

Towards more effective legal aid in Belgium

Draft

1. Introduction

A legal-comparative and legal-sociological study of legal aid in Belgium, England and Wales, Germany, France and the Netherlands¹.

This study, carried out within the framework of the *Centre for Professional Training in Law* in Antwerp², takes a systematic and multidisciplinary approach to legal aid, as an in-depth legal analysis is confronted with legal-sociological aspects.

The systematic approach consists not only in a comparison between the various branches of legal aid in the countries under consideration, but also in an analysis of these constituting elements within the respective national systems. The study covers the current legal aid schemes in Belgium, Germany, England and Wales, France and the Netherlands. By considering the various schemes in their proper context, the comparison becomes more telling than would be the case if the various aspects were merely contrasted fragmentarily.

Besides serving an academic purpose, this study also intends to provide policymakers with the necessary data for them to be able to make well-founded decisions with a view to improving the legal aid systems in their respective countries.

In the following contribution, we provide an overview of findings. The central research question that we try to answer is: how extensive are the legal aid services in the countries and especially in Belgium³.

¹ C. DRIESEN, G. FRANSSSEN, S. GIBENS and J. VAN HOUTTE, *Naar een meer performante rechtshulp. Een rechtsvergelijkende en rechtssociologische studie*, Brussel, Larcier, 428p.

² A collaborative initiative between the UA Faculty of Law and the Order of Lawyers at the Antwerp Bar.

³ See former national reports Belgium in Harvard (2003) and Killarney (2005)

2. The budget

The scope of legal aid services obviously depends first and foremost on the funding that is made available. It would therefore seem appropriate to begin with an overview of the legal aid services budgets in the various countries under study. Save for some minor exceptions, these resources are provided by the public authorities.

In Belgium, the state budget provides for both first-line and second-line legal aid services.

France is an exception in that there are other funding sources besides the State. Legal aid in gaining access to law (*l'aide à l'accès au droit*) is guaranteed by the State, the departments and other public authorities, through contributions from the respective Bars of the jurisdictions, the participation of legal professional groups, subsidies and grants from local authorities, public institutions, social security bodies etc. Funding of *l'aide juridictionnelle* and *l'aide à l'intervention de l'avocat* is provided by the State.

In Germany, there is no national budget for legal aid. As a rule, any lawyer acting under the system of *Prozesskostenhilfe* receives a statutory remuneration from the federal treasury in the case of proceedings before a federal court and from a regional treasury in the case of proceedings before a regional court. As the regions, or *Bundesländer*, are responsible for the functioning of their regional courts, and as the coordination of legal aid is part of the assignment of those courts, any associated additional costs are at the expense of those regions.

In the Netherlands, the funding structure is simpler, as the organisation of legal assistance is entrusted entirely to the Council for Legal Aid (*Raad voor Rechtsbijstand*). Each financial year, the Justice Minister provides the Council with a subsidy in order that it could carry out its statutory task. The Council for Legal Aid in turn grants funds to the legal aid foundations for providing consultations, extended consultations and more elaborate subsidised legal aid.

In England, legal aid is financed through the Legal Services Commission (LSC), which receives its operating funds from the state. The LSC organises the funding primarily along the lines of the structure of the legal aid system itself, where a distinction is made between the Community Legal Service and the Criminal Defence Service⁴.

⁴ Further details are provided in S. GIBENS, "De financiering van de juridische bijstand: een verkenning", in J. STEVENS (ed.), *Advocatenerelonen*, Die Keure, 2006.

If we compare the various budgets, we obtain the following ranking in ascending order of generosity in the funding of legal aid: Belgium, France, Germany, the Netherlands, England and Wales.

This ranking is beyond any doubt, even though the concrete figures cited in different reports vary considerably. Johnson, for example, provides details on per capita spending on legal aid in 2002. The figures quoted are EUR 2.8 for Belgium, EUR 4 for Germany, EUR 20 for the Netherlands, and EUR 24 for England and Wales. In a recent report on “European Judicial Systems 2002”, we find entirely different figures, but the ranking is unchanged: EUR 3.90 for Belgium, EUR 4.64 for France, EUR 5.59 for Germany, EUR 12.66 for the Netherlands, and EUR 53.80 for England and Wales (!).

