



Anna Barlow

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





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and the Nordic countries

Anna Barlow

Public Law
Faculty of Social Sciences, Business and Economics
Åbo Akademi University
Åbo, Finland, 2019

for Violet, Ernest, Hagar and Georg

Injustice anywhere is a threat to justice
everywhere

Martin Luther King Jr.

It is self-evident that where a state chooses
a 'legal aid' system to provide for access to court,
such a system can only operate effectively,
given the limited resources available,
by establishing machinery to select which cases
should be legally aided.

European Commission on Human Rights
X v. UK, 1980

Foreword and Acknowledgements

Legal aid has been a part of my life for nearly 30 years; indeed, for many years, it paid my salary. I have seen first-hand how important legal aid can be to protect the rights of marginalised members of society and have shared their joy when the law turned out to be on their side, after all. During that time the legal aid powers in England kept a close eye on my work for clients and were not afraid to reprimand me if they thought I had wasted their money by writing two letters when one would do. This doctoral research has been my chance to turn the tables and conduct a critical examination of the administration of legal aid in the jurisdiction in which I worked, and also in neighbouring and nearby jurisdictions. Improving legal aid across North-West Europe is an urgent necessity and I hope that this study will encourage governments to take progressive steps, reassured by the finding that better is not necessarily more expensive.

During the course of my research, over 70 busy professionals agreed to be interviewed and gave generously of their time and knowledge. Without the insight into the workings of the legal aid schemes which these interviews afforded, I would have missed much important material and misunderstood more. I thank them all and in particular would like to acknowledge the assistance of: Merja Muilu, Head of the Legal Aid and Enforcement Unit at the Finnish Ministry of Justice and Minna Melender, Secretary General of the Finnish Bar Association; Ylva Boström-Berglund, Chief Legal Officer at the Swedish National Legal Aid Authority; Colin Lancaster, Chief Executive of the Scottish Legal Aid Board; Matthew Thomson then of the Law Society of Scotland and Iain Smith of Keegan Smith Defence Lawyers; Merete Smith, Secretary General of the Norwegian Bar Association; Wenche Bjørland, Head of Department at the Norwegian Civil Affairs Authority and Hege Skaanes Nyhus, Acting Deputy Director of the Legal Department at the Oslo and Akershus County Governor's Office; Olaf Halvorsen Rønning at Oslo University; Peter O'Brien at the Law Society of Northern Ireland and Paul Andrews and team at the Legal Services Agency Northern Ireland; John McDaid, Chief Executive of the Irish Legal Aid Board; Cormac O Culaín at the Law Society of Ireland and Paul Joyce and colleagues at the wonderful FLAC; Astrid Mavrogenis, then Head of the Legal Aid Division of the Department of Civil Affairs in Denmark and Mads Krøger Pramming of Ehmer Pramming & Advokater; Richard Miller and team at the Law Society of England and Wales; Jake Kraft and colleagues at the English & Welsh Legal Aid Agency and last but by no means least Bryndís Helgadóttir, Director of the Department of Legal Affairs at the Icelandic Ministry of the Interior, who patiently answered my many questions by email.

My gratitude and appreciation go to my supervisor, Markku Suksi, who has accompanied me on this journey into the minutiae of legal aid laws. We

both learned much along the way and surprised each other on several occasions with widely differing understandings of public law principles which we had previously each thought quite ordinary and obvious. It has been an illuminating and entertaining experience.

Special thanks go to my friend and collaborator Michael Smyth CBE QC(Hon), for sensibly pointing out that it would be a good idea to choose a PhD research topic that I already knew something about, such as legal aid for example. The results you see before you. The Hon. Mr Justice Robin Knowles CBE, has, as always, been endlessly interested and encouraging, for which I am truly grateful. My thanks to Bryan Adams for his help with the statistics in Chapter 6; he helped me to make sense of the figures, and I hope I have managed to pass this understanding on to my readers.

It is traditional to thank one's family at this juncture, and I do so genuinely and enthusiastically. I realise that, objectively, legal aid rules might not be the most fascinating topic, but you have all listened without complaint and been supportive, encouraging and loving throughout. John, Jess and Fred, without you cheering me on from the sidelines this project would never have been completed. Thank you for keeping me sane and for all the cups of tea. My principal proof-reader has been my mother, Ulla, who has also offered fresh perspectives on my arguments. I hope you know how useful that has been, and how grateful I am.

During the course of my research I have received financial support from the following: Gustaf Packaléns Mindefond, Kansler Lars Erik Taxells forskningsfond, Makarna Eks fond, Eugen Schaumans fond, Nordiska administrativa förbundet finska avdelningen and Åbo Akademi. I am grateful for their assistance.

I hope that this dissertation proves interesting and useful to others who, like me, believe that the health of legal aid is a measure of the health of the rule of law in our precious democracies

Ekenäs, January 2019

Anna Barlow

Svensk sammanfattning (Summary in Swedish)

Fastän rättshjälpen är en viktig del av rättsstatligheten, finns det relativt få studier om rättshjälp ur ett juridiskt perspektiv. Denna avhandling är ämnad att utöka kunskapen inom området genom att undersöka den offentligrättsliga grunden på vilken rättshjälp är byggd. Målet är att dokumentera beslutsfattandet om hur de begränsade medlen för rättshjälp styrs till vissa individer och vissa fall, vem som fattar besluten och hur besluten påverkas av relevant nationell lag. Forskningsmetoden är jämförande, och nio rättsordningar har undersökts: de fem Nordiska länderna (Danmark, Finland, Island, Norge och Sverige); Storbritannien (Skottland, Nordirland och England & Wales) och Irland.

Avhandlingen börjar med en diskussion om varför rättshjälp är nödvändig och vad internationella mänskliga rättigheter kräver inom detta område. Efter en översikt av de olika nationella juridiska systemen och juristyrkena i länderna, behandlas fem forskningsfrågor: (i) Vilka är de nationella förvaltningsformerna och förfaranden för beslutsfattande inom rättshjälp och för övervakning av dessa beslut? (ii) Vilka nationella juridiska bestämmelser begränsar beslutsfattandet inom rättshjälp? (iii) Vilket är sambandet mellan nationell rättshjälp, internationell människorättslagstiftning och rättsstatsprincipen och i vilken grad uppfyller länderna de krav som ställs på dem? (iv) Hur varierar de processuella och materiella aspekterna hos rättshjälp mellan de undersökta rättsordningarna och vilka orsaker kan förklara dessa variationer? (v) Kan olika rättsordningar lära sig eller 'låna' av varandra inom rättshjälpen och i så fall hur?

Forskningen visar att rättshjälpen varierar betydligt mellan de nio rättsordningarna och att det inte finns tydliga, eller förväntade, korrelationer mellan de olika systemen. Till exempel Finland och Sverige företer avsevärda skillnader, medan Finlands och Irlands rättshjälpssystem har mycket gemensamt.

En viktig slutsats är att det inte finns en korrelation mellan storleken av den statliga budgeten som används för rättshjälp och hur omfattande systemet är. Ingen av de nio rättsordningarna uppfyller fullt ut kraven som folkrätten ställer. Finland och Sverige kommer dock närmast till att möta kraven.

Att inom rättshjälpen lära sig och låna av andra rättsordningar är möjligt och önskvärt, men måste göras mycket försiktigt. Alla rättshjälpssystem är mycket komplicerade. Före man 'lånar' från ett annat system måste man, genom att göra en detaljerad studie av alla aspekter hos 'långivarsystemet', kunna påvisa orsak och verkan. Sedan måste man bedöma huruvida 'lånet' passar in i 'låntagarsystemets' helhet.

Avhandlingen avslutas med ett förslag om hur befintlig och framtida forskning om rättshjälp kunde koordineras med hjälp av ett nytt ramverk. Det ramverk som utvecklats i avhandlingen kunde möjliggöra relevant jämförelse mellan rättshjälpssystem och analys av individuella system samt underlätta konstruktionen av rationella och sammanhängande nationella system som uppfyller den internationella människorättslagstiftningens krav.

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1. Chapter 1: Introduction

1.1 Legal aid

Consider a situation in which a person, living in one of the wealthy, developed nations of North-West Europe, has limited personal financial resources. In among the many daily dealings with other individuals and with the authorities, a serious problem arises which cannot be ignored. Maybe a relationship breaks down and it is impossible to amicably agree arrangements for the home and children. Possibly a sole trader faces the risk of bankruptcy because of difficulties with customers not paying bills, or a pregnant woman is dismissed by an unsympathetic employer. An asylum-seeker might need to appeal to court against a refusal of refugee status, or a mental health patient may object to compulsory treatment. Serious disrepair of a rented home may mean a family has to live with damp and mould, causing health problems for them all, or there may be problems arranging the appropriate education for a child with a learning disability. Maybe there has even been an allegation of the commission of a crime.

All these potential issues are acknowledged by the State, and mechanisms for the fair resolution of the ensuing conflicts are in place. Sometimes the mechanism involves the formal legal process, sometimes not, but there is always ultimately a structure available either for the negotiation of a solution or for a decision to be imposed by a third party.

The processes alone, though, are not enough. The person experiencing the difficulty may not know about the existence of the relevant mechanism, and even if she or he does, may need help in using it. The circumstances giving rise to the problem will cause stress and anxiety and make it even more difficult to navigate an unfamiliar system, particularly if the mode of resolution is formal and legal, peopled by experts who can easily seem intimidating. What the individual really needs is help from one of those experts, a lawyer, but lawyers are expensive and there is no possibility of affording one without assistance. The person concerned has no savings, no-one else who will pay and no relevant insurance. Legal aid addresses this problem by providing legal advice and representation, paid for by the State, to a person who needs help in engaging with the legal system.

It can be argued that efforts should be made to reduce the frequency of this situation arising, because judicial dispute resolution routes are expensive and potentially unsuitable. Even defining a problem as 'legal' implies a judgment, usually by lawyers (with their vested interests in play), that the law is the best way to deal with the problem, and some commentators argue that this categorisation must be resisted in order for more appropriate and effective dispute resolution methods to be developed.¹ Whatever the truth of this assertion, the present reality is that there are circumstances which force people into the judicial resolution of disputes, either because another party has chosen that route or because no other options are available. As legal proceedings are sometimes inevitable, legal aid must be available for the protection of indigent parties.

This thesis seeks to add to the understanding of how legal aid works, how well it works and how it could be improved. As will be seen in the literature review below, legal aid scholarship has until now generally focused on the need for and political commitment to legal aid, or the contribution made by legal aid to access to justice. This study extends the range of legal aid research by applying a public law perspective in considering the legal basis for legal aid schemes and the internal mechanisms according to which they operate. It aims to discover who makes the decisions allocating limited legal aid resources to certain individuals and certain cases, and the parameters within which these decisions are made. The geographical scope of the investigation will be a group of jurisdictions in North-West Europe: the UK, the Republic of Ireland and the Nordic countries.

The research takes as its definition of legal aid 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. This is a relatively narrow definition of legal aid; other studies have included the assistance provided through insurance and by volunteer advice services,² whereas here attention 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). Legal aid relating to civil, administrative and criminal law will be considered, thus whilst in the Nordic countries publicly funded legal assistance for criminal defendants is not called 'legal aid', their public defence schemes are within the remit of this research. The intention is to examine the procedural choices which have been made by a selection of jurisdictions in creating legal aid schemes, through a public and administrative law lens, and thereby answer a number of questions.

¹ Cousins 1994.

² E.g. Hammerslev and Rønning (eds.) 2018.

1.2 Research questions

1.2.1 Organisational forms for legal aid decision-making and oversight of decision

Statutory provisions and regulations set up complex administrative and bureaucratic structures for the provision and control of legal aid in each of the jurisdictions to be considered. In some cases, there are a number of specific posts and organisations created solely to deal with legal aid; in others, legal aid is largely administered through existing structures. The structures provided must be able to deal with applications for legal aid and with appeals against refusals and must have mechanisms to ensure that the end result of a successful application is the provision of help to the individual by a lawyer, either state-employed or in private practice.

The need of a person to receive legal aid, and/or an application by such a person, triggers an administrative process within the relevant competent body. This leads to an initial acceptance or refusal of the right to legal aid, concretised in an administrative decision which is obliged to fulfil certain criteria. The initial decisions are generally subject to appeal and appeal decisions, likewise, must be taken according to an administrative process set out in law. This study aims to catalogue these organisational structures and processes in the jurisdictions under consideration.

The first research question is: in the relevant jurisdictions, what are the organisational forms and procedures for legal aid decision-making and for the oversight of such decisions?

1.2.2 Limits on decision-making discretion

The legal aid decision-makers identified in answering the first research question are subject to law when making their determinations. The legal requirements include those of both general and specific nature; they are set out in general administrative law and also in specific legislation governing legal aid. Some requirements are provided in primary or secondary legal aid legislation, whilst others take the form of binding guidance. Even if there are no legal limits to the discretion on a particular point, there may be non-binding guidance designed to ensure consistency of decision-making across the jurisdiction.

Discretion can be curtailed to a greater or lesser extent depending on the jurisdiction and the nature of the decision being made. The point at which decisions are made is a crucial one for governments because the number of legal aid grants has a direct budgetary consequence. Thus, the control of grant decisions is a central factor in the establishment of a legal aid scheme. Choices made as to how cases should be selected for eligibility indicate the priorities which governments set in spending limited resources. As such, a consideration of the limits on decision-making discretion is crucial in understanding a legal aid system and a full exploration of these rules will be undertaken.

The second research question is therefore: what are the material rules limiting decision-making discretion in legal aid?

1.2.3 Compliance with international human rights law

International human rights law has relevance to legal aid, as an element of the fair trial guarantees provided in numerous instruments. Treaties and the related jurisprudence set parameters for how restrictive governments can be when providing legal aid; as the procedural and material requirements for legal aid limit the discretion of decision-makers, so international obligations limit the discretion of governments when setting legal aid policy. The international requirements can also act as a neutral measure outside the legal aid schemes which can be used to compare them impartially.

The clearest guidance can be obtained from cases decided by the treaty bodies, but where there are none relevant, it is also possible to judge legal aid rules against the spirit of the treaties, and even against overriding principles such as the rule of law.

Research question three is: what is the nature and extent of the connections between legal aid, international human rights law, and the rule of law, and to what extent do the jurisdictions comply with the relevant obligations?

1.2.4 Comparison of the jurisdictions in the above matters

This dissertation employs a functional comparative methodology and as such the comparison of the jurisdictions is the core work. The subject matter of the comparison is complex, and the jurisdictions numerous, and a disciplined approach will therefore be needed for the comparison. Not only differences between individual jurisdictions, but also patterns of difference within the group of jurisdictions, will be sought.

In addition to identifying differences and similarities in the administrative law components of legal aid, possible explanations for the differences can be considered. These might include policy differences, contextual dissimilarities or other factors yet to be explored.

The fourth research question asks: how do the procedural and material aspects of legal aid vary between jurisdictions and what reasons might there be for this variation?

1.2.5 The possibility of transfer or learning between jurisdictions

The value of a comparative law approach is partly in bringing to light the peculiarities of each system and opening the eyes of its practitioners to the idiosyncrasies which may previously have seemed mundane. There may also, though, be more to gain through the transfer or borrowing of ideas to solve problems being experienced in the home jurisdiction. Transplant theorists within comparative law disagree on the extent to which transfer is possible. However, within the field of legal aid, transplants have been considered by policy-makers and small-scale transfers have successfully been implemented within the jurisdictions under consideration.³

³ These are described in section 9.5.2.1. below.

The detailed comparison of the procedural and material requirements for legal aid undertaken in the earlier parts of the study should make it possible to consider a fifth and final research question: can transfer or learning between jurisdictions take place within the sphere of legal aid and, if so, how?

1.3 Methods and materials

1.3.1 Choice of methodology

The provision of legal aid is a necessary function which is common to, *inter alia*, all states in the Council of Europe, as will be seen below in Chapter 2. According to their international human rights obligations they must provide legal aid in some cases, both criminal and civil. However, to pay for free legal assistance for anybody appearing before any court or tribunal would involve considerable and unpredictable expense, which is not acceptable. Thus, as the European Commission on Human Rights noted:

It is self-evident that where a state chooses a “legal aid” system to provide for access to court, such a system can only operate effectively, given the limited resources available, by establishing machinery to select which cases should be legally aided.⁴

The construction of this machinery is a national governmental task and is not dependent on the approach of other states. However, considering the position in other jurisdictions through the use of comparative law has the potential to “help compare the ability of different solutions to solve similar problems, and spur similar degrees of progress”.⁵ We can “look at other jurisdictions as a source of inspiration”.⁶

As in many areas of public policy, governments tend to adjust legal aid provision from time to time, sometimes in response to a crisis of affordability.⁷ Information on how this is achieved in similar countries might provide a useful input for better policy-making. At a minimum, comparative research can show that there are potential alternatives to elements of the home system which currently seem self-evident and may be overlooked in policy and lobbying. It also enables the possible alternatives to be evaluated, in the light of their particular national context, so that policy-makers can assess whether they would be suitable for use at home.

It appears that a functional comparative law approach might be appropriate, given that the research questions include how different jurisdictions approach a particular issue. For this method to be a good fit, though, it must be ascertained what social ‘need’ is being met by legal aid systems. This can be challenging

⁴ *X v UK*, 1980, para. 16.

⁵ Michaels 2006, p. 351.

⁶ Smits 2011, p. 555.

⁷ Such as the overhaul of legal aid in England & Wales enacted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

because societal needs “cannot be directly observed”.⁸ However, the conditions in which even the relatively sceptical Husa accepts that functional comparatism may be appropriate are met: “*if* by ‘law’ we mean a certain body of rules, legal principles or institutions and *if* the study is directed at micro-level to these things, then functional assumptions may make sense”.⁹ Furthermore, in this study the needs can be thought of as “second-tier”; they are derived from other needs (to implement international duties and to provide a fair system of justice) and therefore potentially more readily identified. The benefit for the research of the ‘needs’ being at least partially imposed from above by international human rights law will be further addressed below.

It has been argued that functional comparatists are “often insufficiently aware of the non-legal elements of success or failure of societies, including cultural differences.”¹⁰ If we can extend this to encompass legal culture¹¹ we are at the core of a major issue in a functional comparison of legal aid systems. Let us take as the starting assumption that it is possible to measure the success of a legal aid scheme by a combination of economic sustainability (which is of course also tied up with political will) and delivery of access to justice. How well the system performs against these measures will not only depend on the functioning of the scheme itself but also by what is demanded of it by the justice system and by the public. The function performed by the legal aid scheme will vary between jurisdictions according to how courts and judges operate, the availability and popularity of informal dispute resolution, crime rates and levels of civil litigation embarked upon. Other factors such as complexity of laws and even level of education amongst the public may also be highly relevant. Nonetheless, it is hoped that as long as an awareness of these complexities is maintained, the comparison can still be useful as a tool for gaining insight into each system. A comparative exploration of some of these contextual factors will be needed to illuminate the procedural and material comparison.

When considering the appropriateness of a comparative approach, it should also be borne in mind that comparisons between legal aid systems, including several of those currently under study, already take place. Policy-makers are interested in other legal aid systems and are particularly keen to try and discover why their own system may be more expensive than a neighbouring one. There is, for instance, a hope that elements of other systems could be adopted to reduce costs at home.¹² Whether such inter-jurisdictional learning is truly possible is a moot point amongst theorists, and some of the academic arguments surrounding transfer theory will be discussed in Chapter 9. Whatever the theoretical position, one possible outcome of the current

8 Husa 2011, p. 549.

9 *Ibidem*, p. 552.

10 Michaels 2006, p. 351.

11 De Cruz 2008, p. 5, referencing Lawrence Friedman.

12 See e.g. Johnsen 2009a.

research could be a conclusion that such comparisons are not appropriate, if the complexity referred to above so indicates. This would of itself be an interesting result.

The ambition of this study will therefore be to determine and record the laws establishing the decision-making structures and material rules of legal aid systems in various jurisdictions and to analyse the connection between the structures and their specific national contexts in order to suggest whether there could or should be transposition between states where one system is felt to be failing and another succeeding.

The definition of legal aid which will be used in the study was set out above: provision by the state of legal help and representation by lawyers, either through state employees or by paying for private lawyers. This definition places the research in the public law sphere as all relevant legal relationships are between the state and another party, be it a lawyer providing services or the ultimate beneficiary, the client. Furthermore, in so far as it is regulated through government departments or agencies, legal aid law is also administrative law, and much of what will be discussed in the thesis falls within this category. There can also be found, within the field of legal aid in the jurisdictions under consideration, examples of indirect public administration. These arise when the administration of the public functions of legal aid is delegated to non-governmental entities, either individuals or independent legal persons. Consideration of such situations will be included as they arise in the text.

It will additionally be seen throughout the thesis that much of the relevant law is of a procedural nature. However, this procedural law can itself be viewed as falling within public law, if the latter term is broadly understood, and a public law approach allows consideration of the procedural legal elements without conflict. The research questions will thus be addressed from a public and administrative law perspective.

Other approaches are also relevant to legal aid research, although not the focus of this study. Social law has a dual relationship with legal aid: legal aid is often a crucial tool in the enforcement of social law, as seen above, yet legal aid itself can also be considered a social benefit and thus a direct subject of social law research. This positioning of legal aid may be particularly relevant in the Nordic welfare states, but is also found in some of the other jurisdictions. A discussion of the policy identification of legal aid as a social benefit will be conducted in the conclusions in Chapter 9, but throughout the study arguments will be made which are of a social law nature, despite the public and administrative law focus. As will be seen from the literature review later in this chapter, a social law approach characterises much legal aid writing to date. The current research aims to complement that body of work with its alternative emphasis on the structural and procedural aspects of the topic. Thus, whilst social law must properly be referred to, this study will where possible pay greater attention to the procedural law aspects which arise. It will

be the machinery of legal aid, which falls within the overlapping spheres of public, administrative and procedural law, which will be the focus; social law will provide some of the arguments used to critique legal aid schemes.

