather than to attempt small-scale borrowing of individual elements of a scheme. Increasing the understanding of our own and other legal aid systems will improve the likelihood of good policy-making and effective practical comparison. If comparative research is to reach its full potential in the field of legal aid a method must be found for comparing very different schemes in a structured and consistent manner. A framework is needed so that different studies can be brought together to create a more thorough understanding of legal aid. This will also aid better analysis of individual legal aid schemes, albeit with the main aim of more effective learning from other systems.

This establishment of such a framework is a considerable task and one which can only be carried out collectively. In respect of access to justice as a whole, Barendrecht, Mulder and Giesen have suggested a framework for the measurement of the price and

quality, including time and emotional costs,⁷⁵ and work is underway to develop and test the framework.⁷⁶ It is suggested that a similar, complementary exercise would be useful in the specific area of legal aid organisation. A framework could be tested whilst being populated with data, much of which is already available in various discrete studies but which could be given further reach and relevance by such structure. Current research would thus become more useful as an element in successful policy formulation.

4.2. A proposed framework

4.2.1. Overall structure

Existing research relevant to legal aid covers a variety of themes, including access to justice and human rights as well as lobbying and awareness-raising. There is also, inter alia, research on unmet legal needs and on outcomes of legal interventions. At present the various research threads remain largely separate but an interdisciplinary development of an analytical framework would enable them to be woven together into a more comprehensive and cohesive understanding of legal aid. In addition, the development of a framework would illuminate the gaps in understanding and suggest fruitful avenues for further research. The following is merely a tentative proposal for a framework, which invites comments and discussion.

To organise the variables identified by the Åbo Akademi University research discussed above, four categories can be proposed, as illustrated below.



Three of these groupings are internal to legal aid and represent the choices which can be made in creating a scheme, at different levels. The highest level is the establishment of underlying principles; these may be expressly determined by the

⁷⁵ Barendrecht, Maurits; Mulder, José and Giesen, Ivo, 'How to Measure the Price and Quality of Access to Justice?', *SSRN Electronic Journal*, November 2006, available at <https://dx.doi.org/10.2139/ssrn.949209>.

⁷⁶ Gramatikov, Martin; Barendrecht, Maurits and Verdonschot, Jin Ho, 'Measuring the Cost and Quality of Paths to Justice: Contours of a Methodology', pp. 349-379 in *Hague Journal on the Rule of Law*, 3(2), 2011. See also <https://www.hiil.org/projects/>.

state or may only be discernible by implication from the next category, policy choices. The contents of this second category are, ideally, consistent with the underlying principles, and largely derive from them. The lowest level of the pyramid which relates exclusively to legal aid is the practical delivery methods. These generally have little connection to the theoretical basis of the scheme but may be dictated to a greater or lesser extent by policy choices. Again, ideally there should be a logical harmony between the policy choices and practical delivery methods. The fourth and final category of variable is the elements making up the structural, societal and economic context of the legal aid scheme. Whilst this is not chosen by legal aid policy-makers, it is highly relevant. In addition to identifying the constituent elements in these four categories, an understanding of the theoretical and practical links between them should be included as part of the framework. Choices or changes at any level may have consequences for other elements in the same or other categories, either mandating an alteration elsewhere in the system or creating logical inconsistency.

More research is needed, encompassing more jurisdictions and, importantly, other disciplines beyond administrative and public law. Nonetheless, a provisional attempt can be made to list some of the constituent elements of each category. The following section aims only to describe the outline of each category; a small start to the considerable work which is needed in the field.

4.2.2. Guiding principles

The guiding principles of a legal aid scheme are drawn from the political commitment to access to justice and legal aid, and the centrality of legal aid as a delivery method for these. The principles are politically and culturally sensitive; “the worth, functions and limits of the legal aid scheme are intimately connected to the structures and values of the society within which it operates.”⁷⁷ It is clear that the theoretical basis for legal aid is different in different jurisdictions, with in particular a distinction between legal aid as social benefit or as part of access to justice.