For each of the above countries, some remarks are in place.

Belgium’s legal aid budget has been increased substantially in recent years, as it grew by 92 % between 1999 and 2004. By comparison, the budget of the Ministry of Justice grew by just 19.3 % over that same period. Still, legal aid amounted to only 2 % of that budget in 1999 and to 3% in 2004, which is very little indeed. Because of the closed envelope system, the average cost per case increased by barely 14% between 1999 and 2004.

In France, the legal aid budget rose by 144% over a period of approximately ten years (1992-2003). The average cost per case has risen sharply by 87% since 1994.

The German system is not always entirely transparent, as the budgets are divided between the sixteen regions. Expenses for *Prozesskostenhilfe* (legal aid/assistance) have risen spectacularly over a fifteen year period. The budget for *Beratungshilfe* (legal advice) amounts to approximately 10% of that for *Prozesskostenhilfe*. It is estimated that the German authorities spent EUR 514 million in legal aid subsidies.

The marked increase in recent years in expenses on legal aid would appear to be attributable neither to legal reform nor to an increase in lawyers’ fees. The most plausible explanation seems to be that demand for legal aid has risen in consequence of a deteriorating economic situation and reduced coverage under legal cost insurance. A recent reform of the system of legal costs is likely to result in a further rise in the number of legal aid cases.

Figures provided by the Dutch Ministry of Justice show that the total budget for subsidised legal aid has stabilised in recent years. The 2005 budget for legal aid amounted to approximately EUR 375 million.

England and Wales have the most generous legal aid services budgets. The budget for 2002-2003 amounted to approximately £ 2 billion, compared to 1.4 billion in 1995-1996. Remarkably, within the overall budget, the rise was largely attributable to legal aid in criminal cases.

Given the continuous demand for legal aid, it comes as no surprise that the authorities wish to reduce the average cost without compromising quality of service.

3. Greater quality demands

The foregoing shows very clearly how, in the countries under study, the budgets for legal aid have tended to increase and, indeed, continue to increase today. Obviously, the more generous the funding by the public authorities, the greater emphasis is placed on quality of service and efficient use of resources. Not surprisingly, then, in England and Wales quality care and assessment are subject to regulation and monitoring. But what do we learn from this? First and foremost, it should be pointed out that quality is hard to define. The best approach is a pragmatic one, whereby the various attempts at definition are briefly outlined. To begin with, quality tests are carried out whereby firms of lawyers are screened on the basis of minimum quality standards: the internal division of tasks, the continuous follow-up of cases, the degree of specialisation, the costs charged for services provided. One can also focus on the output of legal aid services.

Subsequently, the degree of satisfaction of the clients-consumers is gauged. Various aspects of the services provided are taken into consideration: expertise, waiting time, effectiveness, effort,

Finally, the quality control may consist in a peer review. This entails that a dossier is scrutinised by an experienced practitioner in a particular area of law. It is a necessary complementation of a satisfaction study, as research has shown there not always to be a clear relationship between client satisfaction and the technical quality of the service provided. The growing influence of the public authorities in subsidised legal aid, and the associated requirement of efficient spending of resources, has thus led to certain standards of quality.

For the Bar, these standards of quality signified a new form of control. Moreover, the notion of quality measurement fits into a mercantile perspective of the legal services market. Anyone wishing to play a role of significance in this market can no longer rely exclusively on the model of professionalism; they shall have to prove their worth. Educational or other access requirements to the legal profession no longer suffice, as

practical competency in specific areas of law is now also a consideration. Nonetheless, the legal profession is able to apply self-regulation, provided that it does so in a sufficiently transparent manner to convince the public authorities that their money is wisely and efficiently spent.

4. First-line versus second-line legal aid

Each of the countries has provisions for free or quasi-free legal counsel. In this context, we must not forget provisions outside the legal system itself.