Public administration is also an area which has much to offer an interdisciplinary understanding of legal aid, but is outside the expertise of the author.

1.3.2 The application of functional comparatism to legal aid

In order for a functional comparatist approach to be applied in pure form, it should be possible to express a single function which is being performed within the various jurisdictions. Bell points out that “it is not possible ... to assume that there is a single, universal function [of administrative law]”¹³ However, in carrying out a micro-comparison, it may be that a common purpose can be ascertained, although in the present instance this is not necessarily straightforward.

As “institutions in public law perform tasks in the light of local political agendas”,¹⁴ purpose is a complex concept. It is not always clear whether a government’s purpose in providing a legal aid system is to ensure access to justice, or to satisfy the duty imposed internationally. The former is an expression of a state’s interest in desiring a justice system which functions according to certain standards. If, however, a government has not internalised legal aid as a necessary part of the operation of the courts and justice system then it may be fulfilling a different purpose; to avoid international censure. These differences in possible purpose may lead to reduced comparability of legal aid systems as solutions. However, whilst the jurisdictions under scrutiny fall at various points along the scale from an “access to justice” purpose to an “international compliance” purpose, at least some element of each purpose can be found in each jurisdiction and it is thus submitted that the comparison of solutions can be meaningful. Given the “functional similarity” of the jurisdictions,¹⁵ it can be assumed that the understanding of both the need to comply with international rules and the understanding of access to justice are sufficiently similar to allow valid comparison. This is so despite the ‘formal’ difference, and indeed the presence in the study of civil law and common law jurisdictions may allow tentative conclusions to be drawn about the impact of legal family on the functioning of legal aid systems.

A functional comparative perspective will enable the comparison of the legal institutions which, in different jurisdictions, perform a similar problem-solving function, in this case the provision of a legal aid scheme to contribute to the achievement of access to justice and to satisfy international human rights requirements.

13 Bell 2006, p. 1260.

14 *Ibidem*, p. 1268.

15 Siems 2014, p. 38.

1.3.3 Choice of jurisdictions

It is usual when conducting functional comparative research to concentrate on two jurisdictions: the 'home' system and another. There is understood to be a risk that "choosing a large number of countries may just lead to parallel country studies".¹⁶ However, the length of a doctoral dissertation does, it is submitted, give time and space for in-depth consideration of several jurisdictions, as long as a sufficiently narrow field of study is chosen.

The advantage of choosing a narrow focus with a larger range of jurisdictions within the subject of legal aid is precisely because legal aid is connected to the legal system in which it operates in a very intimate and particular way; not only must the laws and rules establishing the system comply with the requirements of the legal system of the state in question, but its area of operation is that same legal system. It is therefore helpful to look at several systems which provide different contexts for their legal aid systems, making critical comparisons possible and meaningful. The choice for this doctorate of two groups of jurisdictions is intended to enable patterns to be seen across jurisdictions which share some, but not all, contextual characteristics.

The two groups selected are those of the Nordic countries (Finland, Sweden, Norway, Denmark and Iceland), those of the United Kingdom (England & Wales,¹⁷ Scotland and Northern Ireland), and the Republic of Ireland. It will be noted that there are seven states but nine jurisdictions in this list, as the appropriate frame of reference is the area covered by a distinct legal aid system. These jurisdictions, as well as being geographically grouped together in North-West Europe, are all parties to the European Convention on Human Rights and allocate (together with the Netherlands) the highest proportions in Europe of their judicial systems budget to legal aid.¹⁸ They thus form a suitable cohort for comparison: high-spending on legal aid, geographically close and with legal, cultural and historical ties.

As will be seen below, the international requirements upon all nine jurisdictions are similar. They are also at a "similar stage in their legal (and often their political, economic and social) evolution".¹⁹ However, the Nordic group all have civil law systems, whilst the Irish and UK systems (with the exception of Scotland, which is a mixed system) are common law systems. It is expected that within each sub-group similarities will be found, due to historical, political and social parallels. Any clear differences between the two sub-groups might be analysed and explained accordingly. However, within each sub-group there are differences in legal systems which may also illuminate the overall research task.

¹⁶ *Ibidem*, p. 15.

¹⁷ Throughout this thesis, the phrase 'England & Wales' in the singular, with the conjoining ampersand, will be used to describe the single jurisdiction which covers both countries.

¹⁸ See section 8.2.1.3, below.

¹⁹ De Cruz 2008, p. 227.

The author of this study additionally has good access to the two groups of systems: she is a qualified English lawyer with many years' practice there, but is also a Swedish-speaking dual national of Finland, where she now lives. As a result, whilst the English & Welsh legal system must be considered the 'home' jurisdiction, there is an element of 'insider' and 'outsider' perspective already in both that jurisdiction and in Finland.²⁰

Within the states under consideration there are several self-governing territories: the Åland Islands, the Faroe Islands, Greenland and the Channel Islands. Legal aid remains within the national competence of Finland (with respect to the Åland Islands) and Denmark (Faroe Islands and Greenland) at the time of writing. The Channel Islands of Jersey and Guernsey have their own legal aid systems separate from the other UK schemes, which will not be considered in this thesis for reasons of space.

1.3.4 Areas of concern

Care will be taken to minimise the effect of some potential problems of the comparative law method.²¹ Firstly, linguistic issues must be considered. The laws to be examined in this study are in several languages: English, Swedish (for both Finland and Sweden), Norwegian, Danish and Icelandic. The first three of these can be read by the author. Much Danish and Icelandic material is available in English but care will need to be taken to ensure that broadly the same range of material is accessed in all jurisdictions, by means of translation if necessary. It is proposed when writing to translate legal terms into English, for pragmatic purposes, whilst taking care to ensure that translation does not obscure potential different meaning in the different jurisdictions.²²

Additionally, there will be a need to be alert to differences in legal culture. These are anticipated in this study and will form part of the analysis of the variance found in the systems. It is also expected that the relevant context of each system will include "extra-legal' factors, which may be informal customs and practices, which operate outside strict law, or various non-legal phenomena, which ultimately influence the state of the law",²³ such as public attitudes to law. These will be examined briefly in Chapter 8. Whilst it can be argued that functional comparatism demands the inclusion of non-legal answers to societal needs,²⁴ it must be borne in mind that this study has as its subject the state's response to a problem of the state. Thus, non-state solutions are only relevant to the extent that the state can rely on them to reduce its own responsibilities.

20 For a discussion of these perspectives, see Michaels 2006, p. 379.

21 De Cruz 2008, p. 219.

22 Siems 2014, pp. 17-18.

23 De Cruz 2008, p. 230.

24 Michaels 2006, p. 364.

1.3.5 The possibility of a *de lege ferenda* solution

There is a difference of opinion as to whether a *de lege ferenda* solution can or should be sought as the outcome of a functional comparative law exercise. De Cruz suggests that the question of “how the law ought to be” must be asked to avoid a sociological study consisting of simple observation of how the legal institutions in practice operate.²⁵ However, Michaels disagrees:

Because we cannot say easily whether a foreign law is better than our own, recognizing different solutions abroad does not show us deficiencies at home. Functionalist comparison can open our eyes to alternative solutions, but it cannot tell us whether those alternative solutions are better or not.²⁶

Furthermore, “the yardstick [for comparison] must ... lie outside the specific function under scrutiny [and] can be found either in the costs of an institution, or in its functionality of dysfunctionality regarding other problems. This, however, makes a comprehensive evaluation almost impossibly complex”.²⁷ The current study benefits from an external yardstick in the form of international human rights obligations, and therefore it should be possible to make findings as to which systems better comply with the text and spirit of the relevant treaties.

The current research is a “micro-comparison”²⁸ in that it does not attempt to compare the whole of the legal systems of the jurisdictions involved, but there is a risk that the attempt to evaluate may turn “micro-comparison regarding individual functions ... into macro-comparison between whole legal systems”.²⁹ This risk will be minimised by using international human rights law standards to judge each individual aspect studied, leaving overall comparison of systems until the final conclusions and ensuring that these do not stray beyond legal aid as defined.

It is also worth noting that comparative law has already been used by policy-makers as a practical tool for law reform in the field of legal aid. Examples include an examination of the law in England & Wales by the Northern Irish government³⁰ and a comparison between Norway and Finland when proposing new Norwegian legislation.³¹ In these situations conclusions as to which legal aid system was preferable had to be made to inform policy-making, albeit at a micro level with only particular elements of legal systems judged against each other. These exercises will be elaborated upon in Chapter 9.

It has been shown that a functional comparative method is an appropriate and potentially rewarding choice for a study of legal aid from a public and

25 De Cruz 2008, p. 10.

26 Michaels 2006, p. 379.

27 *Ibidem*, p. 375.

28 De Cruz 2008, p. 233.

29 Michaels 2006, p. 375.

30 Access to Justice Review Northern Ireland, 2011.

31 St.meld. nr. 26 (2008–2009), para. 1.1.

administrative law perspective. There are a number of possible hazards which could reduce the validity of the research findings and these must be kept in mind so that they are avoided where possible and, where not, taken into account when drawing conclusions. The choice of a large number of jurisdictions is challenging but may bear useful fruit as the scope of the comparison will be narrow. An attempt will be made to present normative recommendations and to comment on the potential for transposition of aspects of legal aid systems.

1.3.6 Practical method

The different 'machinery' of legal aid will be examined in detail using the sources described below. The practical method used was a desk survey of the available primary sources followed by interviews with relevant actors. The interviews were not conducted as an empirical part of the data collection but were intended to ensure that all important sources used in practice had been identified. This is not easy to ascertain from an external viewpoint as such detailed technical information is often only shared with a small group of people carrying out the task in question. Its very existence may not be apparent to an outsider and access to the document itself is often not possible without the agency of an insider.

In each jurisdiction, contact was made with the relevant body deciding legal aid applications, with the national Bar Association or equivalent, with the judiciary and with individual legal practitioners and, in most places, interviews took place with professionals in all these categories. In some jurisdictions, meetings also took place with charitable and voluntary organisations providing legal advice and assistance. The interviews took place at the office of the interviewee, between 2015 and early 2018. 74 people were interviewed in person. There was a significant difference in the approach to Iceland, where the legal aid machinery is much smaller. There, questions were answered through email exchange rather than by in person interview.

Interviews were followed by perusal of any new primary sources and relevant secondary sources before identification of similarities and differences between the systems. Additional information was also sought as needed through written questions and answers from appropriate actors in the national legal aid systems.

1.3.7 Materials

The materials used can usefully be considered using the primary/secondary sources distinction familiar in some jurisdictions including those of the UK, although this is not the customary categorisation in the Nordic countries. Primary sources are those which authoritatively state the content of the law; secondary sources comment upon it and can assist in interpretation of the law.

For this study, the most fundamental materials are the legal norms establishing the procedural and material aspects of the legal aid and public

defence schemes in the nine jurisdictions. In all cases the highest domestic legal aid norms are legislative, the most relevant in each jurisdiction being as follows.

The governing legislation for civil and criminal legal aid in England & Wales is the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), Part 1 of which concerns legal aid. A significant proportion of the provisions of LASPO are enabling powers for secondary legislation, and there are a considerable number of Regulations relevant to legal aid which are also primary source materials for this research.

In Scotland, the basic legal aid system is set out in the Legal Aid (Scotland) Act 1986, again with a body of secondary legislation, notably the Civil Legal Aid (Scotland) Regulations 2002, the Legal Aid (Scotland) (Children) Regulations 1997 and the Criminal Legal Aid (Scotland) Regulations 1996, all of which have been amended several times.

The legislative basis for Northern Irish legal aid is complex and has built up in a piecemeal fashion. The main current starting point is the Access to Justice (Northern Ireland) Order 2003 which sets out the overall shape of the civil legal service³² and criminal defence service.³³ However, significant amendments were made by the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014, and furthermore some elements of earlier regulations continue to apply. The Civil Legal Services (General) Regulations (Northern Ireland) 2015 and the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (as amended) set out the practical arrangements for the civil and criminal service respectively, with specific elements still governed by the early Legal Aid (General) Regulations (Northern Ireland) 1965. It should also be noted that most of the civil legal aid provisions of the 2003 Order did not come into force immediately; indeed, many of the most important provisions were only effective from April 2015.³⁴

In the Republic of Ireland, criminal legal aid is governed by the Criminal Justice (Legal Aid) Act 1962,³⁵ and its accompanying Criminal Justice (Legal Aid) Regulations 1965, whilst civil legal aid is governed by the Civil Legal Aid Act 1995. The Civil Legal Aid Regulations 1996 flesh out the basis of the civil scheme, and further sets of regulations have amended the position on both the criminal and the civil side.

There is no dedicated legal aid legislation in Denmark; the relevant provisions are included in the Administration of Justice Act 2017.³⁶ Civil legal aid is described in Chapter 31 and the criminal public defender scheme

32 Access to Justice (Northern Ireland) Order 2003, ss.10 -20.

33 *Ibidem*, ss. 21-31.

34 The Access to Justice (2003 Order) (Commencement No. 7, Transitional Provisions and Savings) Order (Northern Ireland) 2015.

35 On the 1 April, under the Criminal Justice (Legal Aid) Act, 1962 (Commencement) Order, 1965.

36 Retsplejeloven, 2017.

is at Chapter 66. Under the regulatory powers within the Act,³⁷ the Minister of Justice has issued more detailed regulations on the procedures for civil legal aid provided by lawyers.³⁸ Subject-specific legislation also provides rules concerning legal aid for particular types of case. Similarly, Icelandic civil legal aid is governed by the Civil Procedure Act 1991,³⁹ Chapter 5, and by secondary legislation.⁴⁰ The 2008 Law on Criminal Procedure⁴¹ sets out the criminal public defender scheme.

The Legal Aid Act 1980⁴² sets out the Norwegian civil legal aid scheme and is supplemented by secondary legislation, notably the Legal Aid Regulations 2005⁴³ and various regulations providing the structure and amounts for fee payments to lawyers.⁴⁴ In criminal cases, Norway operates a public defence counsel system governed by Chapter 9 of the Criminal Procedure Act 1981.⁴⁵

In Sweden the civil legal aid scheme is legislatively based on the 1996 Legal Aid Act⁴⁶ which came into force on the 1 December 1997. In criminal cases, the basic provisions for the provision of public defence counsel are contained in Chapter 21 of the Code of Judicial Procedure.⁴⁷

For both civil and criminal legal aid in Finland, the relevant legislation is in two parts: the Legal Aid Act of 2002⁴⁸ and the State Legal Aid and Public Guardianship Districts Act⁴⁹ of 2016. There are a few relevant sets of regulations, notably the 2002 Regulations on Legal Aid⁵⁰ and 2016 Regulations on State Legal Aid and Public Guardianship Districts.⁵¹ In addition, in criminal matters the Criminal Procedure Act⁵² provides the potential for the appointment of a public defender.

The jurisdictions have different practice when referring to statutory materials. In order to achieve a level of consistency, the footnotes to this thesis state the name and year of primary legislation; the Sources section contains the full reference. Regulations are referred to by number where this is usual practice in the jurisdiction in question, but otherwise by name and year. In the preceding description, and in the body of the main text which follows, translations of legislative titles have been used, in order to allow a broad understanding of the nature of the legislation to English language readers.

37 *Ibidem*, § 323(7).

38 Bekendtgørelse om offentlig retshjælp ved advokater, 2017.

39 Lög um meðferð einkamála, 1991.

40 Regulation 45/2008.

41 Lög um meðferð sakamála, 2008.

42 Rettshjelploven, 1980, as amended.

43 FOR-2005-12-12-1443.

44 E.g. FOR-1997-12-03-1441 and FOR-2005-12-12-1442.

45 Straffeprosessloven, 1981.

46 Rättshjälpslagen, 1996.

47 Rättegångsbalk, 1942, as amended.

48 Rättshjälpslagen, 2002.

49 Lag om statens rättshjälps- och intressebevakningsdistrikt, 2016.

50 Statsrådets förordning om rättshjälpslagen, 2002.

51 Justitieministeriets förordning om statens rättshjälps- och intressebevakningsdistrikt, 2016.

52 Lag om rättegång i brottmål, 1997, Chapter 2.

However, only some statutes in non-English speaking countries are given official English language titles, and informal translations vary. Thus, for accuracy and ease of reference for readers wishing to locate the material, the original language version will be used in footnotes and in the Sources section of the thesis. In respect of Finnish legislation, references are in Swedish, which is one of the two official languages in which legislation is published.

In addition to these legislative primary sources, in most of the jurisdictions there is further direction issued on the proper interpretation of the legal norms. This can be in the form of binding guidance issued by government as an instruction to decision-makers or, in many cases, documents issued by the public bodies administering legal aid indicating to lawyers and their clients how they will apply the norms. Binding guidance is issued in England & Wales and Northern Ireland, and these documents are primary sources for this research. Whilst strictly speaking secondary sources, the non-binding handbooks and circulars issued in Denmark, Scotland, Sweden, the Republic of Ireland and Norway are nonetheless highly relevant as they indicate how the administrators of legal aid schemes apply the legislative provisions. In an examination of the procedural status quo this information is important because it is likely, *prima facie*, that this is the interpretation which is applied in practice.

The Swedish handbooks produced by the National Courts Administration were previously publicly available online, but in April 2018 they were withdrawn from public access. In explaining this decision, the National Courts Administration reiterated that the handbooks are intended as an internal resource for the assistance of the courts and that they should not be regarded as legally binding,⁵³ thus confirming that they do not amount to primary sources. There has been no indication that the content of the handbooks has undergone substantial change, and therefore the content which was previously viewable is for present purposes assumed to be relevant. References to the handbooks within this thesis are to the version most recently publicly available, in April 2018.

The legal aid handbook produced in Finland is a guide written by and for the individual decision-makers to encourage consistency; in this it is equivalent to the internal guide on criminal legal aid produced in the Republic of Ireland by the Judicial Researchers' Office, setting out useful decided cases and legislation for use by judges in their daily work. For this research, these two latter handbooks are less persuasive but nonetheless relevant secondary sources.

Decided cases have differing weights in the different jurisdictions. In the UK and Republic of Ireland they may amount to primary sources, depending on the level of court taking the decision, whereas in the Nordic countries they are indicative but not binding. Again, as this research is considering the practical administration of legal aid, relevant jurisprudence in all jurisdictions

53 Swedish Courts website, <http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Handbocker/>.

is useful source material, as even where it is not binding, administrators take the decisions of courts into account when interpreting the normative rules.

Legislative preparatory documents useful to the interpretation of the law are among the relevant secondary sources and form part of the materials for this study. In Finland and Sweden such documents are of high importance, almost equivalent to decided Supreme Court cases, and thus particularly attention will be paid to legislative preparatory documents in these jurisdictions. Where useful, academic journal articles are referred to as an aid to analysis, as are studies and reports by NGOs and professional bodies.

International norms will be sourced from treaties, with supporting interpretative information from the jurisprudence of the treaty bodies. As part of the context for the legal aid systems discussed, internationally-collated statistical information will be used, largely that published by the European Commission for the Efficiency of Justice (CEPEJ).

The use of sources from many different jurisdictions has necessitated deviations from the usual source-handling conventions. In general, legislative provisions as primary sources have not been referenced in the body of the text, but in footnotes, to avoid overburdening the text. This is necessary as a paragraph comparing provisions in several jurisdictions would otherwise become unwieldy and difficult to read. All efforts have been made to include changes to the law up to and including the end of June 2018. Unless otherwise stated, translations of sources are the author's own.

1.3.8 Limitations

In accordance with the definition of legal aid set out above, schemes contributing to access to justice which are not funded through the central legal aid provisions of the state will not be examined. All of the jurisdictions to be considered benefit from various advice services provided on a voluntary basis or funded through charity. Furthermore, legal expenses insurance and assistance from trades unions and employer organisations are available. However, it is not within the scope of this project to consider these services, despite their valuable contribution, other than as part of the context of each statutory legal aid scheme.

The project will be limited to legal aid for domestic proceedings. Legal aid for international proceedings is available but this will not form part of the study. Similarly, there are a number of specific treaties dealing with the requirements for legal aid for cross-border cases, particularly within the European Union. These agreements only affect the small number of cases where the parties are resident in different jurisdictions or the cause of action arises in a state other than that of the residence of the parties, and these provisions will not be examined here. Legal assistance to victims of crime, whilst important and provided in some form in many jurisdictions, is not within the scope of this study.

There are procedural and material aspects to legal aid schemes. The procedural element includes the structure and organisation of the legal aid system itself: what is the legal foundation for the system; who makes decisions (both general rules on e.g. financial eligibility and in individual cases) and how appeals can be made. This is within the scope of the study. The material element of a legal aid scheme concerns the content of the legal aid rules made using the procedure in question, and the content of decisions made in individual cases.

The content of the rules and decisions (the material element of the legal aid scheme) can also be divided into procedural and material aspects. The former would include which types of proceedings are covered by the scheme (civil, criminal, administrative etc.) and before which courts or tribunals, and how a case can qualify for legal aid. The latter covers issues such as financial qualification, level of fees paid and any quality requirements of the service provided. In this dissertation material aspects of the content of the rules, including financial assessment, will be considered in Chapter 7, concerning the coverage of legal aid, even though assessment of these elements may form part of the decision-making process in an individual case, potentially conducted by the decision-maker who also performs the procedural assessment. The study as a whole concentrates on the procedural administrative requirements of the legal aid schemes and the procedural aspects of the material content of the rules.

Whilst Iceland is included in this study, the quantity and accessibility of available materials is considerably lower than in the other jurisdictions. As a consequence, the comparison is less comprehensive as regards Iceland. Nonetheless, as far as possible Iceland has been included in the analysis.