Whilst legal aid schemes are not always consistent with the alleged guiding principles, it is not uncommon for governments to make statements which link their legal aid policy to high ideals. A typical example is that of England & Wales, where in a consultation on the future of legal aid, concerned primarily with the need to dramatically reduce expenditure, the government prefaced its proposals with the statement that it “strongly believes that access to justice is a hallmark of a civil society”.⁷⁸ Legal aid also at times forms part of state policy in other areas such as equality or poverty reduction. One illustration is in Scotland, where access to justice is considered as being of primary importance but legal aid is in addition seen as

⁷⁷ Young, Richard and Wall, David, ‘Criminal Justice, Legal Aid, and the Defence of Liberty’, pp. 1-25 in Young, Richard and Wall, David (eds.), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty*, London, Blackstone Press, 1996, p. 10.

⁷⁸ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, Consultation Paper CP12/10, November 2010, para. 1.2.

contributing to the Scottish Government’s aim of reducing inequality.⁷⁹ In Finland it is specifically the need to “guarantee the equal rights of citizens to competent legal help” which is seen as “the central task and aim of the public legal aid system”,⁸⁰ and thus equality is a guiding principle for legal aid in that jurisdiction also. Legal aid in Norway is said to be “a social benefit” intended “to guarantee necessary legal assistance for persons who do not have the financial means themselves to enable them to meet a need for legal aid that is of great importance to their persons and their welfare”.⁸¹ This ideological basis was established as early as 1954 during a process of legal aid reform⁸² and legal aid is officially acknowledged as an important measure in the fight against poverty,⁸³ with an explicit statement of this function of legal aid being added to the legislation in 2005.⁸⁴

Whatever the principles governing legal aid at a political level may be, it is desirable that they are overtly stated so that compliance with them on the policy and practical levels can be assessed. The provisional list which follows is drawn from the findings of the Åbo Akademi University study, expressed as a set of scales, with a choice to be made as to where on each spectrum the jurisdiction wishes to position itself. In the absence of express commitment to principle by government, legal aid policy, discussed below, may indicate the underlying principles.

Spectrum of positions of principle

| | | |
|---------------------------------------------------------------|---|-------------------------------------------------------------------------------------------------|
| Commitment to the rule of law and the principle of fair trial | ↔ | Commitment to fulfilling only constitutional and international obligations concerning legal aid |
| Legal aid is a justice issue | ↔ | Legal aid is a social issue |
| Legal aid is part of the justice system | ↔ | Legal aid is about access to the justice system, but is itself ancillary to it |
| Legal aid is the main element of access to justice | ↔ | Legal aid is a minor player in access to justice |
| Costs control is paramount | ↔ | Independent decision-making is paramount |
| Selection for assistance can best be achieved efficiently by | ↔ | Selection for assistance must be individualised so that those |

⁷⁹ Scottish Legal Aid Board Annual Report and Accounts 2015-16, p. 2.

⁸⁰ Regeringens proposition 26/2016 rd *Regeringens proposition till riksdagen med förslag till lag om statens rättshjälps- och intressebevakningsdistrikt*.

⁸¹ Rettshjelploven, 1980, § 1.

⁸² St.meld. nr. 26 (2008-2009) *Om offentlig rettshjelp — Rett hjelp*, para. 1.2.1.

⁸³ *Ibidem*, paras. 1.3.2.1 and 8.2.3.

⁸⁴ Innst. O. nr. 43 (2004-2005) *Innstilling fra justiskomiteen om lov om endringer i lov 13. juni 1980 nr. 35 om fri rettshjelp m.m.*, para. 3.

| categorising cases | | who need help are identified |
|-------------------------------------------------------------------------------------------|---|------------------------------------------------------------------|
| Commitment to the principles of 'innocent until proven guilty' and the right to a defence | ↔ | Willingness to make those with means pay to realise these rights |
| Budget generous and flexible | ↔ | Budget low and fixed |