In Belgium, free frontline legal assistance is available to all through a system of so-called ‘permanencies’ organised by the commissions for legal aid.

France has the system of *l’aide à l’accès au droit*, encompassing general information on rights and duties, assistance in exercising a right or the enforcement of legal duties, help in non-legal procedures, legal advice and assistance in drawing up legal documents. *L’aide à l’accès au droit* is co-ordinated by the *conseil départemental de l’accès au droit*. In view of the independence of the various councils, the possibilities of obtaining first-line legal aid diverge. In addition, France has so-called *Maisons de justices et du droit*, which provide free legal counsel and referrals, but not more extensive legal services. Finally, there are a variety of associations and organisations that offer legal advice. It is important to note here that, in France, the provision of services is regulated by law. Hence, not everyone can claim the status of legal adviser.

In Germany, there is the system of *Beratungshilfe*, whereby lawyers provide legal aid in private practice. In Bremen and Hamburg, *Beratungshilfe* is provided by legal practitioners in public legal services funded by the *Länder* or region itself. In Berlin, two systems of legal counsel exist side by side. In certain instances, the so-called *Amtsgericht*, or lower court, is also able to provide legal advice.

In the Netherlands, the *Juridisch Loket*, or legal services counter, answers citizens’ questions with regard to the law, either in person at the counter, or by telephone or e-mail. For straightforward legal issues, the counter can provide up to one hour’s free counsel.

In England and Wales, counsel in civil cases is covered by the Legal Help scheme. Besides the public legal services, legal aid is also provided by a number of not-for-profit organisations. We refer primarily to Citizens Advice Bureaux and Law Centres.

As regards the concrete functioning of first-line legal services, little accurate data is available for Belgium and France about the number of people to call on such provisions, the prevalence of repeated consultation, and nature of the cases in which advice is sought.

The German system of *Beratungshilfe* is a success. In the space of two decades (1981-2003), the number of applications for *Beratungshilfe* has increased tenfold, from approximately 60,000 to approximately 570,000 cases. Apart from the eligibility criteria, just 3% of applications were rejected in 2003. Here, the question arises whether *Beratungshilfe* goes beyond the notion of frontline legal aid as it is understood in a country such as Belgium.

Data regarding the activities of the Dutch centres for legal advice and assistance (*Bureaus rechtshulp*), which are accessible to all citizens, show that, in 2003, these centres were called upon 440,158 times, which is quite a considerable total. Still, not everyone requiring legal assistance called on the services provided by these centres. In fact, a study has shown that only 3% of the population relied on these services in the two preceding years. It should of course be noted here that there are various other bodies in the Netherlands that also provide first-line legal aid.

In England and Wales, the financial eligibility criteria for “legal help” are the same as those for “legal representation”. No distinction is made, though, between full and partial assistance. Research has shown that about a third of the population is eligible for legal help. Again, the question arises whether the “legal help” scheme does not go beyond the Belgian interpretation of first-line legal assistance as initial advice; more in-depth counsel is regarded as second-line assistance under the Belgian system.

5. Second-line legal aid for “serious” issues: which cases qualify?

Public funds obviously need to be spent wisely and to the benefit of the intended target group. This implies that the problem with which the legal subject is confronted should be taken seriously.

a. Civil cases

Under Belgian law, second-line legal assistance may not be provided if the case appears to be unfounded. In other words, legal aid is only forthcoming if the claim seems to be legitimate.

Similarly, in France, legal aid is not granted if the case appears to be groundless or inadmissible.

In other countries, the criteria applied are more strict. In Germany, the Netherlands, and England and Wales, the application for legal aid is subject to an analysis of the admissibility and significance of the application.