1.4 Structure

This introductory chapter will conclude with a survey of the existing literature. An overview of the body of legal aid research will be given, followed by a closer examination of the more relevant material. Legal aid is a relatively under-explored research area, which brings the advantage that it will be possible to outline the body of material as a whole, but the disadvantage that even the more pertinent previous work is not, on the whole, closely connected to the current study. Nonetheless, the literature survey will enable the work to be placed in an academic context.

Chapter 2 provides background of two kinds. Firstly, a brief discussion of the reasons which compel states to establish legal aid systems, including the rule of law, international treaties covering fair trial and domestic constitutional obligations, will set out the motivations for the provision of legal aid. Secondly, the operational context of the legal aid schemes in the various jurisdictions will be provided; information on their judicial systems and legal professions. An explanation will also be given of the distribution of legal aid work within the

legal profession, as not all lawyers are entitled to carry out legal aid work in all of the jurisdictions. This information will enable the detailed examination of the legal aid schemes, in the next chapters, to be more readily and accurately understood.

Four chapters will then follow, comparing in detail the legal aid schemes in the nine jurisdictions. Each of these chapters will also consider the international human rights obligations relevant to the topic and assess the compliance of the national schemes against this measure.

Chapter 3 will concentrate on the area of criminal law and set out the criminal legal aid schemes and public defence attorney systems in place. These two different models will be examined and compared, in terms of the procedural requirements in each jurisdiction; initial decision-making and appeals against refusals will be included in this comparison. The difference between the two models, from the point of view of the assisted person, will be assessed, and the particular case of Finland, where both types of provision are available, will be used to help illuminate the comparison. Attention will then turn to the material requirements for legal aid or a public defender. In particular, the interests of justice test which features in all jurisdictions will be examined and its different application noted.

Civil legal aid schemes are more complex and more varied than criminal legal aid and public defender schemes, and therefore examination of these will be spread over three chapters. Chapter 4 will describe and compare the decision-making processes for civil legal aid in the nine jurisdictions, at both the initial and appeal stages. In addition to considering the two stages independently, consideration will also be given to the interrelationship between the two, and whether certain combinations of initial and appeal decision-making power might be preferable to others, particularly with a view to the need to avoid arbitrariness.

The scope of civil legal aid will be the subject of Chapter 5. All of the civil legal aid schemes under consideration have some limitation on the types of case for which assistance can be given. However, the extent of the restrictions varies very considerably; some schemes exclude a small number of case types, some only include a restricted range of matters. Many of the scope rules are direct and specify according to type of case, but some jurisdictions in addition identify legal venues in which representation is or is not covered by legal aid, such as an exclusion of cases before administrative tribunals. As in other chapters, the compliance of scope restrictions with international human rights obligations will be considered and, in this case, found wanting.

Chapter 6 has as its subject the merits tests which must be fulfilled before civil legal is granted. These tests can be complex, and vary dramatically between the jurisdictions. Reasonableness and prospects of success are the two most commonly-used criteria and will be explored in detail, together with a number of other less-used tests. Consideration of the merits tests applied can shed light

on the policy considerations behind a legal aid scheme, and these links will be explored in the chapter.

Each of Chapters 3 to 6 will conclude with a comparative case study. These will consider a practical situation from the point of view of a potential legal aid recipient, and contrast the different responses of three of the jurisdictions. Each jurisdiction will feature at least once in the case studies, and the examples are chosen to illustrate the most interesting contrast in approach for each chapter.

Moving away from the normative consideration of legal aid, Chapters 7 and 8 turn to the context of legal aid in order to inform the final analysis of the comparative information gathered. Chapter 7 looks at the micro context: the possibility and consequences of a grant of legal aid or a public attorney to a particular individual. Financial eligibility levels, the availability of lawyers taking legal aid cases and how much work they are able to provide to a publicly-funded client will all be examined.

Chapter 8 then considers the macro context of legal aid within the justice system, both economically and structurally. Three main areas will be considered: the spend on each legal aid scheme, both alone and as part of the justice budget; socio-economic factors which might impact demand for legal aid; and the systemic context. Budgeting decisions quantify how much money is available for legal aid and thus how generous a system can be, but the amounts allocated to other parts of the judicial system are also relevant as concentrating more resources elsewhere may ease the burden on the legal aid scheme itself. The level of demand for legal aid may also be connected to the economic circumstances in a jurisdiction and poverty levels will be considered, in addition to other factors potentially affecting demand, such as level of recourse to law. Finally in this chapter, the systemic context of legal aid will be considered; mechanisms for resolving disputes outside the formal justice system clearly reduce the need for legal aid, but approaches within the formal justice system which aim to make it possible for litigants to navigate without assistance also have a role to play, and both aspects will be discussed.

Chapter 9 forms the final part of the dissertation. It includes an analysis and some conclusions about the current state of legal aid in the Nordic countries, the Republic of Ireland and the jurisdictions of the UK. The schemes will be measured against international requirements and criticisms will be presented of elements of some schemes. The jurisdictions will tentatively be compared with each other, against this benchmark, and the main failings highlighted. In addition to the level of compliance with human rights law, the methods used to achieve compliance will be compared and patterns sought. An analysis of the patterns and of the linkages between the different aspects of a legal aid system will inform a discussion of whether learning and borrowing between jurisdictions is possible and appropriate in the legal aid sphere.

A new framework for analysing legal aid schemes will then be proposed, which can be applied to one system or used to systematically compare schemes.

It will be argued that a methodical approach to comparison is needed, due to the complexity of legal aid schemes. The suggested framework will identify three different levels at which choices are made in legal aid schemes: the establishment of guiding principles; policy choices ideally consistent with these principles; and practical delivery methods. These three levels interact with each other and with the social, economic and legal context in the jurisdiction. The proposal will be made that more, and more coordinated, studies are needed to populate the framework with research data and further improve the structural understanding of legal aid.

1.5 Literature review

1.5.1 Overview

Hitherto, legal aid research from a public law perspective has been largely absent. Legal aid has most often been written about by journalists or practitioners in the form of practical handbooks⁵⁴ or pleas for improved services or against cutbacks.⁵⁵ Academic writing on the subject is often heavily slanted towards the sociology of law; in particular issues of unmet legal need,⁵⁶ the cost to the state of providing legal aid⁵⁷ and the impact of legal aid.⁵⁸

When policy-makers have commissioned comparative studies of legal aid, or journalists or practitioners have made pleas for improved services or against cutbacks,⁵⁹ the main focus has usually been, naturally enough, on the aspects which can be changed quickly to meet political objectives. Such variables as financial eligibility levels, areas of law covered and rates of pay to lawyers can be adjusted relatively simply without altering the underlying structure of the system. The highly practical purpose of much legal aid research to date has, however, meant that little attention⁶⁰ has been paid to some of the more structural aspects of legal aid provision and scant consideration given to the law which constitutes the legal aid systems themselves:

Legal aid scholarship generally focuses on a relatively narrow range of issues. Much of the literature either describes national schemes, or examines recent reforms, or discusses empirical research into the effectiveness of legal services. There are many detailed accounts of eligibility provisions, and various criticisms and defences of government policy, but there are far fewer discussions of how and why governments introduce legal aid schemes and what they intend such schemes to achieve.⁶¹

54 e.g. those issued by the Legal Action Group in England & Wales or, in Denmark, Mavrogenis 2012.

55 e.g. Hynes and Robins 2009.

56 See in particular the work of Warwick University School of Law.

57 e.g. the regular reports of the European Commission for the Efficiency of Justice.

58 e.g. Cousins 1994; Cape *et. al.* 2010.

59 e.g. Hynes and Robins 2009.

60 One exception is the study of legal aid in nine European countries, Barendrecht *et. al.* 2014.

61 Regan and Goriely 2006.

There has also been little consideration of legal aid from a public and administrative law perspective. The multidisciplinary body of knowledge on legal aid will be enhanced by this study, which goes deeper into legal aid and gives attention to the skeleton beneath the surface: how the legal framework is constructed in terms of legislation and other law, and what the decision-making and appeals structures are.

Aside from the relatively narrow body of research specifically on legal aid, access to justice writing is also often relevant. Some studies address the access to justice implications of legal aid without considering in detail the role of lawyers and legal aid in achieving access to justice; an overall critique of access to justice, including legal aid, is instead made. A slightly different category of research does specifically address the role of legal aid within the overall access to justice framework, and debates the extent to which payments to lawyers should feature in a state's access to justice policy.

Awareness-raising and lobbying about current or future proposed aspects of a legal aid scheme, or its costs, is a particular feature of jurisdictions such as England & Wales where significant changes have taken place. A number of comparative studies have also been undertaken often, but not always, connected to a process of development of one of the schemes compared. The extent to which international human rights conventions obligate the provision of legal aid is another topic which generates research, either from a theoretical angle or as part of arguments against current or proposed government policy, from a variety of sources.

Some key examples of the research to date on legal aid follow, with an emphasis on more recent research and on that with greater relevance to this dissertation, although as little has been written on the topic, many of the publications discussed are of indirect, contextual value rather than direct relevance. Writing by academics will be presented alongside studies commissioned by governments, international organisations, professional bodies and NGOs. These different types of document can overlap, as where academics are commissioned to prepare reports for policy-makers. This summary will not include research on unmet legal aid, although this exists in several of the jurisdictions under consideration; such research is too far removed from the current focus to be of use here.

The reader may note a preponderance of English language writings in the review. This is in part due to a greater number of academics in the field working in English, but it is also the case that language barriers have made texts in other languages, particularly Finnish and Icelandic, less accessible to the author. To some extent it is also the case that there has been less research in some of the Nordic countries; in Sweden, for example, academic publications on legal aid are few;⁶² in Finland there has been more focus on other aspects of socio-legal studies rather than access to justice;⁶³ in Denmark there have been relatively

62 Schoultz 2018, p. 48.

63 Rissanen 2018, p. 79.

few studies on legal aid, and most of these have concentrated on unmet need for legal aid⁶⁴ and “to say that literature on access to legal aid in Iceland is scarce is an understatement”.⁶⁵

1.5.2 Legal aid and access to justice

Much has been written about legal aid as an aspect of access to justice, including some very recent contributions to the literature precipitated by the negative impact of legal aid restrictions under ‘austerity’ policies.

The collection of essays *Access to Justice: Beyond the Policies and Politics of Austerity*⁶⁶ addresses, in the main, the situation in England & Wales post-LASPO, although there are comparative chapters on the French and Scottish approaches. The book is in three parts: the theoretical, legal and policy background to access to justice; pressure points on the justice system; and alternative approaches to funding legal services. Caplen, from the perspective of the Law Society of England & Wales, considers that security and justice are the most important imperatives of government,⁶⁷ and thus that the provision of adequate and affordable access to the justice system takes, in principle, priority over most other calls on public funds. He is highly critical of the current political environment in the UK which has enabled significant and, he feels, dangerous reductions in legal aid. Access to justice must be defended; it is “a fundamental corollary of ‘the rule of law’ because without access to justice the rule of law can be nothing more than just a concept, an ideal”.⁶⁸ Furthermore, the reduction in funding for lawyers to carry out work in certain areas of law which are mainly funded by legal aid results in diminishing legal expertise in these subjects.⁶⁹

Cornford addresses the meaning of the oft-used phrase ‘access to justice’ and concludes that:

properly understood, access to justice entails a right of equal access to legal assistance for every citizen. We do not have access to justice properly understood, however, but something weaker. We have a state of affairs in which courts, public authorities and other citizens are obliged in principle to respect our rights regardless of our social status or wealth but in which the degree to which they do respect them is likely to vary in accordance with our wealth. As citizens, the most we can hope for is the chance of protecting our rights rather than the certainty that our rights will be accorded equal weight with those of richer or more powerful persons.⁷⁰

64 Lemann Kristiansen 2018, p. 102.

65 Antonsdóttir 2018, p. 126.

66 Palmer, Cornford, Guinchard and Yseult (eds) 2016.

67 Caplen 2016, p. 13.

68 *Ibidem*, p. 24.

69 *Ibidem*, p. 21.

70 *Ibidem*, p. 39.

The particular challenges in achieving access to justice in specific areas of law are addressed in Part II of *Access to Justice: Beyond the Policies and Politics of Austerity*. These essays are detailed considerations of the state of the law, practice and access to justice in England & Wales for administrative law, immigration, housing, employment and family law. The specific difficulties faced by young people in accessing justice are also addressed, and a case study of an advice project in London is offered. These chapters are interesting but highly specialised and of limited value to the broad comparison being undertaken in this thesis; they will therefore not be summarised here.

In Part III of the same collection of essays, alternative solutions to problems of access to justice are considered, in particular a possible role for Alternative Business Structures⁷¹ and the potential of technology to improve advice delivery.⁷² A brief overview is given of access to justice in France, where “legal aid and the justice system [...] are seriously underfunded”, yet “governments, lawyers, the judiciary and public civil servants both at national and local levels remain committed to the provision of legal aid services to those in need”.⁷³ Suggestions for ways to improve access to justice, including the extension of legal expenses insurance and opening up a competitive market for legal services are made. The Scottish response to austerity is offered as a positive model for progressive planning for the future of legal aid and access to justice; legal aid strategy is embedded in the Scottish Government’s overall development plan, within the Making Justice Work Programme. A focus on prevention and early advice leads to government funding of advice programmes with various focal issues such as debt. The Scottish Legal Aid Board has a statutory duty to report on availability and accessibility of publicly funded legal services, including drawing attention to areas of the country or subject areas where there may be difficulties accessing assistance. An additional strand of policy is to ensure that, within the group of people eligible for legal aid, contributions are collected from those who can afford to pay towards their legal help. Finally, programmes to improve the efficiency of the justice system overall are underway. There is optimism that:

the investment which is being made now by the Scottish government, [Scottish Legal Aid Board] and other partners in working towards preventative and innovative approaches, targeted assistance, and strategic coordination and delivery, together with the eventual impacts of wider reforms within the justice system, could reap rewards in terms of both the legal aid budget and access to justice for the people of Scotland.⁷⁴

71 Stephen 2016.

72 Yates 2016.

73 Guinhard and Wesley 2016, p. 284.

74 O’Neill 2016, p. 301.

The book overall is a useful introduction to the role which legal aid may play in access to justice, but it does not attempt a detailed public or administrative law analysis of legal aid, nor a substantive comparison between jurisdictions, and thus does not overlap with the current study.

The compound difficulties of accessing justice in the Republic of Ireland during a time of government austerity measures was addressed in a 2016 NGO report.⁷⁵ Concern was addressed in particular on two fronts: that at a time of economic downturn, potential applicants for legal aid were less able to afford the minimum contribution; and that funding for the Legal Aid Board fell, resulting in extreme pressure on services. Concerns that inadequate legal aid can result in democratic deficit have also been expressed in the 2012 Democratic Audit of the UK:

We note that problems with the effectiveness of the legal aid system in England and Wales are an ongoing issue of democratic concern. They can mean that some of the most excluded members of society can be denied access to an important part of the democratic system. Uneven coverage is problematic from the point of view of effectively securing the rule of law for all.⁷⁶

It has even been argued in the context of UK immigration law that reduction of legal aid might be part of an ideological government agenda moving towards reduced access to justice for marginalised groups within the immigration system.⁷⁷ These studies all form useful background to the present research but do not contribute to the main elements under consideration.

1.5.3 Balancing legal aid and other tactics for achieving access to justice

Moore and Newbury have set out a well-reasoned argument for ensuring that lawyers, funded by legal aid, must continue to play a considerable role in access to justice in the UK. They suggest that attempts to use legal aid policy to decrease the use of courts and increase informal dispute resolution have failed. The decline in publicly-funded legal advice has removed a source of support and advice which previously assisted potential litigants to resolve their cases before court proceedings commenced, and has led to an increase rather than a decrease in, for example, contested family cases reaching the courts post-LASPO.⁷⁸ In order to make appropriate legal aid provision, it is argued, the debate must be re-framed. Legal dispute is a product of social arrangements and as a greater proportion of our dealings have become legalised, legal disputes and the need for assistance in solving them have inevitably grown, not

75 FLAC 2016.

76 Wilks-Heeg, Blick and Crone 2012, section 1.2.4.

77 Thomas 2016, p. 134.

78 Moore and Newbury 2017, p. 43.

through reckless use of the legal aid scheme but because people have become unavoidably embroiled in more legal disputes.⁷⁹

Arguing against a focus on lawyer-facilitated dispute resolution, however, Goriely states that “the English approach to access to justice has been dominated by legal aid”,⁸⁰ and she argues that the concentration of legal aid in the hands of the private profession has led to supply being tightly managed by professionals. This has resulted in a situation where it is extremely difficult for policy-makers to regain control, she argues, to the detriment of provision. Goriely finds advice centres staffed by non-lawyers to be more successful and suggests that these, together with simplification of legal procedure where possible, represent a better option going forwards.

In agreement with this approach stands the work of Barendrecht; in comparing three access to justice strategies he found that legal aid is a relatively ineffective use of the public access to justice budget. The difficulty with legal aid, he posits, is that it only serves one person at a time, whereas investing in accessible dispute resolution procedures or legal information is considerably more cost effective. The current concentration of funds on individual legal aid should be reversed, and money allocated instead on legal information and improving court procedures.⁸¹ An interesting and useful summary of some arguments on this issue of whether need is driving lawyer-led legal aid or vice versa is provided by Papendorf.⁸²

Given the difficulty governments have funding legal aid, it is not surprising that there is interest also in this quarter for finding alternative methods for achieving access to justice. A clear example of this is the 2015 consultation in Northern Ireland on alternative methods for the funding of money damages claims. The cost-saving intention was explicit: “the overspend on the legal aid budget means that doing nothing is not an option”.⁸³ The consultation built on the recommendations of the second Access to Justice Review in suggesting that legal aid for money cases could largely be replaced by a combination of conditional fees and changes to the *inter-partes* costs rules. It should be noted, though, that these suggestions are geared towards a different way of funding the same justice process, and do not extend to the development of cheaper and more accessible alternative methods of resolving the disputes.

Funding court proceedings other than by legal aid can additionally be achieved through legal expenses insurance and this has also been the subject of research. Some literature has considered the role of legal expenses insurance and how this should relate to the availability of legal aid. A study in Finland concluded that, in that jurisdiction, “public legal aid and [legal expenses insurance] can work as interdependent and concurrent systems, and serve

79 *Ibidem*, p. 70.

80 Goriely 2002, p. 1.

81 Barendrecht 2011.

82 Papendorf 2018.

83 Department of Justice Northern Ireland 2015, para. 1.6.

the legal needs of the public better than trusting the provision on [sic.] legal services solely on [sic.] private sector”.⁸⁴

More broad-ranging changes are also sometimes considered in the attempt to reduce the costs of access to justice. In tandem with the legal aid changes in England & Wales, a wider overhaul of the civil justice system is underway, including proposals to reduce the burden on courts through simplification of the rules of procedure and the introduction of online, virtual hearings. These mechanisms are designed to enable more efficient throughput of cases but it is also hoped that members of the public will be able to navigate a redesigned judicial system with less or no legal assistance.⁸⁵

Even in areas where traditionally it has been assumed that access to justice can be achieved without the need for legal assistance, and therefore without legal aid, the presumption is however open to challenge. In the context of administrative law in the UK, Mullen concludes that “it is not reasonable to make policy on the assumption that citizens can operate the redress mechanisms that take the form of adjudication entirely unaided”.⁸⁶

The Commission on Legal Empowerment of the Poor, established by the United Nations and reporting in 2008, had a global remit, and focused on the use of strategies to strengthen the rule of law as part of sustainable development strategies. However, the findings are relevant to the rich countries of Western Europe as well as to the developing nations which were the focus of the report. The Commission was very clear that legal empowerment is only possible when the rule of law is functioning effectively, which necessitates proper access to justice for all. Access to legal services is necessary for the poor to find out about the laws which might protect them and for them to make use of such laws. Whilst access to justice requires access to legal services, these need not be provided by lawyers, and there is an important role for paralegals and other non-lawyer service providers who are willing to offer legal services to the poor. The development of effective alternative dispute resolution methods and the simplification and standardisation of the law are also part of the solution when resources are limited.⁸⁷ These issues were taken up by the General Assembly of the United Nations and efforts to improve accessibility of justice systems, both through innovative non-formal dispute resolution mechanisms and the provision of legal assistance, including by paralegals, were encouraged.⁸⁸

It is interesting to note that in this report legal empowerment, including legal aid, is seen as part of the endeavour to eradicate poverty.

This approach also forms part of the strategy of the World Bank; within development projects judicial reform is often an element and this has at times

84 Lasola and Rissanen 2013.

85 Evidence of the Rt Hon Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, to the House of Commons Justice Committee, 23 February 2016, HC 814.

86 Mullen 2016, p. 100.

87 UNDP 2008.

88 A/64/50, 2009.

included legal services, provided through funding for NGOs.⁸⁹ The effect on a broader class of beneficiaries, not just the litigants themselves, is also of interest to the World Bank. A study found that litigating social and economic rights was redistributive of wealth towards the underprivileged in the societies studied, thus reducing poverty despite a generally-held presumption that litigation would generally benefit the elite.⁹⁰

The argument between those who believe lawyers must continue to play a central role in ensuring access to justice and those who seek non-lawyer led solutions is ongoing. However, it does not damage the premise of this study due to the formulation of the research questions and definitions adopted. It is currently the case that all the jurisdictions being considered have legal aid schemes and these can be usefully compared whether the intention of government is to reduce reliance on legal aid or not. Indeed, a detailed comparative study may assist such policy decisions by providing reliable information on the structure and content of legal aid in similar jurisdictions.