4.2.3. Policy choices

The policy decisions level of the framework includes those elements which are less tied to ideals and move towards the practicalities, yet are not the operational detail. Policy decisions are also characterised by greater ease and frequency of change than context or guiding principles; changes at this level are common when legal aid schemes are redesigned, whereas alteration to guiding principles requires a sea change of political and public opinion, which happens less often. Again, policy decisions are not generally binary choices but can be placed on a scale:

Choice on policy

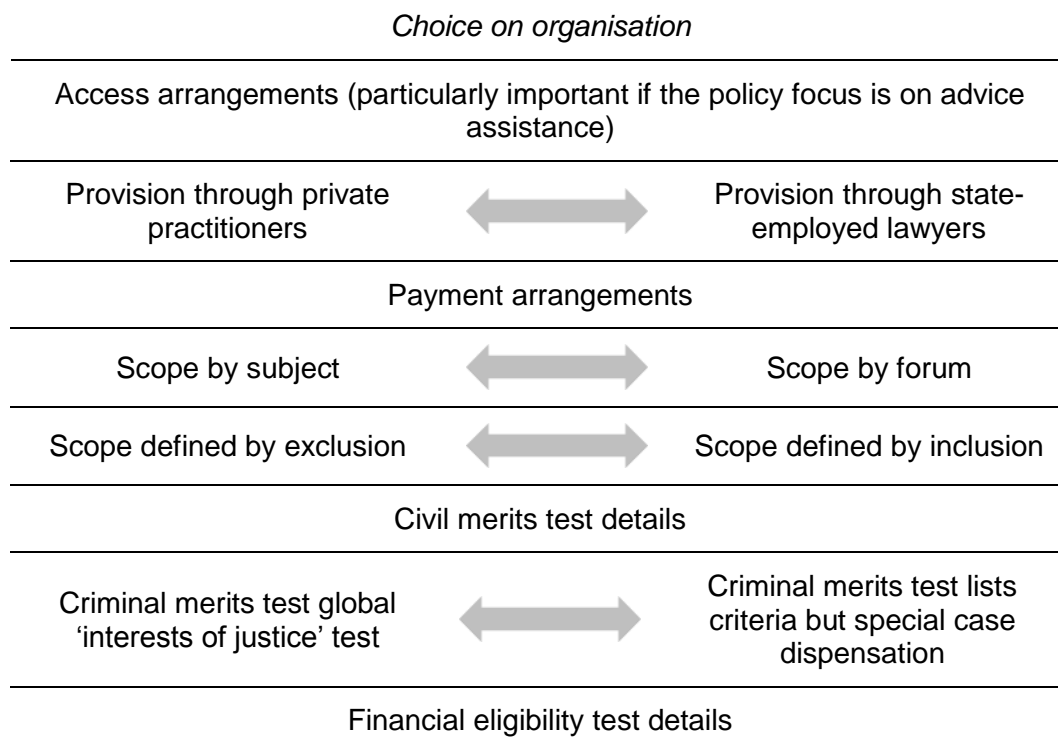
| | | |
|----------------------------------------------------|----|---------------------------------------------------|
| Legal aid decisions by courts | ↔ | Legal aid decisions by government |
| Independent appeal and/or oversight | ↔ | Internal review/appeal |
| Focus on advice and assistance | ↔ | Focus on court representation |
| Legal aid should cover all case types | ↔ | Legal aid should cover few case types |
| Public defender scheme | or | Criminal legal aid |
| No reliance on merits test | ↔ | Significant reliance on merits test |
| High percentage of population financially eligible | ↔ | Low percentage of population financially eligible |
| Universal contributions towards legal aid | ↔ | No legal aid contributions |

4.2.4. Organisation

Organisational choices fill in the detail of the schemes once the policy direction has been decided, and are open to change by the administrators of the scheme. Political

considerations are rarely involved in this category, which ideally should simply realise the ideological and policy goals set at the higher levels. However, where there is inconsistency with those goals, organisational factors have the decisive impact in practice and may thwart the political intentions which should be steering the system. Organisational factors have little bearing on the values demonstrated by the legal aid system, although they are vital in ensuring an effective scheme. Indeed, Rissanen claims that “an efficient and integrated legal aid model is the main reason that the Finnish legal aid system has been able to maintain its comprehensive coverage and internationally recognised reputation”.⁸⁵

Organisational choices are closely related to the context of the legal aid scheme, and choices must be made which are appropriate in the light of the other elements of the justice system and societal challenges in the jurisdiction. As before, some are decisions as to where on a spectrum the system will sit.