In Germany, *Prozesskostenhilfe* can be obtained if the envisaged court action has a reasonable chance of success and is not inspired by malice. The applicant is required to demonstrate the feasibility of the case. The Court subsequently assesses whether there is a sufficiently realistic prospect of a successful procedure. In other words, in Germany, eligibility for legal aid depends largely on the perceived chances of success. In the Netherlands, too, the gravity of the case is an important consideration. As in the other countries, legal aid is not provided if the application appears to lack foundation. Moreover, legal assistance is not provided either if the cost associated with the legal aid is not found to be proportionate to the issues at stake. A notable further criterion is that legal aid is only granted if the handling of the case cannot reasonably be left to the applicant. This concept is entirely unknown under Belgian law. In the Netherlands, it is assumed that certain cases can be left to the applicant to deal with, and that consequently no subsidised aid should be provided.

In England and Wales, criteria such as the sufficient benefit test, and the unavailability of alternative dispute resolution or alternative funding sources, are often decisive in the granting of legal help. As in Germany, the prospects of success are taken into consideration.

In addition, various interest are weighed against each other: the prospects of success and benefit to the client must be proportional to the cost involved. An important reference is that to the 'reasonable private paying client': if such a hypothetical client would not be prepared to litigate, then the cost is considered unreasonable. Clearly, this approach is inspired by the concern that public funds should be used efficiently.

From the foregoing, we may infer that larger budgets for legal aid coincide with detailed systems for assessing the seriousness of the legal matter at hand.

b. Criminal cases

In Belgium’s neighbouring countries, the “gravity” of the case is an important eligibility criterion, not only in civil, but also in criminal cases.

Under the German system, in criminal cases, the right to assistance from a lawyer or, as the case may be, the duty of such assistance depends primarily on the gravity of the accusation and the severity of the potential punishment, as well as the degree of complexity of the case.

In the Netherlands, no legal aid is provided if the request concerns a criminal case and if, in view of the offence committed, it is likely that a fine shall be imposed that is low in comparison to the income of the accused, or if the case comes under the jurisdiction of a subdistrict court (*sectie kanton*), barring complex criminal cases.

In England, a similar approach is taken to second-line assistance. The court decides whether or not Criminal Representation should be granted. Representation shall be granted if deemed ‘in the interests of justice’. There are, in other words, no financial conditions for the granting of Criminal Representation.

It is impossible to ascertain empirically the extent to which the gravity of the case is actually taken into account in the granting of representation. There is however data available on the type of cases in which legal representation was appointed.

Country	Year	Non-criminal	Criminal
France	2004	79%	21%
Germany	2001	80%	20%
England and Wales	2004/2005	37%	63%
Netherlands	2004	60.40%	39.60%
		Family cases	Non-criminal
			(excl. family cases)
France	2004	32%	68%
Germany	2001	80%	20%
England and Wales	2004/2005	48%	52%
Netherlands	2004	35%	65%

The synthetic comparative table regarding the different types of assignment in the countries under study gives rise to a number of question.

Assignment of representation is most common in criminal cases in England and Wales and to a lesser extent in the Netherlands, but far less so in France and Germany.

In the non-criminal sphere, we observe that family cases account for the vast majority of assignments in Germany, and almost half of assignments in England and Wales, but for a far smaller proportion in the Netherlands and in France.

6. Second-line legal aid for persons of limited means

Who is of limited means?

The notion is defined in social terms by the lawmaker as shown in the comparative table below (Table I).

In absolute terms, Belgium applies the strictest income threshold, followed closely by France. The Netherlands and, even more so, England and Wales have set a much higher financial threshold. In addition, the latter countries apply more stringent criteria with regard to assets. As the possibilities for obtaining legal aid become greater, it appears that testing of the data supplied becomes more strict and systematic.

If one is not eligible for entirely free legal aid, then one can still obtain assistance upon payment of a certain contribution, the amount of which depends on one's means (cf. Table II).