1.5.4 Legal aid and international human rights law

The relevance of legal aid to the realisation of human rights can be seen from the involvement of generalist human rights NGOs with the issue. The Danish Institute for Human Rights, for example, in its annual report on the status of human rights in Denmark, includes a chapter on fair trial rights which deals with legal aid. The 2016-2017 report included a call for the government to “conduct an overall analysis of the field of legal aid in order to clarify the extent to which the legal aid scheme should be modified so as to ensure all citizens have proper access to the legal system”⁹¹

Peers summarises the civil subject coverage provided by European Union and European Convention on Human Rights provisions on legal aid. His conclusion (which will be contradicted later in this thesis) is that the Convention only requires legal aid in “sensitive family proceedings” or particularly complex cases, whereas in EU law moves can be seen towards widening coverage to certain issues affecting asylum seekers. EU provisions, he points out, also cover civil cases with a cross-border element such as cross-border family maintenance cases.⁹²

The existence or otherwise of a distinct human right to legal aid has been considered by Rice in several essays. In 2017 he concluded that “it is difficult to conceive of legal aid as a substantive human right on its own terms, and it seems unnecessary to promote it along that ‘painful and time-consuming’ path”. It is sufficient that, as is the case, legal aid is becoming increasingly recognised as an integral part of the realisation of other human rights; recognition of a free-standing right to legal aid would be extremely difficult

⁸⁹ Maru 2010.

⁹⁰ Brinks and Gauri 2012.

⁹¹ DIHR 2017, p. 62.

⁹² Peers 2016, p. 65.

and largely unnecessary.⁹³ An analysis of international human rights law obligations regarding legal aid forms an important part of the current thesis, as international standards will form the benchmark against which domestic schemes are measured. As well as the treaty texts and relevant jurisprudence, academic analyses of the subject will therefore be further referred to in the substantive chapters of this thesis.

1.5.5 Lobbying and awareness-raising literature

It is not uncommon for documents of various lengths to be prepared by NGOs, Bar Associations and political parties outside government describing the status quo for access to justice and legal aid in their jurisdiction, and arguing for a change in policy. These are sometimes prompted by an anniversary, such as the fortieth anniversary of civil legal aid in the Republic of Ireland,⁹⁴ or an anniversary of the pressure group.⁹⁵ Such studies are also sometimes written to address specific governmental proposals, for example the proposals for LASPO.⁹⁶ The purpose of a 2012 report by the Law Society of Ireland is representative:

This report aims to highlight the effects of the increased pressure on resources in today's economy and the reduced capacity of the civil legal aid system. It seeks to enhance understanding amongst the profession and the public of the current problems in the civil legal aid system in Ireland and to provide recommendations for future improvement.⁹⁷

Such texts typically include a historical summary of the situation in a particular jurisdiction, followed by an analysis of the difficulties faced and proposals for improvements. The studies provide a very useful insight into the practical experience of legal aid practitioners at a given moment in time and can round out the overall picture in ways which official documents and statistical studies do not. A good example of this is the NGO study in the Republic of Ireland,⁹⁸ which commented on the organisation's experience of judicial practice and remarked that not all judges were prepared to postpone proceedings until a legal aid application had been processed, a problem linked to long waiting times for legal aid decisions in this jurisdiction.

Academic articles have also contributed to the body of awareness-raising literature by detailing the consequences of insufficiency in a legal aid system. This has been done in specific subjects such as housing law⁹⁹ or family law.¹⁰⁰

93 Rice 2017.

94 FLAC 2009.

95 E.g. Hynes 2012, published to mark the 40th anniversary of the founding of the Legal Action Group.

96 *Ibidem*.

97 Law Society of Ireland 2012.

98 FLAC 2009.

99 Brookes 2007.

100 Richardson 2016.

One strain of such articles addresses the problems of unrepresented litigants, both for the individuals concerned and for the courts.¹⁰¹

The cost of legal aid is often central to political discussions of the subject, and research is sometimes undertaken to try and quantify the value for money represented by legal aid expenditure. Two examples can be seen in the Republic of Ireland and Northern Ireland. The Republic of Ireland undertook, in 2011, a Value for Money and Policy Review of the Legal Aid Board. The effectiveness of the Board was measured mainly in terms of the timeliness of the service provided, and it was noted that an increasing number of the Board's Law Centres were becoming less effective against this measure. The imminent introduction of a new IT system was expected to enable more detailed effectiveness assessment in future. An efficiency analysis was also conducted, which considered the number of cases cleared compared to the financial and staff resources of the Law Centre. The researchers found that there was considerable variation in the time taken to clear cases and that efficiency improvements in some offices should be possible. A number of recommendations were made, largely for managerial steps to improve efficiency.¹⁰²

The Northern Ireland Audit Office considered the position in that jurisdiction in 2016. It noted that despite recent reforms of criminal legal aid, the cost-saving aims had not been achieved. Furthermore, non-criminal legal aid had not been reformed, and implementation of planned changes was progressing slowly. In particular, the report recommended that: there should be regular value for money reviews of all legal aid schemes; standard fees should be introduced urgently; steps should be taken to ensure budget and expenditure are more closely aligned; and that recovering money from fraudulent claimants and convicted defendants should be improved.¹⁰³

The Law Society of Scotland has commissioned a Social Return on Investment analysis on the legal aid, and found that government spending on legal aid reaps financial benefits overall for clients and for public services.¹⁰⁴ The study considered housing, family and criminal cases and found that, for every £1 spend on legal aid, the total returns were, respectively, £11, £5 and £5. In addition there were other benefits which were impossible to quantify. The study will be used as a tool in Law Society discussions with the Scottish Legal Aid Board and government.

Internationally, in 2010 the Council of Bars and Law Societies of Europe issued Recommendations on Legal Aid calling on the EU to develop a European-led legal aid scheme and to support national legal aid schemes within the member states. The Council called for a greater involvement of the EU beyond the Directives concerning criminal prosecutions and cross-border cases

101 Genn 2013 and Trinder 2015.

102 Value for Money and Policy Review of the Legal Aid Board, 2011.

103 Northern Ireland Audit Office 2016.

104 Law Society of Scotland 2017.

including financial assistance to states which cannot afford to provide the minimum necessary levels of legal aid.¹⁰⁵

At various points throughout this study, useful assistance will be gained from these types of publication, particularly when they provide insights into the current functioning of legal aid schemes which may not be apparent from formal sources.

1.5.6 Comparative studies of legal aid

Some comparative research into legal aid has taken place, both historical comparisons and international comparisons. The former have in particular been a feature of the response to the significant changes to legal aid in England & Wales over the past decades. Two notable examples were both published by the Legal Action Group, an independent charity which campaigns for equal access to justice. In 2009, Hynes and Robins contributed a detailed description of the development of legal aid from its inception to the (then) current state of affairs. Finding a situation lacking vision and values, the authors suggest that it is essential for policy-makers to commit to a set of principles which could then form the theoretical foundation for legal aid. In addition, they set out a series of further recommendations, some general across all types of legal aid and some subject-specific. Other than the general principles, which will be discussed further in the conclusions of this thesis, the suggestions are specific to the time and place that the book was written.¹⁰⁶

The pace of change in England & Wales has been such that one of the authors of the above book wrote another, in 2012, to address the challenges arising from the significant funding cuts already implemented and the threats posed by the imminent introduction of LASPO. As with the previous work, a historical comparison is a major element of the book, tracing the development of legal aid and also of the not-for-profit advice sector which briefly flourished pre-LASPO. Coming at a time of continued and dramatic change, the book tentatively suggests some likely outcomes and gives five suggested priorities for policy-makers.¹⁰⁷

Over recent decades there have also been a number of comparisons and parallel country studies touching on the jurisdictions of North-West Europe. A comparison of a number of European legal aid systems was undertaken in 1994 by Cousins, and some interesting conclusions were reached. At that point in time, Cousins found that the vast majority of legal aid schemes were “confined to a very traditional approach to legal services and concentrate uniquely (or predominantly) on legal advice and representation”.¹⁰⁸ Furthermore, of the selection of Western European jurisdictions studied only the Netherlands and the UK had moved beyond family law in the provision of civil legal aid.

105 CCBE 2010.

106 Hynes and Robins 2009.

107 Hynes 2012.

108 Cousins 1994, p. 114.

The study is interesting in that it attempts to find links between legal aid (in particular legal aid spend) and wider social factors. For example, it is noted that more is spent on legal aid in Protestant than in Catholic countries but that there does not appear to be a correlation between numbers of lawyers and legal aid spend. Ultimately, Cousins concludes that the cost of legal aid can only be explained by supplier-led demand:

concepts such as 'access to legal services' and 'unmet legal need' have been shown to involve value judgments rather than empirical assessments. The people making the value judgments have been lawyers rather than individuals seeking access to the law. [...] in practice legal aid has much more to do with the economic needs of the legal profession than it has to do with the 'legal needs' of individuals.¹⁰⁹

From a UK perspective, Flood and Whyte in 2006 sought possible answers from other jurisdictions to the difficulties of legal aid. The jurisdictions used for comparison vary within the article according to the element of legal aid which is being considered. Thus, the costs of legal aid are compared in the UK, New Zealand, Ontario and Queensland, Australia; legal aid strategies are compared in Italy, Greece, the UK and Victoria, Australia. Some interesting suggestions are made, such as that a legal aid system can afford to be generous with legal aid for representation if the state has control over access to court processes. The passage of time now makes the comparative data of both these studies obsolete for the current dissertation.

The state of criminal defence services in nine European jurisdictions were measured against the European Convention of Human Rights in 2010.¹¹⁰ The jurisdictions were England & Wales, Finland, Belgium, France, Germany, Hungary, Italy, Poland and Turkey. Each jurisdiction is considered and recommendations made for improvements to effective implementation of criminal defence rights. This work is a parallel study of the nine jurisdictions rather than a true comparison.

A greater degree of comparative analysis, and the use of an external yardstick, can be found in a large-scale study in 2014 comparing legal aid in nine European jurisdictions: England & Wales, Scotland, Finland, Ireland, France, Germany, Belgium, Poland and the Netherlands.¹¹¹ The legal aid systems were assessed against the requirements of Article 6 of the European Convention on Human Rights, as will also be attempted in this dissertation, and there are clearly some similarities with the present work. However, the jurisdictions selected are different, and the 2014 work contains more statistical information on the breakdown of costs of legal aid and types of cases helped. In addition, that work includes information on the quality of services provided under legal aid financing, which is not included in this thesis. Conversely,

¹⁰⁹ *Ibidem*, p. 128.

¹¹⁰ Cape, Namoradze, Smith and Spronken 2010.

¹¹¹ Barendrecht, Kistemaker, Scholten, Schrader and Wrzesinska 2014.

there is less detail on the decision-making processes than will be found in the following chapters and, it is submitted, less analysis of the differences found. A 2017 collection of essays invites the reader to draw parallels between the recent experience in Australia and in England & Wales. Both jurisdictions have suffered spending cuts resulting in significant reductions in legal aid in recent years, including significant changes in the last half decade.¹¹² Some of the essays in the volume are historical, such as a consideration of the developments in criminal legal aid over time, first positive and now negative, as assessed by Smith and Cape. Their current view of the situation in England & Wales is bleak: “It is not too strong to conclude that criminal legal aid and the criminal defence profession are in crisis. It is difficult to see, at this juncture, how (if at all) that crisis will be resolved.”¹¹³ A historical overview of the development of legal aid in Australia is also included.

The majority of the essays, however, deal with current problems arising from insufficient availability of funding for legal services to the indigent: the difficulties of self-represented defendants as observed by an Australian magistrate;¹¹⁴ severe impacts on advice agencies in Liverpool, England,¹¹⁵ and on English Citizens’ Advice Bureaux in general;¹¹⁶ problems arising from the need to resort to mediation rather than representation in private family law disputes in England & Wales;¹¹⁷ difficulties for victims of domestic violence in Victoria, Australia¹¹⁸ and the particular problems faced by indigenous groups in achieving access to justice.¹¹⁹ There is analysis of the impact on lawyers’ understanding of their function in society when funding cuts mean their role in realising access to justice is threatened¹²⁰ and some possible partial solutions to the current difficulties are considered. These include the use of video-link technology in prisons and courtrooms in Australia as a means of improving efficiency of advice delivery¹²¹ and the advantages and disadvantages of the rise of ‘DIY law’.¹²² The development of Community Legal Centres in Australia and recent restrictions on their systemic work are assessed.¹²³

Whilst all of these essays are positioned within a ‘comparative’ collection, they do not utilise a comparative approach internally; each chapter is a free-standing description of a particular topic without information on similar issues in the other jurisdiction. Whilst of course some of the issues brought to light are familiar across jurisdictions, such as the similar challenges arising

112 Flynn and Hodgson 2017.

113 Smith and Cape 2017, p. 78.

114 Spencer 2017.

115 Organ and Sigafos 2017.

116 Kirwan 2017.

117 Hunter, Barlow, Smithson and Ewing 2017.

118 Mutha-Merrennege 2017.

119 Schwartz 2017.

120 Byrom 2017.

121 McKay 2017.

122 Laster and Kornhauser 2017.

123 Buchanan 2017.

from restrictions to criminal legal aid in both jurisdictions, and these parallels are briefly mentioned, no detailed comparisons are attempted. One chapter, consideration by Rice of whether there is a human right to legal aid, is cross-jurisdictional and of wider application; this is considered elsewhere in this review of literature.

The issue of cross-jurisdictional comparative spend on legal aid is addressed in a 2017 publication by Moore and Newbury. Arguing that direct comparisons of spend on legal aid are too simplistic, they urge consideration of the amounts spent on other aspects of the justice system, the nature of the legal system concerned and the wider impact on other areas of social welfare law. Similar arguments will be returned to in Chapter 8 on legal aid in context. Furthermore, they point out that comparisons of spend are open to contrasting interpretation: higher spend may be evidence of excessive provision or may show excellence of provision.¹²⁴ Whilst the book does not attempt detailed comparisons between jurisdictions it does argue strongly for caution if using a comparative approach to inform change, in the context of England & Wales.

In terms of detailed comparative studies of legal aid systems, in the countries within the remit of this dissertation, the most notable publications are those of Johnsen. In particular in connection with work which the Norwegian government was undertaking in 2008 he has compared in depth the legal aid systems in Norway and Finland,¹²⁵ and studied the English scheme with a view to lessons which might be applicable to Norway.¹²⁶ Changes have occurred in the legal aid schemes of both Finland and England & Wales since these studies, and so some of the comparisons are now outdated. The first comparison is broadly favourable towards the Finnish approach, with particular approval of the system of delivery through Legal Aid Offices. Furthermore, it is recommended that the Norwegian government should follow the Finnish example by reducing the amount of non-means tested legal aid and reforming the means test and contributions scheme. Johnsen also suggests extending the scope of Norwegian legal aid to cover a greater range of case types. In his consideration of the English scheme, Johnsen particularly picks up on the attempts underway at the time of his study (2009) to put legal aid on a principled footing, ensuring policy decisions are made by government rather than being left to the market. The aim at that time was also to regain control of expenditure through a variety of mechanisms such as contracting and increasing oversight of high cost cases. The study was pre-LASPO and the current situation in England & Wales bears little resemblance to that observed by Johnsen in 2009. One area in which this is stark is that he comments positively on the extension of legal aid to social welfare law providers in the NGO sector; this funding stream has almost completely dried up post-LASPO. Both reports were considered by the Norwegian government when it drew up

124 Moore and Newbury 2017, p. 74.

125 Johnsen 2008.

126 Johnsen 2009b.

its recommendations on legal aid¹²⁷ but in Johnsen's view the resulting policy suggestions were not far-reaching enough. In particular, the failure to bring civil legal aid and criminal defence closer together in a coordinated system, continued concentration on the private profession for delivery of legal aid, and lack of comprehensive policy standpoint drew criticism.¹²⁸ In the event, a change of government led to the proposals being shelved and legal aid in Norway has continued to be organised as per the status quo described by Johnsen.

In 2018 a cross-Nordic study was published, 'Outsourcing legal aid in the Nordic welfare states'.¹²⁹ The aim was to examine the extent to which legal aid schemes in the Nordic countries match welfare state ideology, and whether changes in the welfare state are mirrored by changes in legal aid. This study clearly demonstrates a strong social law focus. Descriptions of legal aid in all five Nordic countries are presented with analyses of their compatibility with welfare state ideology. These chapters are in effect parallel country studies and are followed by chapters on four particular access to justice schemes: the JussBuss student clinics in Norway; Gadejuristen legal service for socially marginalised clients in Denmark; an analysis of legal needs and provision relating to ex-prisoners in the same jurisdiction and a consideration of clinical legal education in the USA and Europe. There is a chapter presenting theoretical arguments about the role of lawyer-led legal aid, and two chapters which might truly be considered comparative. Johnsen, again largely in the context of Norway and Finland, compares Nordic provision as measured against human rights norms. He concludes that both the Finnish and Norwegian constitutions contain the main access to justice human rights provisions but that entitlement to legal aid in neither country fully meets the demands of the caselaw of the European Court of Human Rights. This comparison is very relevant to the current research and will be referred to later. However, it does not apply the measure to all the Nordic jurisdictions, and naturally not the UK or Republic of Ireland, and it is suggested that the current research dissertation contributes differently in taking a narrower focus (on the public and administrative law of legal aid schemes narrowly defined) and comparing more jurisdictions. The final chapter of the collection explores the relationship between legal aid and the Nordic welfare model, and will be useful in the conclusions to this research.

127 St.meld. nr. 26 (2008-2009).

128 Johnsen 2009c.

129 Hammerslev and Halvorsen Rønning 2018.

2. Chapter 2: Background

2.1 Introduction

Before looking in detail at the mechanics of legal aid in the nine jurisdictions under comparison, it is useful to consider why states implement legal aid systems and to gain a broad appreciation of the environment in which such schemes operate. The motivations for legal aid can be international or national in nature, and range from an ideological commitment to democratic principles to compliance with concrete constitutional provisions. Three categories of drivers will be considered below: the political philosophical concept of the rule of law; international treaty obligations and domestic constitutions. Together, these elements place a compulsion on states to establish and maintain some level of legal aid provision.

The legal aid schemes which arise as a result do not operate in a vacuum. As pointed out in the previous chapter, there is a particularly close relationship between legal aid and the legal system in which it operates. The legal aid scheme is established by law and forms part of the public administrative arrangements of the state; as such it is subject to the requirements of national administrative law. However, as well as being obliged to comply with the requirements of the legal system of the state in question, legal aid is engaged with the operation of that same legal system. In this respect it is akin to the rules of court procedure. In addition, legal aid operates upon the legal profession of the state and must integrate appropriately with any professional rules of conduct. To enable a proper contextualisation of the detailed descriptions of legal aid machinery in the following chapters, the judicial systems and legal professions of the nine jurisdictions under comparison will therefore be outlined below.

2.2 Motivations for legal aid

2.2.1 Legal and the rule of law

The provision of a properly functioning justice system is one of the key tasks of the state, indeed it can be argued that “a government’s prime responsibility is surely to provide for the proper administration of justice within its

boundaries”¹³⁰ The fundamental nature of a justice system can be seen in the emphasis given to the rule of law in international institutions and treaties. Taking the United Nations as an example, the Universal Declaration of Human Rights in its preamble declares that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”. The Preamble to the European Convention on Human Rights declares that European countries have a “common heritage of political traditions, ideals, freedom and the rule of law”, and it is clear that the concept applies, *inter alia*, to all the jurisdictions in this study.

Highlighting its importance, the United Nations has ‘strengthening the rule of law’ as one of its thematic areas and the Secretary-General has described the ideal as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹³¹

The rule of law thus requires both access to the courts and other processes of justice and a fair hearing or trial in any case which is heard before a court or tribunal. Such access should be available regardless of who the individual is, their position in society or their resources. In modern democracies, law is the mechanism by which the duties and rights of individuals are fixed. In order for the rule of law to be maintained, it is important that everyone subject to the laws of the jurisdiction has access to the justice system in order to be able to enforce their rights and have their responsibilities fairly determined. Without such access, equal application of law to all members of society is difficult, if not impossible to guarantee. The term “access to justice” is in common use in English-speaking jurisdictions, but has application also in the Nordic countries. It will be used throughout the thesis to express this concept that the justice system, as guarantor of the rule of law, should be available to the entire population of a state. According to this understanding, access to justice is an essential element of the rule of law; the latter provides the theory of universal applicability of law and the former makes possible the enforcement of the ensuing rights and responsibilities.

The rule of law requires a wide range of factors to be present. Some elements are broad and overarching, such as democracy, the separation of powers

130 Caplan 2016, p. 13.

131 S/2004/616.

and legal certainty. Others relate to the enforcement and upholding of laws through the judicial system, including the practicalities of physically providing a court structure but also the necessary qualities of the system, including the independence of the judiciary. The requirement for access to justice overlaps with the necessity for a properly functioning judicial system, but includes elements which are not part of the judicial system. Legal education and the provision of non-judicial dispute resolution methods are examples of contributions to access to justice which cannot be located within the judicial system. Within the overlap between access to justice and the judicial system, legal aid can be located. It plays a role in both the structures of law (the judicial system) and proper access for all. Legal aid is part of the judicial system inasmuch as it is the counterbalance to state prosecution services in criminal cases, and an essential element in any judicial system which relies on the parties having legal representation, whenever some citizens will be unable to pay for such representation themselves. In addition, legal aid is a necessary component of access to the judicial system for those who would otherwise lack the necessary assistance and therefore be unable to participate in court proceedings. Figure 1 below illustrates this proposition.