4.2.5. Context

Finally, in analysing legal aid schemes attention must be paid to the environment in which they operate. It is important to note, in particular when considering changes to legal aid, that the context is in many instances rigid compared to the elements within the legal aid system. Indeed, some significant contextual elements are outside the

⁸⁵ Rissanen, Antti, 'Legal Aid in Finland', pp. 77-97 in Halvorsen Rønning, Olaf and Hammerslev, Ole (eds.) *Outsourcing Legal Aid in the Nordic Welfare States*, Open Access, 2018, p. 94.

justice system and therefore unlikely to be within the scope of even access to justice reviews, let alone legal aid reform programmes. For practical purposes, some contextual factors must simply be accepted, and a legal aid system built in a way consistent with them. For instance, public attitude to risk is not something which policy-makers are likely to be able to influence or change. Elements within the justice sphere can also be resistant to change, but are extremely significant for legal aid. A clear example of this is the significant structures in place in all the Nordic countries to resolve family disputes without the use of court, absent in the UK and Republic of Ireland with significant impact for legal aid spending on family cases.

Any framework for analysis, comparison or planning of legal aid systems must take account of the immovable context, but may include plans for change of those elements which can be altered. Attention must be paid to at least the following contextual factors:

- External to the justice system
 - Availability of other sources of funding for advice or litigation (e.g. insurance)
 - Poverty levels
 - Public litigiousness
 - Public attitude to risk
 - Population size and density

- Broadly within justice sphere
 - Access to justice budget
 - Diversion of cases to non-court resolution mechanisms
 - Level of assistance for litigants from court during hearings
 - Complexity of laws
 - Affordability of private lawyers
 - Permissibility of non-lawyer advice and representation
 - Nature of hearings, in particular the extent to which evidence and argument are oral

These four categories together with the interrelationships between and within them, make up the pyramidal structure proposed for the analysis of legal aid schemes.

5. Conclusions

The framework set out above, if developed, could have various applications in the analysis of existing legal aid systems, either individually or by comparison with each other, and also in the planning of change to schemes or indeed of altogether new schemes.

Comparison of legal aid schemes in different jurisdictions may be greatly facilitated by the application of such a framework. Breaking down the administrative law elements of legal aid systems according to the same schematic provides a structure which enables comparison of the equivalent element of each system; a more in-depth approach than comparing whole systems. By indicating the links between principles, policy and organisation the schematic can aid comparative analysis. For example, if two systems profess to follow similar guiding principles, significant difference in policy choices would be particularly interesting and invite further investigation. Conversely, discrepancy in policy may be of little note if it clearly relates to different values expressed in the guiding principles; in that situation it is the difference in principle which is of interest. Sometimes, also, as discussed above, difference in performance (particularly expense) may be found to relate very largely to context if principles and policy are aligned between two jurisdictions but outcomes are at variance.

Particularly when attempting to reduce cost by a comparative method, a structured approach can aid effectiveness. The Åbo Akademi University study found no clear direct correlation between the amount spent on legal aid and any of the other factors considered, whether procedural, material or contextual. No individual aspect of a legal aid scheme could be identified which would always indicate lower costs; rather, it was the unique combinations in each jurisdiction which, in that societal context, resulted in a particular spend.

This paper has merely suggested a starting point for the development of an analytical framework for legal aid and presented a fledgling structure. Discussion between researches across disciplines is needed to determine whether such a system would be useful and, if so, to develop the concept, but the rewards of more successful inter-jurisdictional learning are potentially great.