Table I – Persons of limited means, amounts not adjusted for inflation

	Belgium	Germany	France	Netherlands	England and Wales
Income criterion	Income < € 965 for single persons Income < € 1,177 for cohabiting couples and singles with a dependent person Increase by approx. € 80 per additional dependent person	No maximum income but income does affect The level of the own contribution	income < € 1,265 increased by € 152 for first two dependent persons and € 96 for every additional dependent person	income < € 1,438 For single persons income < € 2,055 in case of a common household	Gross income < approx. € 3,350 and disposable income < approx. € 930
Assets criterion	There is no specific assets criterion Assets are only taken into account for determining income	As a rule, there are no maximum assets Assets do affect the level of the own contribution	There is no specific assets criterion Assets are only taken into account for determining income	Assets < € 7,300 for single persons Assets < € 10,500 in other cases	Assets < approx. € 11,730

Table II – Personal contribution, amounts not adjusted for inflation

	Belgium	Germany	France	Netherlands	England and Wales
Entirely free	income < € 750 for single persons Income < € 965 for cohabiting couples and singles with a dependent person Increased by approx. € 80 per additional dependent person	disposable income < € 15	income < € 845 Increased by € 152 for first two dependent persons and € 96 for every additional dependent person	No entirely free legal aid Some categories are eligible for exemption of contributions	Disposable income < € 400
Partly free	income < € 965 for single persons income < € 1,177 for cohabiting couples and singles with a dependent person Increased by approx. € 80 per additional dependent person	disposable income > € 15	income < € 1,265 Increased by € 152 for first two dependent persons and € 96 for every additional dependent	income < € 1,438 for single persons income < € 2,055 In case of a common household	Disposable income < approx. € 930
Type of contribution	One-off contribution	monthly income-based contribution or possibly a one-off assets-based contribution	One-off contribution	One-off contribution	monthly income-based contribution or possibly a one-off assets-based contribution

Neither Belgium nor France have a fixed system for determining applicants' own contributions. The criteria applied in the Netherlands, England and Wales are much more unequivocal.

Germany, because of its characteristic legal aid system, whereby financial conditions and own contributions are combined, falls outside this comparison. The basic assumption underlying assignment is that the applicant, for personal or economic reasons, is unable to bear the cost of a court action, or can only pay for it in part or in instalments. In theory, there is no upper threshold for eligibility for *Prozesskostenhilfe*. This means on the one hand that needy applicants who have slipped through the net can nevertheless be helped, which may be the necessary, for example, in cases where legal action is very expensive. On the other hand, the system implies that the assessment of whether or not to grant legal aid can be very tricky, as all depends on the anticipated cost of the procedure.

The assets-related criteria applied have an impact on the proportion of the population that is eligible for subsidised legal aid.

In view of the low income threshold applied in Belgium, the group that is eligible for second-line assistance may be expected to be rather small. In 2000-2001, it amounted to 8.5 %. Considering that the income threshold was increased in 2003-2004, an estimated 10 % of the Belgian households now qualify for legal aid.

In parallel with the increase in potential eligibility, the percentage of entitled persons to claim free legal help has also risen: from 7.8 % in 2000-2001 to 11.3 % in 2003-2004.

In France, an estimation was made in 2001 of the number of households that would qualify for free legal assistance. The authors of the study point out that their estimate is approximate and should be treated with reservation. They put the proportion of households eligible for entirely free legal aid at 27% and those eligible for partially free legal aid at 46%.

Use was measured on the basis of the number of assignments of legal representation, which was also compared with demand for legal help. In 2004, the number of assignments amounted to 831,756. It was calculated that, for 1999, it concerned approximately 12 assignments per 1000 members of the public.

Another significant observation is that partially free legal aid accounted for only 13% of all assignments, while according to the above estimate some 46% of the total number of households were entitled. It has been argued that this low percentage is attributable to the unpredictable nature of the own contributions and the associated perception that lawyers are less interested in such cases because of the limited resources of the applicant.

Approximately 40 % of the German population is covered by legal aid insurance. However, there are proportionally fewer people with such insurance among the lower income groups. In

1998, the number of applications in civil cases amounted to 145,238, compared to just 96,605 in 2001. The proportion of successful applications declined from 78.5 % in 1998 to 70.7 % in 2001 (68,302). Approximately 90 % of applications to be approved relate to *Prozesskostenhilfe mit Ratenzahlung* (deferred payment of legal costs).