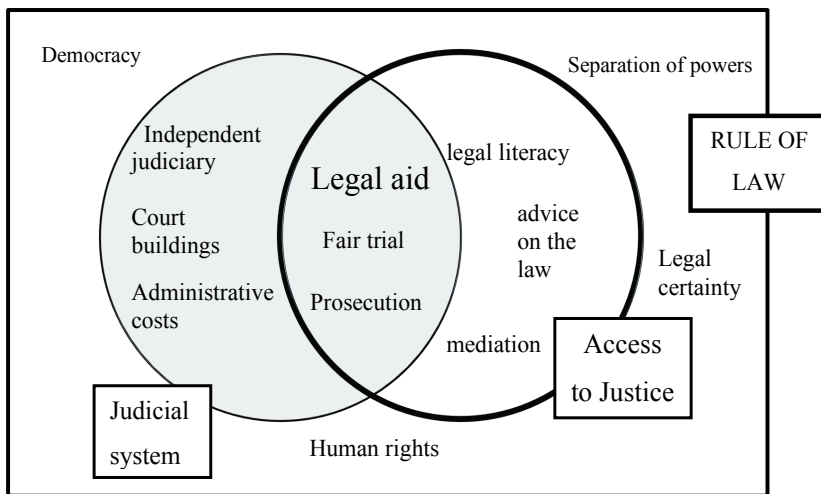


Fig. 1. The position of legal aid within the rule of law.

This analysis indicates where legal aid may play a role in the rule of law, but does not specify that it is a necessary component. It is clear that, whilst legal aid is one of the elements of access to justice, it is far from the only one, and is not always popular. Money is a significant factor in states' choices on how to provide access to justice; particularly when it is felt necessary to rein in public spending, legal aid can be seen as an expensive option. As a result, many states actively seek a variety of methods to ensure that citizens have meaningful access to justice in ways other than by paying for them to be assisted in dealing

with the formal justice system. This is so particularly in civil law, as in criminal matters it is less common for alternatives to court to be developed, although the expansion of penalties which can be imposed by the police has made some inroads in this area.

However, as long as a judicial system is in place and dealing with matters in which one or both parties may be of limited means, it is submitted that legal aid is required if the rule of law is to be upheld. The law can be used to ensure that a more powerful person or body does not ignore the legal rights of a less powerful person. However, because the more powerful very often have more money, there is a risk that legal proceedings will not provide neutral justice if the potentially oppressive party has unequal access to information about what is possible through law and assistance in obtaining the desired outcome. Legal aid, in putting the weaker party in a more equal position within legal proceedings, can help to avoid the consolidation of advantage which wealth and power bring. This is an essential element of the rule of law. The law must apply equally to all and in some circumstances this requires the state to assist a disadvantaged party in legal proceedings, to level the playing field.

Situations where the parties are of equal power are more likely to be amenable to a fair negotiation or mediation process, thus avoiding judicial process; nonetheless, other circumstances particular to the individuals concerned or to the jurisdiction may mean that legal proceedings are necessary. If the parties are equally inexperienced and neither is represented, there may not be a problem of inequality before the court, but wherever the norm is for parties to be represented in a given court, the proper administration of justice will be much assisted if this is the case. Substantive justice may also require legal arguments to be put or legal skills to be exercised on behalf of the parties.

Thus, for the rule of law and access to justice to be achieved completely without legal aid in a jurisdiction, a very particular and unusual set of circumstances would need to apply. Either the judicial system and laws would need to be genuinely so simple that any individual could understand and use them without help, or all disputes which might ever involve a person with limited financial means would have to be capable of binding resolution through a non-judicial process which provided a fair hearing without representation of the parties. In the latter situation, it would need to be impossible for one of the parties to choose instead to resolve proceedings through a judicial route unless the other party agreed. Furthermore, it would need to be impossible for one party in judicial proceedings to be represented if the other was not. These conditions do not apply in any of the jurisdictions being considered in this study and it is difficult to imagine that they would be satisfied anywhere. Legal aid is thus a necessary part of implementing the rule of law.

2.2.2 International obligations requiring a legal aid scheme

In addition to the theoretical argument that legal aid is directly mandated through the rule of law, specific international human rights obligations also establish a need for legal aid, either explicitly in the treaties or as developed through their interpretation by treaty bodies.

The global and European human rights systems are relevant to a study of legal aid as a result of the fair trial provisions they contain. The Human Rights Committee has emphasised that “the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law”.¹³² There is clearly a connection between the availability of legal advice and representation to the parties and the fairness or otherwise of a trial.¹³³

All the jurisdictions within this study are, naturally, bound by the International Covenant on Civil and Political Rights (ICCPR). They are all also within the Council of Europe, and therefore all subject to the regional human rights requirements within the European Convention on Human Rights (ECHR). All except Norway and Iceland are also EU member states or parts of such states and thus under the influence of the Charter of Fundamental Rights of the European Union. However, the provisions of the EU Charter have limited applicability compared to the ICCPR and ECHR; they apply only to situations where there is national application of EU law,¹³⁴ which within the area of legal aid largely restricts applicability to cross-border cases. The Charter does not have a bearing on the general duty to provide access to justice within a state. As such, it is of limited relevance to this thesis and will only briefly be examined.

The majority of decided cases concerning international human rights obligations to provide legal aid are judgments of the European Court of Human Rights (“the Court”) or the former European Commission on Human Rights. However, there are some relevant cases decided by the Human Rights Committee of the UN and these will also be alluded to where pertinent. In this section an overview will be provided but reference will be made throughout the thesis to specific international provisions and jurisprudence as relevant.

The treaty provisions differ significantly in their treatment of criminal and of civil proceedings:

132 CCPR/C/GC/32, para. 2.

133 *Ibidem*, para. 10.

134 Charter of Fundamental Rights of the European Union, Article 51.

International
Covenant on Civil
and Political Rights,
Article 14:

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...]

[...]

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

European
Convention on
Human Rights
Article 6 (3):

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]

[...]

(3) Everyone charged with a criminal offence has the following minimum rights:

[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

Charter of
Fundamental Rights
of the European
Union, Article 47:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Whilst the ICCPR and ECHR requirements apply prima facie to all the jurisdictions under consideration here, there is in force in respect to the Republic of Ireland a reservation to the European Convention on Human Rights, which reads:

The Government of Ireland do hereby confirm and ratify the aforesaid Convention and undertake faithfully to perform and carry out all the stipulations therein contained, subject to the reservation that they do not interpret Article 6.3.c of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland.¹³⁵

135 In force since 03/09/1953; Council of Europe website.

This reservation was lodged in 1953, since which time legal aid in Ireland has developed significantly. The result of the reservation at present is that it would be difficult for an individual to bring a case against the Republic of Ireland at the European Court of Human Rights to argue that the Convention requires additional criminal legal aid to be provided. However, as civil legal aid falls under Article 6.1, challenges may and have been brought concerning such provision.

In addition to Article 47 of the Charter of Fundamental Rights of the European Union, set out above, the EU also has a number of legal aid-specific directives. For the moment, however, the obligations largely relate to cross-border issues, such as children's issues where the parents live in different states or proceedings involving European Arrest Warrants.¹³⁶ The Legal Aid Directive¹³⁷ provides instruction on how the costs of legal aid, translation, travel and other expenses of cross-border litigation are to be shared between the states involved. Overall, as the Directive only regulates legal aid in cross-border disputes, it has had "little or no impact on the minimum rules for the provision of legal services of Member States".¹³⁸

It can be seen from the provisions reproduced above that the requirement to provide criminal legal aid is explicit; all three treaties state that, where the interests of justice so require, a criminal defendant must have legal representation paid for by the state if he does not have sufficient means to pay for his own defence. The financial eligibility criteria applied in the jurisdictions under consideration are explored in Chapter 7, and the interpretation and application of the 'interests of justice' criterion will be discussed in Chapter 3, below. The latter will also set out some additional EU requirements for legal aid in criminal cases, with limited applicability to the jurisdictions under consideration.¹³⁹

The international position regarding civil cases and legal aid is more complex; only the EU Charter contains an explicit requirement for civil legal aid but the treaty bodies, particularly the European Court of Human Rights, have developed such a requirement through caselaw. This jurisprudence will be discussed in detail as it becomes applicable to the discussions in Chapters 4, 5 and 6. As an initial observation, however, it is notable that the European Court of Human Rights, in its jurisprudence concerning civil legal aid under Article 6, has focused on an implied aspect; that of access to court. This right has been found capable of limitation, despite the absence of any limitation clause in the Article itself. Fair hearing itself has received much less attention despite its obvious relevance to the question of legal aid. The consequences of this interpretative approach by the Court will be examined in Chapter 6 and debated further in the conclusions in Chapter 9.

136 A useful summary of the provisions can be found in Kiraly and Squires 2011.

137 EU Council Directive 2003/8/EC.

138 Kiraly and Squires 2011, p. 45.

139 Directive 2013/48 and Directive 2016/1919.

In addition to the work of the European Court of Human Rights in this area, the Council of Ministers of the Council of Europe issued, in 1993, a set of (non-binding) recommendations on Effective Access to the Law and to Justice for the Very Poor. *Inter alia*, these encourage governments to defray the cost of legal advice for the very poor through legal aid and extend legal aid to all judicial instances and all proceedings.¹⁴⁰ In addition, the Council of Ministers in 1978 issued a Resolution on legal aid and advice, which recommends the provision of legal aid to ensure that no one is prevented by financial obstacles from pursuing or defending his rights in any court matter.¹⁴¹

International treaty bodies dealing with social, cultural and economic rights have also pointed out the importance of legal aid as an element of the effective exercise of such rights. The European Committee of Social Rights, which monitors implementation of the European Social Charter, has for example interpreted the Charter as requiring legal aid in, *inter alia*, housing, social assistance, health and employment cases.¹⁴² Such findings emphasise the notion that “the right to legal aid is a critical precursor to the effective enjoyment of socio-economic rights”,¹⁴³ without arguing for a right to legal aid as a free-standing socio-economic right.

2.2.3 Domestic constitutional drivers for legal aid

Several of the jurisdictions of North-West Europe have constitutional provisions relevant to legal aid, usually in the form of fair trial rights. These provide an additional impetus for the establishment and maintenance of a properly functioning legal aid scheme.

In Finland, for example, the right to a fair trial is enshrined in the Constitution, alongside provisions which reflect the rule of law:

Section 21 – Protection under the law

Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.

140 Council of Europe Council of Ministers Recommendation No. R(93)1, 8.1.1993.

141 Council of Europe Council of Ministers Resolution (78)8 on Legal Aid and Advice.

142 European Committee of Social Rights, 2008.

143 Durbach 2008, p. 71.

The Constitutional Committee of Parliament addresses constitutional ramifications of legislative proposals and has drawn *inter alia* the Finance Committee's attention to the need to protect the "fundamental rights to a fair trial ... [and] to have a case heard appropriately in court ... within a reasonable time and at reasonable cost",¹⁴⁴ even when spending cuts are needed. Similarly, the Swedish constitution provides that legal proceedings must be processed fairly¹⁴⁵ and that courts must pay regard to the equality of all before the law.¹⁴⁶ The equivalent provision of the Icelandic Constitution covers criminal and other cases and mandates fair trial before an independent and impartial court of law.¹⁴⁷

Chapter E of the Norwegian Constitution sets out various human rights which are protected, including at Article 95 that:

Everyone has the right to have their case tried by an independent and impartial court within reasonable time. Legal proceedings shall be fair and public. [...] The authorities of the state shall ensure the independence and impartiality of the courts and the members of the judiciary.

The Danish constitution, despite containing a chapter on individual rights,¹⁴⁸ does not include fair trial rights within its provisions. However, the European Convention of Human Rights has been incorporated in Danish law since 1992 and thus Article 6 is directly applicable.

The UK, including England & Wales, has no single constitutional document and there are no written constitutional provisions concerning fair trial rights. However, the Magna Carta of 1225 famously provided that "to no one will we sell, to no one deny or delay right or justice", a provision which applied to all "free men" and which over the centuries was seen as giving, for example, a right to trial by jury.¹⁴⁹ In modern times, the European Convention on Human Rights, to which the UK has been a party since 1951, has been the applicable source of human rights protection. The Human Rights Act 1998 gave domestic effect to the rights contained in the European Convention on Human Rights and thus Article 6 fair trial rights are directly applicable, although there is a commitment by the current government to revoke the 1998 Act.¹⁵⁰ In addition, in Scotland the Scotland Act 1998 provides that "a member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law".¹⁵¹

Despite having, nominally, a constitution, Northern Ireland has no single constitutional document; the Northern Ireland Constitution Act 1973 deals

144 GrUU 29/2014 rd — RP 131/2014 rd.

145 Regeringsform, 1974, Chapter 2, Article 11(2).

146 *Ibidem*, Chapter 1, Article 9.

147 Constitution of the Republic of Iceland, Article 70.

148 Grundlov, 1953, Part VIII.

149 Breay and Harrison 2014.

150 Conservative Party Manifesto 2015.

151 Scotland Act 1998, s. 57(2).

only with aspects of devolution and with discrimination on religious and political grounds. There are no constitutional provisions which give fair trial rights. However, as in the rest of the UK the Human Rights Act 1998 applies and gives domestic effect to, *inter alia*, Article 6 fair trial rights. It is accepted that “legal aid plays a vital role in ensuring that there is fair and equal access to justice in Northern Ireland”¹⁵²

The Republic of Ireland is interesting in having two main sets of constitutional provisions which have led to significant caselaw on legal aid. Firstly, in respect to criminal proceedings, Article 38 provides that “no person shall be tried on any criminal charge save in due course of law.” In addition, Article 40 sets out rights which are relevant to the conduct of court proceedings:

1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.¹⁵³

These provisions have together been held by the Supreme Court to amount in some circumstances to a constitutional right to legal aid in criminal proceedings. The reasoning bears repeating at some length:

Article 38 deals specifically with a criminal trial and provides that no person should be tried on any criminal charge save in due course of law. This Article must be considered in conjunction with Article 34; with Article 40, s. 3, sub-s. 1, under which “the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen” and with sub-s. 2 of the same section under which “the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.” Being so considered, it is clear that the words “due course of law” in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.¹⁵⁴

152 Northern Ireland Audit Office 2016, p. 2.

153 Constitution of Ireland, 1937.

154 *The State (Healy) v. Donoghue*, 1976, judgment of O’Higgins C.J, p. 349.

The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing, as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does.¹⁵⁵

On the civil side, the High Court has considered the extent to which there exists a constitutional duty to provide legal aid. Expanding upon the previously-established constitutional right of access to court,¹⁵⁶ the High Court concluded that:

the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid.¹⁵⁷

Thus, the Irish constitution has proven an effective tool for the provision of access to justice through legal aid.

Within the geographical scope of this thesis (the Nordic countries, the United Kingdom and the Republic of Ireland), then, it is clear that legal aid schemes covering criminal and other matters are required. At least the adherence to the rule of law and compliance with international treaty obligations, and potentially also constitutional requirements, mandate such assistance in some circumstances. The details of how these jurisdictions select cases for funding, and the administrative nature of their legal aid and public defender schemes, are the subject of this thesis.

2.3 Area of operation of legal aid

2.3.1 Judicial systems and legal professions as the operational sphere of legal aid

The definition of legal aid set out in the introduction to this thesis establishes that, for current purposes, legal aid pays for lawyers to help individuals in their interactions with the legal system. Therefore, both the nature and operation of the legal profession and the structure of the courts are highly relevant in understanding legal aid in any given jurisdiction. Significant difference in these elements may require different approaches in the provision of legal aid

¹⁵⁵ *Ibidem*, p. 350.

¹⁵⁶ *Macaulay v. The Minister for Posts and Telegraphs*, 1966.

¹⁵⁷ *O'Donoghue -v- Legal Aid Board & ors*, 2004, as per Mr Justice Kelly.

and may also affect the cost of providing assistance particularly, for example, if a bifurcated legal profession means that two lawyers are needed. In addition to the general arrangement of the legal profession, jurisdictions may have rules limiting legal aid work to certain sectors of the profession. Details of the arrangements for use of lawyers in criminal legal aid and as public defenders will be given in Chapter 3, but an overview across both civil and criminal work will be given here. The nine jurisdictions under consideration show significant variety in their judicial systems, legal professions and distribution of legal aid although clear patterns emerge.

2.3.2 Judicial systems

A brief examination of the court systems of the Nordic countries, the UK and the Republic of Ireland reveals three main groupings.

The Finnish court system is organised separately for administrative matters and for all other matters. The General Courts deal with civil and criminal matters and appeals can be made to the Court of Appeal and ultimately the Supreme Court. There is an absolute right for either party to appeal to the Court of Appeal in more serious matters but in other Court of Appeal cases, and for all appeals to the Supreme Court, leave is required. However, all matters concerning decisions by or responsibilities of local or central government authorities, public bodies, parliamentary agencies or the President's office fall within the jurisdiction of the Administrative Courts.¹⁵⁸ Administrative Court decisions are appealed directly to the Supreme Administrative Court¹⁵⁹ and leave to appeal is required for some types of case. In addition to these two main judicial venues, there are also a number of specialist courts, in particular the Commercial Court, Labour Court and Insurance Court. The Ministry of Justice also administers several dispute resolution boards such as consumer dispute boards and insurance boards. It is possible for parties to appear before any level of court without representation, with the minor exception that representation is necessary in Supreme Court cases concerning procedural errors.¹⁶⁰

Sweden also has a court system which is divided into general and administrative courts. Each kind of court has 3 tiers: first-instance courts, in the case of general courts called District Courts and otherwise simply Administrative Courts; Appeal Courts and Administrative Appeal Courts; and the Supreme Court and Supreme Administrative Court. Individuals are entitled to appear before any of these courts without representation. Finland and Sweden thus form the first group: jurisdictions divided into administrative and general courts, with three separate tiers in each (apart from in administrative cases in Finland, with only two tiers).

158 Förvaltningslag, 2003, 2 §, para. 2.

159 Except where there is no right of appeal such as in parking fine cases.

160 Lag om ändring av 15 och 31 kap. i rättegångsbalken, 2011, 1 §.

Norway has a single court system which deals with criminal, civil and administrative matters, and in addition some specialist courts dealing with particular types of matter, such as the Land Consolidation courts and the Industrial Tribunal.¹⁶¹ There are three levels in the court hierarchy, beginning with the 66 District Courts which hear all cases¹⁶² as the court of first instance. Six Courts of Appeal hear appeals from District Courts in both civil and criminal matters. Appeals will only be heard in full if a screening committee of three judges believes there is merit in the appeal.¹⁶³ The highest court in Norway is the Supreme Court, which has jurisdiction in all types of case but will not revisit the question of guilt or innocence in criminal cases; only sentencing and procedural issues are appealable. The stated aim of the Supreme Court is “to ensure uniformity, clarity and development of the law”¹⁶⁴ and thus the Appeals Selection Committee in general gives leave to appeal in cases which raise points of legal principle. There is no requirement for representation before courts other than the Supreme Court, in which a party can be required to obtain representation if they are unable to properly present the case unaided.¹⁶⁵

Since the beginning of 2018, Iceland has had a three-tier court system: district courts, a new Court of Appeal, and the Supreme Court. All proceedings (criminal, civil and administrative) commence in one of the eight District Courts. If certain conditions are met, an unsatisfied party can appeal the judgment of the District Court to the Court of Appeal and further, with permission of the higher court, to the Supreme Court. It is intended that very few cases will proceed to the Supreme Court, and that these cases will be those where it is useful for a precedent to be set. Representation is not required before any court.

Denmark also has a unified court system: civil, criminal and administrative cases are all heard by the same courts. The first tier court is the County Court, which hears civil, criminal, enforcement, probate and bankruptcy cases. Since 2008, civil claims involving sums of up to DKK 50,000 (approx. 6,700 €) are dealt with through an accelerated small claims procedure, unless the judge decides they are complex and require handling through the usual court process.¹⁶⁶ There are 24 County Courts in Denmark.

Appeals against decisions of the County Court are made to the two High Courts, which can also hear civil matters at first instance upon referral from the County Court. The specialist Maritime and Commercial Court, which deals *inter alia* with bankruptcy, compulsory debt settlement and some debt rescheduling matters, replaces both the County and High Court within its areas of jurisdiction. The highest court in Denmark is the Supreme Court

161 The Courts of Norway website.

162 Except those within the competence of the specialist courts.

163 Although criminal cases involving a possible prison sentence of 6 years or more cannot be refused an appeal hearing.

164 The Courts of Norway website.

165 Tvistemålsloven, 1915, § 3(2).

166 Retsplejeloven, 2017, Chapter 39.

which hears appeals from the High Courts and the Maritime and Commercial Court. Leave is needed to appeal to the Supreme Court and in criminal matters appeal to the Supreme Court is only possible on a point of law; the factual conclusions of the trial jury will not be revisited.¹⁶⁷ In civil cases leave to appeal will only be granted if the matter raises a point of legal principle or is of general importance.¹⁶⁸

As a general rule, courts hold oral hearings to fulfil the basic principle that the justice system should operate in public, and representation is not mandated. In small claims cases the judge has a duty to assist the parties¹⁶⁹ although assistance is not given with completing the application forms and formulating the claim.

The Republic of Ireland has a legal system in which most court levels are unitary, i.e. the court deals with all types of matters. The court of first instance for most cases¹⁷⁰ is the District Court; more serious cases are heard by the Circuit Court. The Circuit Court hears criminal cases by jury trial and civil cases up to a certain financial limit.¹⁷¹ The next level up is the only part of the courts system which is divided: the High Court acts as an appeal court from the Circuit Court in civil matters and has power to review the decisions of certain tribunals, whilst the Central Criminal Court hears trials for murder, rape, aggravated sexual assault, treason, piracy and related offences. The Court of Appeal was established in October 2014 as an additional appeal level for both civil and criminal cases, above which the Supreme Court hears appeals in matters of general public importance, or where the interests of justice require an appeal to that Court.¹⁷² The court system is adversarial and as such representation is common although there is no requirement to be represented before the courts at any level.

Norway, Iceland, Denmark and the Republic of Ireland form the second group, with a unitary court system dealing in principle with all types of case, with first-instance courts and two appeal tiers (or in some cases in the Republic of Ireland, three). Specialist courts may also exist parallel to the general courts.