In the Netherlands, the financial conditions applied in 2004 meant that almost half (47%) of the foreign residents were eligible for subsidised legal aid. Annually, an estimated 500,000 citizens actually claim subsidised legal aid – which amounts to just under 10 % of those entitled on the basis of income. In reality, however, the percentage of users is very likely lower, as the estimate does not take into account repeated users.

In 1997-1998, 48 % of the population of England and Wales was eligible for legal aid in civil cases, be it with (23 %) or without (25 %) a personal contribution.

7. The role of the Bar in legal aid

The Bar plays an exceptional role within the Belgian legal aid system. First-line legal help is provided within the framework of the Commission for Legal Aid. This commission operates under the auspices of the Bar. The actual counsel is provided by lawyers. Second-line legal aid, and assistance or representation inside and outside of court, is entrusted to the Bureau for Legal Aid, which is established within the Bar Association. No salaried lawyers are deployed in the legal aid system. On the other hand, the decision regarding legal aid (free administration of justice) is left to the court itself. One should however not lose sight of the fact that, in Belgium, the Bar does not hold a monopoly on legal counselling services. In fact, many other players are active in the legal aid and the commercial legal services markets.

In France, where the legal aid system resembles most closely to that in Belgium, the role of the Bar is less significant. *L' aide à l' accès au droit*, or frontline legal aid, is organised at departmental level by *Le conseil départemental de l' accès au droit*. Lawyers are however involved in the process. The council is also entitled to conclude agreements with legal practitioners. Second-line legal assistance is the responsibility of a *Bureau d' aide juridictionnelle*, which is established at each *tribunal de grande instance*. This bureau also decided on whether legal aid should be granted (free legal proceedings). It is chaired by a magistrate and further encompasses a vice-chair, two civil servants, and two legal staff members (one lawyer and one acting on the behalf of the users). Although the Law Society is involved in decision-making, the organisation of *aide juridictionnelle* is a task for the courts. It should also be mentioned here that the provision of legal counsel in France is regulated by law.

It would appear from various studies in France that the number of assigned cases is unequally distributed. A significant number of lawyers (probably around 25%) do not take cases involving legal aid. Most such cases are dealt with by one-man practices and assistant lawyers. Most bar associations (156 out of 168 in 2000) take first-line level initiatives. However, one should not forget that various other organisations also provide legal services.

In Germany, the entire organisation of legal aid is a matter for the courts to deal with. All courts are obliged to examine and assess any applications for *Beratungshilfe* and *Prozesskostenhilfe*, and, as the case may be, to appoint a lawyer to the case. In other words, under the German system, even frontline legal assistance is organised primarily by the courts. The *Amtsgericht*, or regional court, is supposed to assess the legitimacy of any request for *Beratungshilfe*, and may provide advice itself or deliver a document entitling the applicant to consult a lawyer under the *Beratungshilfe* system.

Germany has few public legal services. *Prozesskostenhilfe* is provided by lawyers in private practice. This also holds for *Beratungshilfe* in thirteen of the sixteen Bundesländer. In Bremen and Hamburg, *Beratungshilfe* is however provided by jurists in public legal services, funded by the *Länder* itself. In Berlin, there are two parallel systems of services. In certain cases, the *Amtsgericht* is also able to provide legal counsel.

The German system also differs in that lawyers hold a quasi-monopoly on legal work. This stands in the way of legal services by non-lawyers, be they commercial or non-commercial voluntary services. Currently, a bill is being considered for the replacement of the *Beratungshilfegesetz* in the longer term. The new law – known as the *Rechtsdienstleistungsgesetz* (RDG) – would somewhat restrict the monopoly of the lawyers and be conducive to pro bono work in the field of legal services.

No data were found on the actual deployment of lawyers under the German legal aid system.

In the Netherlands, all first-line and second-line legal aid is provided by public institutions, such as the Councils for Legal Aid and the Legal Aid Foundations. Until recently, those Foundations deployed both lawyers and salaried jurists. The new system involves a legal services counter, where people can seek advice in simple legal matters. For more complex cases, the client is referred to a specialised legal counsel, who may or may not be a lawyer. If legal procedures are involved, then a lawyer is appointed, as the staff of the bureau for legal aid no longer perform such tasks. The role of private lawyers has thus grown.

One should also keep in mind that, in the Netherlands, there are numerous private and public bodies that provide first-line legal aid.

Subsidised legal assistance is offered and provided by the Bar. Fewer than half of all lawyers (2004, 47%) are registered with the councils for legal aid and can therefore participate actively in subsidised legal help. In a 2004 survey of lawyers providing legal aid, just 10 % of the respondents indicated that they had an outspoken preference for subsidised cases.

As far as first-line legal assistance is concerned, there are numerous semi-public and private organisations besides the Bar that provide such help.

In England and Wales the organisation of legal aid is entrusted to a public body known as the “Legal Services Commission”. This Commission is responsible for two legal service schemes: the Community Legal Service (legal aid in civil cases) and the Criminal Defence Service (legal aid in criminal cases). Both services provide counsel, assistance and representation at different levels in their own area of law. The Community Legal Service concludes contracts with firms of lawyers to carry out these services and it also collaborates with not-for-profit organisations. The Criminal Defence Service also operates on the basis of a system of contracts with law firms. However, for criminal cases, one can also call on lawyers employed at so-called Public Defender Service Offices, which operate autonomously. In other words, here salaried lawyers and private lawyers operate in the same field. The client is still free to choose between the two. Besides the public services discussed, there are also a number of not-for-profit organisations that provide legal aid. We refer first and foremost to the Citizen Advice Bureaux and Law Centres.

Since the implementation of the Access to Justice act in 2000, a system of contracts has been in place. This system is coupled with the unequivocal quality requirements with which contracts must comply. These contracts also specify the fees due for services performed. Since the introduction of the contract system in January 2000 for civil cases and in April 2001 for criminal cases, the number of service providers has declined substantially. According to the Legal Services Commission, the smaller service providers have disappeared because they were unable to meet the required standards. Although the greatest dropout was recorded among the liberal legal professions, they continue to constitute the largest group of providers. Not-for-profit organisations accounted for just 8 % of all contracts in 2002.

8. The role of the Bar in legal aid services and the remuneration systems

In Belgium, lawyers who provide second-line legal services are remunerated on the basis of a points system. They are required to report to the Bureau on cases dealt with. The Bureau awards points to the lawyers for services provided on the basis of a list indicating the number of points to be granted for different types of cases. The budget for second-line legal aid is divided by the total number of points awarded to all the lawyers. In this manner, every point is equated to a money value.

France applies a similar points system. There is however an important difference in that, in France, the money value of a point is determined beforehand, so that it is not inversely proportional to the number of cases involving legal aid. Unlike in Belgium, the budget for legal aid is open rather than closed.

A second difference is that the money value of a point is increased if a Bar is required to deal with a relatively great number of cases involving legal aid. Hence, the cash equivalent of a point may vary from Bar to Bar.

The Netherlands is the third and final country to apply a points system. Procedures are again equated to a specific number of points according to a fixed list, though the Dutch list is more qualified than the Belgian one. As in France, the cash equivalent of a point is determined beforehand and an open budget is used. Registered lawyers receive periodic advances.

In Germany, the eventual fee in non-criminal cases essentially depends on the financial significance of the case and a system of coefficients. The coefficients are predetermined in accordance with the nature of the case as well as the nature of the service provided. The list is rather detailed and it is also used, albeit with different coefficients, for calculating the amount the winning party is entitled to.

Fees in criminal cases are not determined on the basis of coefficients. Here, the amounts are fixed. A lawyer who is entitled to remuneration from the treasury under the *Prozesskostenhilfe* scheme can demand a reasonable advance on fees and expenses.

In England and Wales, almost all fees for legal aid were, until recently, calculated on the basis of an hourly rate. Unlike in Belgium, France, the Netherlands and Germany, the remuneration received under this system was very input-dependent.