Northern Ireland has been a separate jurisdiction within the UK since 1921 and the current division of legislative responsibility between the Northern Ireland Assembly and the UK Parliament is set out in the Northern Ireland Act 1998. Much Northern Irish legislation echoes that in the rest of the UK and the justice systems are still closely related; UK Appeal Court cases are highly persuasive (although not binding) in Northern Ireland and the UK Supreme

167 *Ibidem*, Chapter 83.

168 *Ibidem*, § 253.

169 *Ibidem*, § 406.

170 Apart from terrorism and organised crime cases.

171 Unless all parties to an action consent, in which event the jurisdiction is unlimited. The limit of the court's jurisdiction relates mainly to actions where the claim does not exceed €75,000 and the rateable valuation of land does not exceed €253.95.

172 Appeals to the Supreme Court are usually from the Court of Appeal but can also be from the High Court with leave.

Court is the highest court also for Northern Ireland. Legal aid is governed independently from the rest of the UK; the court service and some policing and justice powers (including legal aid) were devolved by an amendment to the 1998 Act with effect from April 2010.¹⁷³

Civil and criminal courts in Northern Ireland are largely separate at the lower levels and all criminal cases are heard at first instance in either the Magistrates' or Crown Court. Criminal offences are of three categories of seriousness: summary offences punishable by a fine of up to £5,000 or a prison sentence of up to six months; 'either-way' offences which have a potential penalty of between 6 and 12 months' imprisonment; and indictable offences which may result in a prison term of over 12 months. Broadly speaking, the Magistrates' Courts hear summary offences and either-way offences where the defendant has opted out of trial by jury.¹⁷⁴ The Crown Court tries indictable offences and either-way offences where the defendant has chosen trial by jury. However, there are certain offences which can be heard at either court as selected by the prosecution¹⁷⁵ and others where the magistrate can decide to try an offence which would otherwise be indictable, if certain conditions are fulfilled.¹⁷⁶

Civil cases within the family sphere are also heard by the magistrates' courts (known in such cases as the Family Proceedings Court), but other civil cases are heard by the County Courts or, if particularly grave or complex, the High Court. Within the County Court, cases with a value of under £3,000¹⁷⁷ are heard through a special "small claims track" which uses a simplified procedure. The High Court hears most civil matters with a value of above £30,000 and has various sub-divisions which hear appeals from lower courts in both civil and criminal cases as well as first instance hearings of some civil matters. The higher appeal courts for both civil and criminal cases are the Court of Appeal and the Supreme Court. There is no obligation for a party to be represented in proceedings before any court, but, as in the Republic of Ireland, representation is usual before all courts except the small claims track of the County Court.

Scotland has been part of the United Kingdom since the Act of Union 1707 merged the Kingdom of Scotland and the Kingdom of England to form the new Kingdom of Great Britain. However, the Act explicitly left the Scottish Court of Session and Court of Justiciary with "the same Authority and Privileges, as before the Union".¹⁷⁸ Recent devolution has cemented the position; the Scotland Act 1998 and Scotland Act 2012, which prescribe the role of the Scottish Parliament, permit the passing of legislation on any matter which is

173 The Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010.

174 Magistrates' Court Order (NI) 1981, Article 29.

175 As defined in the specific legislation establishing the offence.

176 Magistrates' Court Order (NI) 1981, Article 45.

177 Not including personal injury claims which are always heard using the full County Court procedure.

178 Act of Union 1707, Article 19.

not reserved¹⁷⁹ and justice and the courts are not on the list of reserved matters. As a result, the courts of Scotland form a separate jurisdiction within the UK applying legislation passed by the UK Parliament (where these have force in Scotland) as well as that passed by the Scottish Parliament.

The courts in Scotland are divided into those with criminal and those with civil jurisdiction. Less serious criminal offences are heard by local Justice of the Peace Courts. These courts apply a summary (non-jury) procedure and can impose a penalty of up to 60 days' imprisonment or a fine of up to £2,500. However, most criminal matters are heard by the Sheriff Courts which, in addition to their civil jurisdiction (see below) can conduct criminal trials using both summary procedure and solemn (jury) procedure. The most serious crimes such as murder and rape can be heard directly by the High Court of Justiciary, which also handles appeals from the Sheriff Court. There is no further appeal available in criminal cases in Scotland except that if there is an alleged breach of the European Convention on Human Rights or European law a referral to the Supreme Court of the United Kingdom is possible.

Sheriff Courts are also the first instance venue for most civil cases although particularly complex or high value cases are heard at first instance by the Outer House of the Court of Session. The Inner House of the Court of Session hears appeals on a point of law from the Outer House and from the Sheriff Court; on a point of law a further appeal is possible to the Supreme Court of the United Kingdom with permission of either the Inner House or the Supreme Court. In addition to the regular Scottish courts there are also a number of specialist courts and tribunals including the Scottish Land Court and the Lands Tribunal for Scotland, and the Court of the Lord Lyon which deals with heraldry matters. There is no requirement for representation in any Scottish court.

England & Wales is the largest jurisdiction in the United Kingdom, with 89% of the total UK population resident here (compared with 8% in Scotland and 3% in Northern Ireland).¹⁸⁰ Although the Welsh Assembly has many areas of legislative competence,¹⁸¹ responsibility for the court service and legal aid are not yet devolved. The Silk Commission on Devolution in Wales recommended in 2014 that there should be a review of the case for devolution of legal aid within 10 years.¹⁸² No devolution of the justice function has yet come to fruition,¹⁸³ but a Commission on Justice in Wales is currently undertaking a review of the operation of justice in Wales and considering how the Silk Commission recommendations might be implemented.

The court structure in England & Wales is complex as it has developed organically over a period of a thousand years without any clear overarching plan. The roles of the various courts overlap to an extent but civil and criminal

179 Scotland Act 1998, s.29.

180 Office for National Statistics 2015.

181 Schedule 7 to the Government of Wales Act 2006.

182 Commission on Devolution in Wales 2014, Recommendation 28.

183 Sherlock 2015.

cases are to a large degree dealt with separately.¹⁸⁴ Almost all criminal cases commence in the magistrates court and over 90% are concluded at that level,¹⁸⁵ but the more serious criminal matters are committed (i.e. forwarded) to the Crown Court. Cases at Magistrates' Courts may be heard either by magistrates, who are trained, unpaid lay persons, or by District Judges. Magistrates' Courts deal with certain more minor offences ('summary offences') and 'either-way offences' for which in general either the court or the defendant can insist on the case being referred up to the Crown Court. The penalties which the Magistrates' Court can impose are up to 6 months in prison (or up to 12 months in total for more than one offence), a fine of up to £5,000 or a community sentence.¹⁸⁶ In addition to either-way offences, the Crown Court hears serious 'indictable' offences such as murder, rape and robbery, almost always by jury trial. The jury decides guilt or innocence, and the presiding judge passes sentence.

Appeals can be made against the conviction as a whole or against the sentence. From the Magistrates' Courts, appeals are in general to the Crown Court;¹⁸⁷ appeals from convictions at the Crown Court are generally heard by the Court of Appeal Criminal Division,¹⁸⁸ with leave of the court. An appeal from the Court of Appeal to the Supreme Court is only possible if the Court of Appeal has certified that there is a point of law of general public importance involved in the case.

The family courts are a specialist division of the magistrates' court, with specially trained magistrates. These courts hear most family cases at first instance and appeals go to the Family Division of the High Court, and then on to the Court of Appeal Civil Division on a point of law, and potentially the Supreme Court in a case of general public importance.

Although a small group of civil cases begin in the Magistrates' Court, most are heard at the County Court, by professional judges only very rarely assisted by a jury. However, some types of case such as judicial review and libel claims are reserved to the High Court, which also hears personal injury claims for over £50,000 and other money claims of over £100,000.¹⁸⁹ The County Court has various 'tracks' with differing procedures depending on the type and value of the case. The small claims track is the track for claims where the financial

184 The chart at <https://www.judiciary.gov.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf> is useful to understand the structure.

185 The Courts and tribunals judiciary website, 2016.

186 Government website.

187 However, if sentence was handed down by the Crown Court, an appeal against that sentence will be to the Court of Appeal Criminal Division even if the conviction itself took place at the Magistrates' Court. Some appeals from the Magistrates' Court are to the Administrative Court (a division of the Queen's Bench Division of the High Court).

188 Criminal appeals on points of law may also be heard in the Queen's Bench Division of the High Court.

189 Sime 2016.

value of the claim is not more than £10,000;¹⁹⁰ the fast-track covers most claims where the financial value is not more than £15,000 and the court considers that the trial is not going to be relatively simple in evidence terms and not last for more than one day; the multi-track covers all remaining cases.

Appeals from the County Court may, depending on the circumstances, be to the High Court or the Court of Appeal; appeals from the High Court are to the Court of Appeal. Permission is required to appeal most decisions of County Court and High Court judges.¹⁹¹ Further appeals in civil cases will be to the Supreme Court, but only in cases of public importance. In most cases only one appeal will be possible. Litigants at all levels are entitled to represent themselves.

The jurisdictions of the UK thus form a third group, with judicial systems which separate criminal cases out at least to a large extent, at trial stage. Civil and administrative cases are heard together in the non-criminal courts. There is some overlap, for example in the Magistrates' Courts in England & Wales and the Sheriff Courts in Scotland, and at the appeal level this overlap increases. The highest court, the Supreme Court, hears any type of case. There is not, in these jurisdictions, a clear three-tier structure for appeals; a complex appeals structure depends on the case type and judicial venue at first instance.

To the extent that any judicial system is so complex that it is difficult to navigate without advice, there may be an impact on legal aid. Within the jurisdictions described above, the three court systems of the UK are particularly complicated and it is very likely that a lay person would find it difficult to identify the court in which their case should be issued. However, even the division between administrative and general courts in Sweden and Finland may cause confusion for individuals. The Norwegian, Danish and Icelandic judicial structures are straightforward to navigate as all cases commence at the same court. In the Republic of Ireland, the situation is more complex as although there is no division into general/administrative or civil/criminal, there are a number of overlapping competences of courts.

2.3.3 Legal professions

The nature of the legal profession impacts upon legal aid in several ways. The extent to which the legal profession has a monopoly on representation in court is relevant, as if there is no such monopoly assistance may be obtained, usually more cheaply, from other sources. This in turn may either relieve the state of any cost, if the individual pays, or if the non-lawyer advisor is permitted to act under the terms of the legal aid scheme, reduce the cost to the state by lowering the legal aid fee. Additionally, an individual may be able to obtain free support and help in court from, for example, family and friends. Conversely,

190 As well as any claim by a tenant of residential premises against his landlord for repairs, where the estimated cost of the repairs is not more than £1000.

191 Civil Procedure Rules, Rule 52.3.

a professional monopoly can be beneficial as it brings the advantage of professional disciplinary control in enforcing quality and ethical standards, which can provide a level of assurance that legal aid money is being well spent. The way in which the profession operates can impact on the cost of legal aid, particularly if lawyer specialisations mean that more than one lawyer is needed for a case, or if within the profession specialists can increase their charges because of demand for expert services. Furthermore, the political strength of the profession determines the level of influence it has over legal aid fees and structures. Several of these themes will be returned to in Chapter 7, but it is useful to have an overview of the relevant legal professional structures in mind before exploring the detail of legal aid in the following chapters.

Legal services in Finland are relatively unregulated. Since 2014 only a member of the Bar Association or a registered lawyer may act as an advocate in court but office-based legal services can still be provided by anyone, with no restriction on use of the title ‘jurist’. The qualified legal profession in Finland can be considered in three sections, all of which are overseen to at least some extent by the Finnish Bar Association. The most highly qualified lawyers are attorneys (‘advokat’) who are members of the Finnish Bar Association. To join the Bar Association, a lawyer must be over 25, have a Masters’ degree in law, at least 4 years’ experience in the legal field of which 2 years must be in a law office, and pass the Bar exam. The next most regulated group are Public Legal Aid Attorneys; attorneys or other lawyers employed by Public Legal Aid Offices. Public Legal Aid Attorneys are state officials, appointed by the Minister of Justice. Eligibility for the office of Public Legal Aid Attorney requires a Master’s degree in law and adequate experience of advocacy or adjudication, and more than half of the Public Legal Aid Attorneys in Finland are also members of the Bar Association. All Public Legal Aid Attorneys are independent of any other actors in the performance of their commissions, but are supervised by the Bar Association (whether or not they are members of it) when engaged in advocacy before courts of law. In conducting this work Public Legal Aid Attorneys are under an obligation to observe the rules of proper professional conduct for attorneys enforced by the Finnish Bar Association. The third group of lawyers is licensed legal counsel, who are certified by an authorisation Board. To be licenced, a lawyer must have a Masters in law and either have relevant experience or pass the Bar exam.¹⁹² The work of licensed legal counsel is supervised by the Bar Association only to the extent of court representation; work outside court is supervised by the authorisation Board. Whilst the Bar Association can recommend penalty fines or that a licence be revoked, penalties can only be actually imposed by the Board.¹⁹³ Some, but not all, licensed legal counsel go on to become attorneys.

192 Lag om rättegångsbiträden med tillstånd, 2011, 2 §.

193 *Ibidem*, 12 §.

Lawyers in Sweden can be classified as either advocates ('advokat') or jurists ('jurister'). The Swedish legal profession is even less regulated than that in Finland, as anyone can appear before any level of court, not only representing herself but also representing another person. No qualification is required before a person can offer legal services to the public and use the title 'jurist'. The title 'advokat' is protected by law and refers to members of the Swedish Bar Association, entry to which is restricted to those with a law degree and at least 3 years' experience of practising law, and dependent upon passing the Bar exam. Advocates are subject to the disciplinary authority of the Bar Association and, generally, only advocates are appointed to carry out public defence work. There have been no public law offices in Sweden since reforms in 1997; all lawyers providing services to members of the public are in private practice.

The rules on who can practice as a lawyer in Norway are contained in Chapter 11 of the Courts of Justice Act 1915.¹⁹⁴ Anyone who has completed a law degree can give legal advice and assistance to members of the public¹⁹⁵ but to carry on a legal practice a person must hold a licence issued by the Supervisory Council for Legal Practice. To qualify for such a licence, the applicant must have a law degree and 2 years' relevant experience,¹⁹⁶ usually including a certain amount of litigation experience.¹⁹⁷ Under the relevant regulations,¹⁹⁸ an applicant must have attended an obligatory course. Gaining rights of audience before the Supreme Court requires 3 years' practice experience and the taking of a test before the Supreme Court.¹⁹⁹ Membership of the Bar Association is voluntary, but more than 90% of practising lawyers are members,²⁰⁰ which enables them to use the title "advokat". Membership is seen as a mark of quality, as advocates are subject to the Bar Association code of conduct.²⁰¹

In Iceland, there are three classifications within the legal profession: lawyers, district court attorneys and Supreme Court attorneys. All lawyers must be members of the Bar Association and are subject to its disciplinary rules. To carry out non-court legal work as a 'lawyer', a person must be a law graduate from the University of Iceland or equivalent. To achieve the position of district court attorney and have the right to represent clients before the courts, a lawyer must in addition pass the Bar Exam and assist a practising advocate in at least one case before the District Court. There are some additional requirements concerning personal qualities, *inter alia* not having been a bankrupt, being of unblemished record and of good mental health. After a period of practice of 5 years it is possible to qualify to act in the Supreme Court, once certain numbers of District Court cases have been conducted and if the Supreme Court judges

194 Lov om domstolene, 1915.

195 *Ibidem*, § 218, (2)(1).

196 *Ibidem*, § 220.

197 FOR-1996-12-20-1161, Chapter11, § 8-1.

198 *Ibidem*, § 8-2.

199 Lov om domstolene, 1915, § 221.

200 Bar Association of Norway website.

201 *Ibidem*.

the advocate fit to work before them on the basis of four argued cases.²⁰²

The Danish legal profession is strictly controlled and membership of the Bar and Law Society (Advokatsamfundet) is compulsory for any person carrying out the work of a lawyer.²⁰³ There are around 6000 advocates ('advokat') registered with the Society. Qualification as a lawyer requires the holding of both a bachelor's and a master's degree in law, three years' practical training experience and the passing of a final postgraduate oral examination. Any advocate is entitled to represent clients before the city courts but further qualification is needed in order to appear before the High Court or Supreme Court. This permission can be granted by the courts to those who have adequately conducted at least two cases before the High Court and (for the Supreme Court) have practised for a further five years after qualification. There is no legal requirement for representation at any level although in a particular case a court may order representation, if need be by a public attorney, if it is problematic that a party is unrepresented. If a person does choose to be represented in a civil case, in general the representation can only be conducted by a lawyer or a member of the person's household. However, in small claims cases or enforcement actions with a value of under 100,000 DEK anyone can act as a representative.

As in the UK (see below), the legal profession in the Republic of Ireland is divided into solicitors and barristers. Solicitors are the first point of contact with the profession for members of the public and provide advice, case preparation and representation for clients. Barristers "provide specialist advocacy and advisory services in a wide variety of areas and in many different types of forum, including the courtroom"²⁰⁴ and are employed by solicitors to work on clients' cases. Since 1970, solicitors in the Republic of Ireland have had rights of audience before all courts including the Supreme Court, but the usual practice is that barristers are retained to carry out advocacy from the Circuit Court level upwards.

The qualification routes for the two arms of the profession differ. To become a solicitor an applicant must either be a graduate or pass a preliminary examination. All applicants must then pass the 'Final Examination First Part' in eight legal subjects, following which they should seek a training contract with a firm of solicitors. Once a training contract is secured, the individual can commence the Professional Practice Course and over the next 32 months will complete the Professional Practice Courses I and II at the Law School and undergo practical training in the firm, in alternating blocks of time. Once this period has come to an end and the exams have been successfully taken, the applicant is qualified as a solicitor and can commence work, although the Law Society encourages solicitors to be employed for at least a year in someone else's

202 Lög um lögmenn, 1998.

203 Retsplejeloven, 2017, § 143.

204 Bar of Ireland website.

firm before setting up in private practice on their own.²⁰⁵

Becoming a barrister involves three stages: academic, vocational and practical. An applicant must obtain a Law Degree or, if they have a bachelor's degree in another subject,²⁰⁶ take a two year Diploma in Legal Studies. The next step is to pass an entrance examination in five legal subjects to gain admission to the King's Inns and then take a one year²⁰⁷ course leading to the degree of Barrister-at-Law. Once this course is passed, an applicant will be 'called to the Bar' and must then undertake a 12-month training period of 'pupilage' (commonly called 'devilling') with a suitably qualified barrister before being entitled to practise on his or her own.²⁰⁸

The legal profession in Northern Ireland is also split into solicitors and barristers operating the same division of labour as in the Republic of Ireland. To qualify as a solicitor it is necessary first to take a qualifying undergraduate law degree. After graduation there is a further two year training period spent partly undertaking academic studies at the Institute of Professional Legal Studies and partly working with a "master", who must be a solicitor. After qualification, solicitors cannot work alone for the first 3 years. There are about 2700 solicitors in practice, mostly in small private practices.²⁰⁹ Solicitors' rights of audience are more restricted than in the Republic of Ireland, Scotland and England & Wales; whilst the Justice Act (Northern Ireland) 2011 made it possible for solicitors to be given powers to appear in higher courts regulations effecting the change have not yet been made. To become a barrister, a similar route is followed but the master must be a barrister and, in addition to the certificate at the Institute, additional advocacy training is arranged by the Bar (the barristers' professional body). There are currently about 700 barristers in Northern Ireland.

With a background of historical misgivings about the independence of official bodies, the legal profession in Northern Ireland has a particularly important role and is determined to retain its independence both in reality and in public perception. The Law Society commented, in its response to a consultation on the regulatory structures for the profession:

the independence of the legal profession has a particular significance and resonance in Northern Ireland. Despite the ending of the "Troubles" and the welcome process of normalisation, there are circumstances of legal practice in Northern Ireland which are unique. These, combined with a continued context in which manifest sensitivities exist about the accountability and independence of state bodies and Government influence over the administration of justice [...] are all factors which should be taken into account.²¹⁰

205 Law Society website.

206 Non-graduates over the age of 25 can also qualify by taking the Diploma course.

207 Alternatively the course can be taken part-time over two years.

208 Bar of Ireland website.

209 50% of firms have only one partner and 90% have 3 or fewer.

210 Law Society of Northern Ireland 2005.

As in the rest of the UK, the legal profession in Scotland is divided into solicitors and advocates (the equivalent of barristers in the other UK jurisdictions). A member of the public seeking legal help must first approach a solicitor, who will advise and carry out most of the preparatory work for court. A solicitor can represent a client in Justice of the Peace Courts and Sheriff Courts without further qualification. It is also possible for a solicitor with at least 5 years' relevant post-qualification experience to complete additional training and sit an exam to qualify as a solicitor advocate. This qualification enables a solicitor to appear before any level of court in Scotland, and the UK Supreme Court. The advocates' side of the profession specialises in court representation at all levels and is often also instructed to provide a discrete piece of specialist legal advice in a case.

Qualification as either a solicitor or advocate generally involves completion of an undergraduate degree in Scots law followed by the Diploma in Legal Practice. All prospective lawyers must then find a training contract at a solicitors' office; in the case of those intending to qualify as a solicitor this training will be for 2 years and completes the training process. For advocates, the period of time in a solicitors' office will be 21 months²¹¹ and is followed by a further period of training with a qualified advocate. This is known as 'devilling' and lasts for 9 months, after which the individual can apply to be admitted as an advocate.