Now England and Wales have switched to a more output-dependent system. Under this new system, the LSC pays a fixed fee for each case. To calculate the fee, the LSC takes the average claims of the legal aid provider in each area of law in the previous year and adds 2.5%. The LSC pays this average for each case, irrespective of the amount of time spent on it. The system is likely to be replaced with a fixed fee system based on regional and national averages per category of work. In criminal cases, too, there is a tendency to switch over to a remuneration based on output rather than input. To this end, use could be made of a kind of public tender. The essential purpose of the altered approach is to combine a closer control over the budget with the best possible service to the client.

As this overview shows, countries applying an open funding system are inclined to build in mechanisms that will keep cost in check.

9. Which model do the present legal aid systems follow?

This question is merely a figure of speech, as social institutions do not follow models. Models are analytical tools which are constructed ex post, on the basis of observation of concrete

social facts and evolutions. They are derived from social reality and their purpose is to enhance our insight into that reality.

Part I deals extensively with models of legal aid. In the present paragraph, we restrict ourselves to aspects which are relevant to our conclusions regarding the countries studied.

In the legal aid systems considered, we recognise quite clearly elements of the *judicare* model.

The intention is invariably to make legal services equally accessible to persons of limited means as they are to better-off citizens. Under the *judicare* system, lawyers, i.e. liberal professionals, provide free legal aid in return for a fee from the public authorities. While interference by those public authorities is avoided as much as possible, they do determine the access criteria (demand) and fees (supply).

Next to the *judicare* model stands the public salaried model, whereby legal aid services are entrusted to jurists in the employ of an organisation. The role of this organisation is not restricted to offering legal services to individuals, but they are committed to enhancing the democratic and egalitarian content of society.

The English system contains a public salaried component: the Criminal Defence Service Office. This institution employs salaried jurists who may be approached by members of the public to defend them before a criminal court. Until recently, under the Dutch legal aid system, salaried jurists working for the *Bureaus Rechtshulp* also provided legal representation before criminal courts. However, this scheme has been replaced with the counter system, which probably explains why the latter has come in for such fierce criticism from academic and social circles.

The difference between the *judicare* model and the public salaried model is obviously founded on an ideological opposition. Regan's model allows us to ascertain whether the available subsidised legal aid enables persons of limited means to deal effectively with legal issues. In order for a legal aid system to be adequate, it should be both generous and comprehensive. By generous, we mean that about half the population should have access to the legal aid services provided. The term comprehensive denotes that services should be available for the entire range of legal problems. The latter may require certain restrictions, as otherwise the organisational burden on legal aid services might otherwise become excessive. In order for a system to be rightly regarded as quasi-universal, two kinds of services should at least be provided, namely inside litigation services and outside litigation services.

Indeed, any analysis of legal aid systems on the basis of Regan's model necessitates a distinction between "outside" and "inside" litigation, which we have optimised here as respectively first-line and second-line legal aid. As far as frontline legal aid is concerned, we observe that in all the countries studied public subsidised services are available. The manner

and extent of involvement of the Bar varies from country to country. A role is in any case reserved for a variety of organisations besides the Bar, be they public or private.

The question arises to what extent the legal needs of the public are met. In some countries, there are no conditions of access to first-line legal aid whatsoever. So in theory, such systems should be “generous” and “comprehensive”. Further research will tell whether this holds true in practice.

According to Regan, a second-line system is generous if approximately half of the population has access to the legal aid services provided. From this perspective, France, the Netherlands and England & Wales have generous legal aid systems. By comparison, few Belgian citizens are eligible for subsidised legal aid.

If we consider the respective legal aid budgets of the countries studied, it is again Belgium that emerges as the country that spends the least on such services. In ascending order, France, Germany, the Netherlands and England & Wales have more generous legal aid budgets.

In order for a legal aid system to be quasi-universal, it should moreover be comprehensive, i.e. the available services should cover the whole array of legal issues. It is hard to draw conclusions in this respect on the basis of the empirical data collected. Our overview does however suggest that there is some divergence in the nature of the cases in which legal aid services is provided. So perhaps our tentative conclusion should be that each legal aid system has strengths and weaknesses and that none is therefore truly comprehensive.

Bibliography