The legal profession in England & Wales consists, likewise, of solicitors and barristers. A client first consults a solicitor, who will advise and carry out paperwork, fact-finding and negotiations on their behalf. If the matter progresses to court, the question of who will conduct the advocacy arises. All solicitors have rights of audience *inter alia* in Tribunals, Magistrates Courts, County Courts and the Family Court. A solicitor may make an application to the Solicitors Regulatory Authority (SRA) for civil higher rights of audience and if they pass the competency assessment may be authorised to appear in civil proceedings in the Crown Court, High Court, Court of Appeal and Supreme Court.²¹² Solicitors undertaking criminal advocacy must also comply with the SRA Quality Assurance Scheme for Advocates (Crime) Regulations 2013.²¹³ If the case is to be heard in a court in which the conducting solicitor does not have rights of audience, or if the solicitor or client prefers, the solicitor may appoint a barrister to represent the client at court. Barristers are also frequently asked to provide advice on specific points and to draft documentation. Only in rare situations may a member of the public employ a barrister directly. Judges are generally appointed from the ranks of barristers; a number of solicitors

211 If the individual obtained a first or second class degree this period is reduced to 12 months. Faculty of Advocates Regulations as to Intrans.

212 Solicitors Regulatory Authority Higher Rights of Audience Regulations 2011, Solicitors' Handbook.

213 Quality Assurance Scheme for Advocates (Crime) Regulations 2013, Solicitors' Handbook.

are also employed in the role but this proportion is small and seems not to be growing.²¹⁴

Students wishing to practice law may either take an undergraduate law degree or another bachelors' degree followed by a one-year Graduate Diploma in Law. At this point the two arms of the profession divide. Aspiring solicitors undertake a one-year Legal Practice Course followed by a two-year training contract with a firm of solicitors. Upon qualification at the end of this training, a newly qualified solicitor cannot set up in practice on their own until they have worked under supervision for at least 3 years.²¹⁵ Future barristers undertake the Bar Professional Training Course for one year and then spend one year as a pupil in barristers' chambers receiving practical training.

As with the comparison of court systems, there are three different groups of legal professional organisation in the jurisdictions under consideration. In the UK and Republic of Ireland, the legal profession is divided into solicitors and barrister ('advocates' in Scotland); each branch has specific responsibilities and specialities, but neither can be said to be senior to the other.

Norway, Denmark and Iceland have unified legal professions which are controlled and limited to those who have obtained a certain level of qualification and experience. In Norway and Iceland a law degree enables a person to provide advice and assistance outside court but further experience and a licence is required to represent clients at court. In Denmark post-graduate legal experience is required to qualify for any legal work, including County Court advocacy, although in small claims cases any person can act as a representative. In Norway, Bar Association membership is voluntary and does not confer any additional areas of permitted work, but is a disciplinary and quality indicator. Conversely, in Iceland and Denmark, Bar Association membership is compulsory for all practising lawyers. Despite their differences, these three jurisdictions can be grouped together as they all require a certain level of qualification before legal services can be provided to the public and operate a system of increasing qualification permitting increased levels of work.

In Sweden and Finland, legal practitioners can be from the unregulated branch of 'jurists' or the professional, regulated 'advokats'. There is variation within this group as in Sweden either type of practitioner can represent clients before any court; in Finland, only an advokat, licensed legal counsel or Public Legal Aid Attorney can represent clients in court. There is a clear relationship of seniority, with the title of advokat superior to that of jurist.

2.3.4 Distribution of legal aid work

The limits on which lawyer can be engaged by a client seeking legally aided assistance vary across the jurisdictions. Under international law, there is no

214 Fouzder 2016.

215 Solicitors Regulatory Authority Practice Framework Rules 2011, Rule 12, Solicitors' Handbook.

right to choose one's own legal aid counsel, but the wishes of the individual must be taken into account.²¹⁶

In Sweden, it is in theory possible for the person representing a client under civil legal aid to be legally unqualified; the legislation states that a legal aid representative must be "a senior lawyer [advokat], lawyer in a firm [biträdande jurist på advokatbyrå] or another suitable person".²¹⁷ If the client proposes a suitable person, they must be appointed unless there are special reasons for not doing so.²¹⁸ This is in keeping with the unregulated nature of the practice of law in Sweden. Under legal aid, the client can only change lawyer for special reason, and only once unless there are exceptional reasons.²¹⁹ Public Attorneys, as will be seen in Chapter 3, are provided for defendants in many criminal proceedings, but they are also allocated in other cases where the state is taking proceedings against an individual such as child care proceedings, compulsory treatment of addicts and incarceration under mental health legislation.²²⁰

Norwegian legal aid is provided almost entirely through privately practising lawyers, although there are a few state legal aid offices.²²¹ A client has free choice of lawyer in civil cases, although dependent of course on the willingness of the lawyer to take the case. In criminal cases, defence counsel are appointed by the court using a register system which will be described in Chapter 3. In Iceland, any qualified advocate can act under legal aid funding or as a public defence attorney.

Any practising solicitor or barrister is entitled to represent a client under legal aid in Northern Ireland.²²² The criminal and civil legal aid schemes both work through payments to private lawyers who, having been instructed by a client, apply for the legal fees to be covered by the state. There are no government-employed lawyer schemes representing individuals, which may be a result of the fierce independence of the legal profession which has historical roots in the Troubles.²²³ Once a client has obtained legal aid to be represented by their chosen lawyer, however, they cannot change solicitor and take their legal aid with them without the prior authority of the Director of the Legal Services Agency.²²⁴ Whilst there is legislation allowing civil legal aid to be limited to providers who have a contract with the Legal Services Agency,²²⁵

216 ECHR Article 6; ICCPR Article 14. Caselaw includes *Croissant v. Germany*, 1992, para. 29; *Chaplin v. Jamaica*, 1995, para. 8.3; *Klaus Werneck v. Australia*, 1997, para. 9.4.

217 Rättshjälpslag, 1996, 26 §.

218 *Ibidem*.

219 *Ibidem*.

220 A list of some of the governing legislation could be found at Kanslihandbok allmän förvaltningsdomstol, para. 4.4.1., part of the Domstolsverkets handböcker, now no longer publicly available.

221 A pilot project took place between 2010 and 2012 in which lawyers were employed by the state to provide one hour of non-means-tested legal advice on any subject within community centres in 40 counties. Although this project was positively evaluated, it has not been rolled out further.

222 Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, para. 15.

223 Law Society of Northern Ireland 2005.

224 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 9.

225 Access to Justice (Northern Ireland) Order 2003 s.14.

such a system has not been introduced and there are no current plans to do so.²²⁶ The Department of Justice has concluded that contracting would not provide better value for money although the National Audit Office does not accept that this conclusion is properly supported by evidence.²²⁷

Sweden, Norway (in civil cases) and Northern Ireland thus have very few provisions limiting the use of legal aid by any lawyer, and Iceland joins this group, having no restrictions on the distribution of legal aid cases to lawyers. However, several jurisdictions do have systems requiring that lawyers must be on some form of register (sometimes involving an element of qualifying or contracting) before they are able to carry out work under legal aid. In Denmark such a system exists; the Minister of Justice appoints “a suitable number of lawyers” to each court to undertake legal aid work.²²⁸ The list is prepared and updated by the court,²²⁹ and the lawyers on the list are obliged to provide legal aid advice in order to be permitted to carry out legal aid litigation.²³⁰ Lawyers who are not on the list for legal aid litigation may also undertake legally aided advice work, but only upon application to the Minister.

In England & Wales, almost all the services provided with legal aid funding are organised by the Legal Aid Agency contracting with providers, who are most often private firms of solicitors, although contracts for civil work are also made with NGOs. A client does not have a free choice of lawyer but is obliged to find a contracted supplier with capacity to take the case. However, contracts are subject-specific and some subject areas are under-supplied to the extent that ‘advice deserts’, i.e. geographical areas without a contracted supplier in a subject, are a real problem, particularly in relation to housing law.²³¹ A civil legal aid contract provides that the supplier may give advice to a certain number of clients per year in a particular subject and indicates whether the supplier can also undertake legally aided representation in that subject. The definitions determining which matters will fall within a contract are complex and frequently change.

The situation in Scotland is looser, requiring only registration rather than full contracting. If a private solicitors’ firm wishes to carry out criminal work, the firm and the individual solicitor must be registered²³² and comply with a Code of Practice.²³³

226 Stutt 2015, para. 5.39.

227 Northern Ireland Audit Office 2016, para. 3.23.

228 Retsplejeloven, 2017, § 333.

229 Bekendtgørelse om offentlig retshjælp ved advokater, 2017, § 1.

230 Retsplejeloven, 2017, § 333(5).

231 <http://www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/>.

232 Scottish Legal Aid Board *Criminal Legal Assistance Handbook*, Part II para. 1.1.

233 Scottish Legal Aid Board *Code of Practice in relation to Criminal Legal Assistance*.

To carry out civil²³⁴ or family²³⁵ legal aid work, only the firm needs to register with the Scottish Legal Aid Board. This process is administered by the Board in cooperation with the Law Society of Scotland, which has issued Ten Administrative Requirements for Civil Registration²³⁶ which must be met and is also tasked with issuing a ‘compliance certificate’ of quality assurance which is a prerequisite for registration. The statutory framework is in place for regulations to introduce contracting for any criminal legal aid²³⁷ or children’s legal aid²³⁸ services at any level, but this has not yet been done, with the exception of the police station duty scheme and court and children’s cases duty schemes.

Most legal assistance under legal aid is provided through solicitors in private practice, but grant funding is also provided by the Scottish Legal Aid Board to law centres for the conduct of civil cases.²³⁹ In addition, a small proportion of cases are taken on by solicitors directly employed by the Board in the Public Defence Solicitors’ Office (PDSO) for criminal cases and in the Civil Legal Assistance Offices (CLAO) for civil cases.²⁴⁰ The PDSO and CLAO make applications for legal aid for their clients in the same way as private practitioners, and the applications are all treated alike. These employed solicitor organisations also have the same reporting requirements (for example, the duty to report every 6 months on progress of an ongoing legally-aided case), but do not submit a bill for payment at the end of the case; the funding is paid as a lump sum to the organisation instead. The CLAOs in particular improve access to legal advice and support in areas of law and geographical locations which are poorly served by private legal aid practitioners, thus reducing the problem of ‘advice deserts’ experienced in England & Wales. There is a proposal that Scottish third-sector organisations whose clients have complex legal issues should also be permitted to provide legal aid services.²⁴¹

The use of state-employed lawyers in state legal aid offices forms, conversely, a mainstay of provision in the Republic of Ireland and in Finland, as will be seen in Chapter 4. The provision of legal assistance under legal aid in Finland is through private practitioners or state-run Legal Aid Offices; in 2013, 64% of legal aid matters were conducted by Legal Aid Offices.²⁴² 23 Legal Aid Offices around the country are organised within six regions, each led by a Director of

234 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part I para. 2.1.

235 Scottish Legal Aid Board *Handbook: Children’s Proceedings under the Children’s Hearings (Scotland) Act 2011*, Part I, para. 1.1.

236 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part I, Chapter 2, and SLAB Practitioner Guide.

237 Legal Aid (Scotland) Act 1986, s.33A.

238 *Ibidem*, s.33B.

239 In the year ending 31 March 2016, £6,255,000 grants were made out of a total civil legal aid budget of £41,230,000. Scottish Legal Aid Board Annual Report and Accounts 2016-17.

240 *Ibidem*. In crime, £2,594,000 out of a total spend of £80,597,000 and in civil £1,769,000 out of £41,230,000 in 2016-17.

241 Evans 2018, p. 64.

242 Statistics Finland.

Legal Aid and Public Guardianship District.²⁴³ The Offices employ altogether about 220 public legal aid attorneys who carry out all types of legal aid work: advice and representation in civil and criminal matters. Whilst the starting point is that legal aid work is reserved to the Legal Aid Offices,²⁴⁴ private practitioners can act in cases which will go before a court²⁴⁵ or where the Legal Aid Office cannot act because of lack of capacity, conflict of interests, breakdown of trust or inability to provide the service in the appropriate national language.²⁴⁶ In a non-court case where a Legal Aid Office cannot act, if another Legal Aid Office within a reasonable distance can take the case it must be referred there; otherwise a private lawyer can be appointed.²⁴⁷ If an applicant requests a private attorney in a non-court case the Legal Aid Office dealing with the application must carefully consider whether the grounds for appointing a private attorney are present.²⁴⁸ The individual may choose the person to be appointed as their lawyer under legal aid, if the requirements for using a private lawyer are met, and is entitled to have that choice respected unless there are special reasons.²⁴⁹

As divorce and ancillary relief are not dealt with by the courts, these aspects of family law can only be dealt with by Legal Aid Offices despite the fact that many clients would have money to pay privately with the winnings, and to pay the client contribution. The fact that these and other cases not going to court must be considered first by a Legal Aid Office and will only be referred out if the Legal Aid Office does not have capacity is seen by the Bar Association as unfair competition. The generous financial eligibility rules and possibility of legal aid with a 100% contribution add to these concerns as it is felt that many clients who could appropriately be dealt with by private practitioners, and in fact who pay for their assistance albeit at legal aid rates, are reserved to the Legal Aid Offices.

Criminal cases in the Republic of Ireland are dealt with by private practitioners, but they must be on a panel administered by the Department of Justice and Equality, described in Chapter 3. The defendant may request a particular solicitor, in which case that person will be appointed as long as they are on the panel, unless there is good and sufficient reason to refuse to assign that solicitor.²⁵⁰ In respect of civil cases, the Civil Legal Aid Act²⁵¹ authorises the Board to “make legal aid and advice available through [...] law centres [...] or through solicitors or barristers”.²⁵² In deciding on the locations in

243 Department of Justice website.

244 Rättshjälpslag, 2002, 8 §, para. 1.

245 *Ibidem*.

246 Lag om statens rättshjälps- och intressebevakningsdistrikt, 2016, 12 §.

247 *Ibidem*.

248 HFD:2016:27.

249 Rättshjälpslag, 2002, 8 §, para. 3.

250 *State (Freeman) v Connellan*, 1986.

251 Civil Legal Aid Act 1995.

252 *Ibidem*, s. 30.

which to establish law centres, the Board must have regard, *inter alia*, to the need for reasonable access nationwide, ready access in areas where the need is greatest and the maximisation of resources.²⁵³ The majority of provision is made through the 33 full-time Law Centres around the country²⁵⁴ from which solicitors provide legal advice and representation to the public.

However, the Legal Aid Board may also, according to statute, contract with outside suppliers for services²⁵⁵ and specifically make legal aid and advice available through solicitors who have registered on a panel.²⁵⁶ This option is exercised by the Board to provide additional services through private solicitors where needed. As over 80% of civil legal aid applications are in the area of family law,²⁵⁷ it is maybe inevitable that input from private practitioners is mainly within this subject. Panels are set up and discontinued as needed; as of 2018 there is a District Court family law Panel, Circuit Court Panels for separation and divorce and for child protection work and a Panel for international protection (asylum-seeking, subsidiary protection and leave to remain). A new panel in place since 2016 also provides legally aided help in mortgage arrears cases through private solicitors. In 2011 it was reported that “in Dublin, in general, all District Court family law matters are referred to the Private Practitioners Scheme”²⁵⁸

The availability of a relevant private solicitor panel does not alter the entry route into civil legal aid, however. In all cases a potential applicant must contact a Law Centre and have an appointment with a Law Centre solicitor to discuss their case and receive advice. If a certificate is granted, the case can be conducted by a Law Centre solicitor or the certificate can be given to the client together with the list of solicitors on the appropriate panel. In the latter case the client themselves approaches private firms for assistance, which is then paid for by the Legal Aid Board. Whilst enabling high levels of control over expenditure on civil legal aid, the delivery of assistance very largely through the law centres has disadvantages. In addition to the considerable problems of delay in accessing services referred to in Chapter 7 below, the system also engenders problems of conflicts of interest, particularly outside Dublin. If a client attends a law centre for assistance but it transpires that the other party to the dispute has already attended that law centre, the professional rule preventing solicitors from acting for parties with conflicting interests will mean that the second person will have to seek advice from a different law centre, which may be a considerable distance away. The Civil Legal Aid Act states that a law centre may provide assistance to more than one party to a dispute²⁵⁹ but the professional rule remains in place and renders the statutory permission futile. It should be

253 Civil Legal Aid Regulations 1996, Regulation 22.

254 The Board also has 20 mediation centres as at April 2018.

255 Civil Legal Aid Act 1995, ss. 11(7) and (8).

256 *Ibidem*, s. 30.

257 In 2017. Legal Aid Board Circular on Legal Services, 2017, Part 7, p. 7-1.

258 Value for Money and Policy Review of the Legal Aid Board, 2011, para. 2.10.

259 Civil Legal Aid Act 1995, s. 30(6).

noted that the provision of civil legal aid in the Republic of Ireland does not provide any real choice of lawyer to the client.

The distribution of legal aid work amongst lawyers differs radically in the jurisdictions being compared. In Finland and the Republic of Ireland, a considerable amount of legal aid work is reserved to state-employed lawyers in specialist legal aid agencies. In England & Wales, the lawyers who carry out legal aid work are private practitioners but must have a contract with the Legal Aid Agency; in Scotland and Denmark only registration is required. A registration scheme is also in place for public defence work in Norway but in civil cases Norway joins Iceland and Northern Ireland in having no restriction on the choice of lawyer for a case. In Sweden in theory even an unqualified person could receive legal aid to advise, assist or represent a client.

2.4 Conclusions

It has been seen that all the jurisdictions which are under examination in this thesis are under international obligations to provide legal aid in criminal cases, and in at least some civil cases. The details of these obligations will be further explored in the following chapters. Several of the jurisdictions also have constitutional provisions relevant to legal aid, in the form of fair trial rights, although none expressly mandate such provision. The generic duty to provide legal aid must be realised in the varied settings of the different judicial systems and legal professions.

In this regard, the summaries show considerable similarities between the three jurisdictions of the UK. They share very similar legal professions and their court systems possess similar characteristics, in particular the separation of criminal and civil cases at first instance. However, the restrictions on distribution of legal aid work to lawyers are not equivalent, as England & Wales has a strict contracting system for controlling lawyer eligibility for such work.

The Republic of Ireland shares the structure of its legal profession with the UK jurisdictions but its court system has more in common with Norway, Denmark and Iceland as there is no division of courts by category of case. The Republic of Ireland's court system is however more complex than the other three jurisdictions. The Norwegian, Danish and Icelandic judicial structures are unitary and they all have unified, regulated legal professions. In respect of selection of lawyers for legal aid work, the Republic of Ireland in civil cases is very similar to Finland in having state-employed legal aid lawyers carrying out most of the work. This is in contrast to Norway and Iceland which allow free choice of any lawyer and Denmark which uses a registration system for private lawyers willing to take on legal aid work.

Sweden and Finland are very similar to each other, in comparison with the other jurisdictions, with a judicial structure strictly divided between general and administrative courts at all levels. These two jurisdictions both have legal

professions consisting of regulated advocates and unregulated 'jurists' who can provide any (in Sweden) or many (in Finland) legal services to the public. However, the distribution of legal aid work to lawyers is not at all similar in the two jurisdictions; Sweden has almost unrestricted access to legal aid work, potentially including non-lawyers, whilst Finland, like the Republic of Ireland, retains most such work at public Legal Aid Offices.

The subsequent chapters will compare the legal aid schemes in these nine jurisdictions of North-West Europe in detail; the background explored in this chapter gives useful context to the following examination. The relationship between this background and the findings on legal aid will be considered in the conclusions in Chapter 9.

3. Chapter 3: State-funded assistance for criminal suspects and defendants

3.1 Introduction

In some respects, availability of assistance in criminal cases is the core of access to justice. Criminal conviction always has at least some negative effect, by intent, and the consequences can be extremely serious. Imprisonment is, in the absence of the death penalty in North West Europe, the ultimate exercise of state authority over the life of a person, and lesser penalties than imprisonment also have a serious impact: fines are intended to cause financial discomfort and may cause serious monetary difficulties; community penalties remove freedom of movement for certain periods of time; some convictions can render a person unable to carry out particular jobs and thus may cause loss of livelihood, and any conviction can cause social stigma. The right to a fair criminal trial can rightly be described as a “key element of human rights protection and [...] a procedural means to safeguard the rule of law”.²⁶⁰

It is well-established, furthermore, that international human rights bodies consider legal aid to be “an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law.”²⁶¹ Indeed, in international treaties touching on legal aid, the primary focus is on fair trial in criminal prosecutions in an attempt to avert the worst abuses of state power over individuals. The international obligations touching on fair trial which are applicable to the jurisdictions with which we are concerned arise from three main sources: the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union (although this latter does not, of course, apply to Norway or Iceland). These will all be considered below, together with the interpretation of the provisions by the treaty bodies.

Fair trial in criminal proceedings can be difficult to achieve without legal representation which itself is dependent on being able to afford to pay a lawyer, or on the state paying for assistance. Ashworth finds four points of connection

260 HRC, General Comment No. 32, para. 2.

261 UNODC 2012, A1.

between the right not to be wrongly convicted²⁶² and legal aid: the complexity, technicality and jargon of criminal proceedings; the immense resources of law enforcement agencies; the consequences of conviction for an individual and the principle of equality before the law.²⁶³

The method of providing legal assistance to criminal defendants varies between the jurisdictions being compared in this study. In four of the Nordic jurisdictions (Denmark, Sweden, Iceland and Norway), advice and representation in criminal cases is provided through public defence attorney schemes administered by the courts.²⁶⁴ In the UK jurisdictions and the Republic of Ireland, criminal matters fall within the legal aid scheme and in Scotland and England & Wales are administered alongside civil legal aid. In Northern Ireland and the Republic of Ireland criminal legal aid is administered by the courts whilst civil legal aid is respectively within the remit of the Legal Services Agency and Legal Aid Board. Finland operates a dual system whereby legal assistance in criminal matters can be obtained either through legal aid or via the appointment of a public defence attorney.

Despite these differences, the coverage of state-funded assistance in criminal cases is similar in all of the jurisdictions under consideration. In contrast to the position in civil cases where most of the jurisdictions under consideration implement some form of ‘prospects of success’ test, no tests are applied asking whether the accused person is thought likely to be convicted (although Scotland does consider whether a defence is frivolous, in the determination of whether criminal legal aid should be granted). In criminal matters, rather than cases being excluded because they are not sufficiently likely to succeed, they may be excluded because the offence is too minor, either judged on the basis of the possible sentence upon conviction or on a more general test of whether the ‘interests of justice’ require that the accused have representation. The latter test encompasses severity of offence but allows a broader range of factors to be taken into account, including in some jurisdictions whether the interests of someone other than the accused mean that the accused must be represented, in the interests of justice. As will be seen in later chapters, several jurisdictions significantly restrict the availability of civil legal aid by limiting the types of case for which assistance is available. Scope restrictions are by comparison rare in state financing of criminal defence, but there are often exclusions for minor offences, and in particular road traffic offences.

This chapter will commence with a brief examination of the international requirements concerning state-funded legal assistance in criminal cases, before considering the organisation of such provision in the UK, the Republic of Ireland and the Nordic countries, with particular attention being given to the unusual position in Finland. The non-financial restrictions on eligibility and

262 Ashworth 1996, pp. 55-56.

263 *Ibidem*, pp. 56-57.

264 Rättegångsbalken, 1942, Chapter 21 (Sweden); Straffeprocessloven, 1981, § 102 (Norway); Retsplejeloven, 2017, Chapter 66 (Denmark).

the coverage for appeals against conviction or sentence will then be discussed, before conclusions are drawn.

3.2 International obligations

3.2.1 Assistance in criminal proceedings

The main international human rights treaties applying to the jurisdictions which are the subject of this study include the right to a fair trial in criminal proceedings, with a specific reference to the provision of free legal assistance. The main relevant provisions are as follows:

International Covenant on Civil and Political Rights, (ICCPR) Article 14 (3):	In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
European Convention on Human Rights (ECHR) Article 6 (3):	Everyone charged with a criminal offence has the following minimum rights: [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
Charter of Fundamental Rights of the European Union, Article 47:	Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. ²⁶⁵

The majority of decided cases are judgments of the European Court of Human Rights or the former European Commission on Human Rights. However, there are some relevant cases decided by the Human Rights Committee of the UN and these will be referenced where relevant. There are two relevant EU Directives: Directive 2013/48 on the right of access to a lawyer in criminal proceedings and Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. Neither of these Directives apply to the UK, the Republic of Ireland or Denmark²⁶⁶ and thus, within this study only apply to Finland and Sweden and are consequently of limited value here. Nonetheless, where relevant

²⁶⁵ This provision does not specify that only criminal cases are covered and it is thus also applicable in civil cases, as will be seen in Chapter 4.

²⁶⁶ Directive 2013/48/EU para. 58 and 59; Directive 2016/1919, para. 32 and 33.

they will be mentioned.

3.2.2 The definition of a criminal charge

The above provisions of the International Covenant on Civil and Political Rights and European Convention on Human Rights apply only to those subject to a “criminal charge”²⁶⁷ or “charged with a criminal offence”.²⁶⁸ Whilst in most cases it is clear that a criminal charge is being brought, because national law classifies the proceedings as criminal, there have been situations in which this delineation required deliberation by the European Court of Human Rights. For example, in *Campbell & Fell v. UK*²⁶⁹ the Court considered the situation of a hearing before the Board of Visitors of a prison, which domestic law did not characterise as criminal proceedings. The Board of Visitors dealt with disciplinary offences by prisoners and had power to forfeit remission of a sentence, with the effect that a prisoner could be deprived of his liberty for longer than would otherwise be the case. The Court found that “both the ‘especially grave’ character of the offences with which Mr. Campbell was charged [...] and the nature and severity of the penalty that he risked incurring and did in fact incur”²⁷⁰ meant that the adjudication was the determination of a criminal charge regardless of its status under national law.

The three indicators of a criminal charge were clarified in *Benham v. UK* as “the classification of the proceedings under national law, the nature of the proceedings and the nature and degree of severity of the penalty”.²⁷¹ In that case, although the proceedings were again clearly civil under national law, the fact that “the proceedings in question were brought by a public authority under statutory powers of enforcement [...] and] had some punitive elements”, together with the fact that “the applicant faced a relatively severe maximum penalty of three months’ imprisonment, and was in fact ordered to be detained for thirty days”,²⁷² led the Court to find that the applicant had been charged with a criminal offence. However, in *Aerts v. Belgium*,²⁷³ incarceration of the applicant in a mental hospital did not involve ‘determination of a criminal charge’ despite the fact that deprivation of liberty was at stake. It seems that the non-punitive nature of the proceedings was decisive.

The EU Directive also addresses the situation where sanctions are applied through non-criminal proceedings, but limits its consideration to minor matters:

267 ICCPR Art. 14(3).

268 ECHR Art. 6(3).

269 *Campbell & Fell v. UK*, 1984.

270 *Ibidem*, para. 73.

271 *Benham v. UK*, 1996, para. 56.

272 *Ibidem*, para. 36.

273 *Aerts v. Belgium*, 1998.

In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive.²⁷⁴

It is clear on the face of both the ECHR and the ICCPR that the state must, where the interests of justice so require, pay for legal assistance for an indigent defendant in criminal proceedings. This applies even if the defendant himself is not present at the trial.²⁷⁵

3.2.3 Sufficient means to pay

The treaties provide that legal assistance must be given free of charge if the defendant does not have ‘sufficient means to pay’. The meaning of this phrase has been the subject of very few decisions by the treaty bodies. A case before the European Court of Human Rights has however dealt with some procedural details. According to the decision in *Croissant v. Germany*,²⁷⁶ assessment of means after the trial is compatible with Article 6 as long as it does not adversely affect the fairness of the proceedings.²⁷⁷ Furthermore, it is also acceptable for the burden of proving inability to pay to rest with the applicant.²⁷⁸ However, in very many cases the state does not contest the issue of ‘sufficient means to pay’,²⁷⁹ thus removing the need for a decision by the Court. As McBride notes, “there is still uncertainty as to the point at which a person’s financial resources make the provision of legal aid necessary”.²⁸⁰

It is likely that, if faced with the need to decide on a specific situation where ability to pay for legal assistance was disputed, the Court would allow a wide margin of appreciation to states to set their own financial rules for legal aid.²⁸¹ This would be in keeping with the very varied economic situations in the countries of the Council of Europe, and the Court’s traditional reluctance to become involved in directly economic matters.²⁸² Chapter 7 below sets out information on financial eligibility for legal aid in the jurisdictions under consideration, and it will be seen later in the current chapter that the public defender schemes are not means-tested.

274 Directive 2013/48/EU, para. 16.

275 *Petrina v. Croatia*, 2014, para. 47.

276 *Croissant v. Germany*, 1988.

277 *Ibidem*, paras. 35 and 36.

278 *Ibidem*, para. 37.

279 See e.g. *Artico v. Italy*, 1980; *Granger v. UK*, 1990; *Quaranta v. Switzerland*, 1991; *Maxwell v. UK*, 1994.

280 McBride 1998, p. 259.

281 Ashworth 1996, p. 62.

282 See e.g. *Bélané Nagy v. Hungary*, 2016.

3.2.4 The interests of justice

On occasion, when a state has been accused of violating Article 6 through lack of provision of a legal aid lawyer to assist a criminal defendant, the state has argued that in the circumstances the interests of justice did not require representation for the accused, relying on the final phrase of Article 6(3). In such cases, the Court has been at pains to examine the arguments in some detail and to analyse the content of the proceedings for themselves in order to decide whether the interests of justice did require legal assistance for the accused.²⁸³ Importantly, proof of actual prejudice to the applicant is not required.²⁸⁴

In *Granger v. UK*,²⁸⁵ the Court emphasised that “whether the interests of justice required a grant of legal aid must be determined in the light of the case as a whole”,²⁸⁶ and in that determination took into account “not only the situation obtaining at the time the decision on the application for legal aid was handed down but also that obtaining at the time the appeal was heard”.²⁸⁷ Thus, the emergence during the appeal hearing of a complex ground of appeal required the possibility that the refusal of legal aid could be reconsidered as it “would have been in the interests of justice for free legal assistance to be given to the applicant at least at that stage for the ensuing proceedings”.²⁸⁸

Where criminal matters are minor states frequently do not extend either the right to be assisted by Counsel, or the right to legal aid, to all cases. Unsurprisingly, the Court has:

accepted that there could be exceptional circumstances dispensing the obligation to hold an oral hearing in cases not belonging to the traditional categories of criminal law such as proceedings concerning traffic offences where the issues at stake were of a rather technical nature, or even relating to a factual matter, and where the accused had been given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. These considerations are not limited to the issue of the lack of an oral hearing but may be extended to other procedural requirements covered by Article 6.²⁸⁹

Such exclusions established by governments have not always been approved by the European Court of Human Rights, however. In a case before the lowest criminal courts in the UK, the possibility of a custodial sentence, in combination with the application of laws which were “not straightforward” led to a requirement of free legal representation in a case concerning non-payment of local tax.²⁹⁰

283 See e.g. *Artico v. Italy*, 1980, para. 34.

284 *Ibidem*, para. 35.

285 *Granger v. UK*, 1990.

286 *Ibidem*, para. 46.

287 *Ibidem*.

288 *Ibidem*, para. 47.

289 *Marčan v. Croatia*, 2014, para. 35.

290 *Benham v. UK*, 1996, paras. 61-64.

Before the Human Rights Committee, the fact that in a particular case “charges were trivial and ordinary and could in practice only lead to a small fine” led to a decision that the claimant had “failed to show that in his particular case the ‘interests of justice’ would have required the assignment of a lawyer at the expense of the State party”.²⁹¹

This is in keeping with the EU Directive which observes that:

In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive.²⁹²

Ashworth points out that “it could be argued that no criminal proceedings are so trivial that they matter little to defendants” and also suggests an interesting possible tactic: “the state should be obliged to provide legal aid for the indigent in all proceedings serious enough to involve the criminal law, which might in turn persuade states to ensure that their criminal process was reserved for non-minor wrongs”.²⁹³

For the present, though, the European Court of Human Rights continues to treat the right to a lawyer paid for by the state under Art 6(3) as “[an aspect] of the notion of a fair trial in criminal proceedings”²⁹⁴ and to decide cases by looking at the provision in this context, with seriousness of the offence only one of many factors to be considered. The Court must “determine [...] whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair.”²⁹⁵ The Court will consider Article 6(3)(c) together with the general right to a fair trial under Article 6(1).²⁹⁶ If proceedings will not be fair without representation of the accused, and the accused does not have the means to pay for private legal assistance, such assistance must be provided by the state.

291 *O. F. v. Norway*, paras. 3.4 and 5.6.

292 Directive 2013/48/EU, para. 17.

293 Ashworth 1996, p. 65.

294 *Artico v. Italy*, 1980, para. 32.

295 *Barberà, Messegué & Jabardo v. Spain*, 1988, para. 67.

296 *Granger v. UK*, 1990, para. 43. See also *Dvorski v. Croatia*, 2013, para. 86 and *Omelchenko v. Ukraine*, 2014, para. 45.

3.2.5 Pre-trial assistance

The international human rights treaties reveal an important difference in wording as regards early access to legal assistance. The ICCPR provides:

Article 14(3): In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of his defence **and to communicate with counsel of his own choosing**; [emphasis added]

The ECHR, on the other hand, simply provides that:

Article 6(3): Everyone charged with a criminal offence has the following minimum rights:

[...]

(b) to have adequate time and facilities for the preparation of his defence;

On the face of the treaties there is arguably the right under the ICCPR but not under the ECHR to legal assistance prior to trial. Even under the ICCPR this right is not extended so as to provide a right to free legal advice at this stage if unable to afford to pay for a lawyer. However, both the UN Human Rights Committee and the European Court of Human Rights have used the interests of justice requirement to extend the reach of this right beyond that which is explicit in the treaties.

The Human Rights Committee has been concerned, particularly in capital cases, that “legal assistance must be made available to an accused faced with a capital crime not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case”.²⁹⁷ Furthermore, “it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings”.²⁹⁸ These statements, made in cases where a lawyer had been assigned and paid for by the state, suggest that a legal aid scheme must, at least in serious criminal cases, allow for early provision of legal assistance and sufficient time for the preparation of the case. This includes time for the lawyer to review the statements of prosecution witnesses with his client, and sufficient time for the lawyer to ensure the adequate preparation of the defence.²⁹⁹ What counts as ‘adequate time’ depends on the circumstances of the case.³⁰⁰ The issue of the amount of lawyer time included in legal aid provision is considered further in Chapter 7 below.

297 *Clarence Marshall v. Jamaica*, 1998, para. 6.2.

298 *Little v. Jamaica*, 1991, para. 8.3.

299 *Ibidem*, para. 8.4.

300 HRC General Comment No. 32, para. 32.

The European Court of Human Rights has shown a different emphasis: less time is taken up with capital offences due to their relative rarity in the countries of the Council of Europe. Instead, in criminal cases in general the emphasis has been on early access to legal help as a necessary prerequisite to a fair trial. The Grand Chamber has stated that:

National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.³⁰¹

Extending this even further, it has been held that:

an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned. Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.³⁰²

Early access to a lawyer is seen as a “procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting the particular vulnerability of an accused at the early stages of the proceedings, when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved”.³⁰³ This is particularly important when the accused is a child.³⁰⁴ A ‘holistic’ approach has been suggested by Judge Power-Forde in his dissenting judgment in *Dzhulay v. Ukraine*.³⁰⁵ He remarks that “[from] the moment of arrest until the handing down of sentence, criminal proceedings form an organic and interconnected whole and an event that occurs at one stage may influence and, at times, determine what transpires at another”. He thus urges a presumption that a trial is unfair unless access to a lawyer has been given from the initial police interrogation. Particularly where disputed confession statements have been taken in the absence of lawyers, the Court has found that lack of access to legal advice in the early stages prejudices the whole proceedings even where there is

301 *Salduz v. Turkey*, 2008, para. 52. See also *Blokhin v. Russia*, 2013, para. 158; *Blaj v. Romania*, 2014, para. 88.

302 *Dayanan v. Turkey*, 2009, para. 32.

303 *Yuriy Volkov v. Ukraine*, 2013, para. 62.

304 *Blokhin v. Russia*, 2013, para. 160.

305 *Dzhulay v. Ukraine*, 2014.

the opportunity to later challenge the statements in court.³⁰⁶

EU Directive 2013/48 imposes a requirement on Finland and Sweden that a suspect must have access to a lawyer from the earliest of the following events: police questioning; evidence collection by the authorities; deprivation of liberty or summons to appear before the court.³⁰⁷ This is built upon in EU Directive 2016/1919 which states that legal aid should be available where a suspect is deprived of liberty, required to be assisted by a lawyer in accordance with EU or national law, or is required or permitted to attend an aspect of the investigation of the criminal offence.³⁰⁸ Furthermore, legal aid should be available in criminal proceedings either when a suspect is in detention or is brought before a judge to decide on detention without a means test.³⁰⁹

3.2.6 A lawyer of one's choice

In criminal cases, both the ICCPR and the ECHR provide the right of a defendant to be represented by a lawyer “of his own choosing”. This clearly causes difficulties when legal counsel is to be paid for by the state, as funds are limited and many jurisdictions have legal aid schemes which provide relatively low rates of pay, thus impeding access to lawyers unprepared to work for those low fees. The problem was explored in *Croissant v. Germany*:

It is true that Article 6 para. 3 (c) entitles ‘everyone charged with a criminal offence’ to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant’s wishes [...]. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.³¹⁰

The Human Rights Committee is clear that “article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge”,³¹¹ although it has not explained how this finding is supported by the wording of the Article.

The jurisdictions of this study provide some element of choice of counsel within their publicly funded criminal assistance schemes, but this choice is limited. A common restriction is that counsel must be selected from a register

306 See e.g. *Pakshayev v. Russia*, 2014, para. 31; *Aleksandr Vladimirovich Smirnov v. Ukraine*, 2014, para. 73; *Zinchenko v. Ukraine*, 2014, para. 88; and *Çarkçı v. Turkey* (No.2), 2014, para. 45.

307 Directive 2013/48/EU, Article 3(2).

308 Directive 2016/1919, Article 2.

309 *Ibidem*, Article 4.

310 *Croissant v. Germany*, 1992, para. 29. Applied inter alia in *Zinchenko v. Ukraine*, 2014, para. 93.

311 *Chaplin v. Jamaica*, 1995, para. 8.3; *Klaus Werenbeck v. Australia*, 1997, para. 9.4.

kept by the authorities. In Norway, for example, the courts must advertise vacancies for public defence attorneys in the newspapers and notify the local Bar Association.³¹² After the published application deadline has passed, the chief justice of the court makes recommendations to the court administration and the recommended lawyers are appointed as permanent public defence attorneys for that court. When a public defence attorney is needed, the selection will be made from the list and, assuming that there is more than one such person appointed at that court, they will normally act in turn.³¹³ There is however some concern that, particularly in Oslo, the permanent defender scheme is anti-competitive and may not be performing its role of ensuring quality because the work is often delegated to other lawyers in the permanent defender's firm.³¹⁴

If the permanent attorneys are so busy that it would cause delay to appoint one of them, another lawyer satisfying the eligibility criteria for a public defence counsel may be chosen by the court.³¹⁵ The government has pointed out in its recent proposal for a new Criminal Procedure Act that the right to a free choice of public defender is an important procedural safeguard for the accused. Nonetheless, efficiency of the criminal courts is an important consideration and difficulties can arise when a particular lawyer is popular and thus very busy; a compromise has to be reached between choice and delay.³¹⁶

Finland has a generous approach to the choice of lawyer; any public legal aid attorney or advocate³¹⁷ can be appointed as a public defender unless they are personally disqualified. Furthermore, if no such person is available or there are other special reasons, a licensed legal counsel (see Chapter 2) can also be appointed.³¹⁸ Legal aid in criminal cases can be provided by a public legal aid attorney at a Legal Aid Office, or by any private lawyer applying for legal aid in the same way as for civil/administrative cases (see Chapter 4 below).

The Swedish arrangement for public defenders is similar; the general rule is that an advocate should be appointed, but in special circumstances a less legally-qualified person can be allocated the defence role. Usually, a person who is experienced in appearing before the court should be appointed.³¹⁹ The National Courts Administration's online Handbook on criminal proceedings clarifies that different courts have different practices concerning the selection and appointment of public defence attorneys. These include sharing the work between the lawyers working in the geographical area of the court by means of lists of lawyers willing to take on the work.³²⁰ Such courts are thus operating

312 FOR-2011-03-04-251.

313 Straffeprosessloven 1981, § 103.

314 NOU 2016: 24, para. 9.4.3.8.

315 *Ibidem*.

316 *Ibidem*, para. 9.4.

317 See Chapter 2 for an explanation of this qualification.

318 Lag om rättegång i brottmål, 1997, Chapter 2, 2 §.

319 Rättegångsbalken, 1942, Chapter 21, 5 §.

320 Domstolsverkets handböcker, brottmål, chapter 3.3.

under a very similar scheme to that in Norway. It is not necessary for the Swedish defendant to be asked for their opinion on the choice of lawyer before allocation, but they are given the opportunity to comment after the allocation, and a change can be permitted by the court in certain circumstances.³²¹

In Iceland, the accused person must be given the opportunity to select the lawyer who is to be appointed and this choice must be respected unless there is reason to believe that there would be a risk to the investigation if that person was appointed.³²² Any suitably qualified lawyer can be appointed as public defender, and all Icelandic attorneys are obliged to take on criminal work even if they specialise in civil or administrative cases, to ensure sufficient availability. The accused can also request a change of public defender and this must be permitted unless it would cause delay.³²³ Denmark adds a further category of persons who can be appointed as official defenders: in addition to advocates with rights of audience and others approved by the Minister of Justice, advocates from other Nordic countries can be given the role if appropriate in the circumstances of the case.³²⁴

The legal aid panel in the Republic of Ireland is maintained for the whole jurisdiction by the Courts Policy Division of the Department of Justice and Equality. Solicitors wishing to carry out legally aided criminal work must apply to be put on the list of panel members and show evidence of the relevant tax certification. Barristers have an additional hurdle of approval by the Bar Council before they can apply to the panel. However, it is not necessary to show expertise in criminal law and in effect the panel acts as a useful list of those willing to take on criminal legal aid cases.

Solicitors wishing to carry out criminal defence work in England & Wales under legal aid must have a contract with the Legal Aid Agency, which will specify the types of work which the provider is authorised to carry out, such as police station advice or Magistrates' Court representation. Bidding rounds for contracts take place periodically, and although the process is not competitive, there are a significant number of criteria which must be met before a contract will be awarded. These criteria cover issues such as quality of legal work, administrative processes and compliance with detailed rules on how work is to be carried out. Contracts generally last for three years.³²⁵

If a private solicitors' firm in Scotland wishes to carry out criminal work, the firm and the individual solicitor must be registered³²⁶ and comply with a Code of Practice.³²⁷ Unlike in England & Wales, there is no explicit contracting system in place but some practitioners feel that the compliance rules have become so detailed that they amount to 'contracting by the back

321 *Ibidem*.

322 Lög um meðferð sakamála, 2008, § 33(3).

323 *Ibidem*, § 34.

324 Retsplejeloven, 2017, § 730(2).

325 Ling and Pugh 2017, Chapter 18.

326 Scottish Legal Aid Board *Criminal Legal Assistance Handbook*, Part II para. 1.1.

327 Scottish Legal Aid Board *Code of Practice in relation to Criminal Legal Assistance*.

door'. Inspections of private firms take place annually to check compliance with quality standards and the Code.

Northern Ireland has considered the introduction of panels of lawyers able to take on criminal legal aid work but the current intention is to keep the existing position of open competition between all suitably qualified solicitors and barristers,³²⁸ thus retaining a system similar to that in Finland, Denmark and Sweden. All the restrictions imposed in the other jurisdictions are likely to be within the latitude allowed by the international treaty bodies.

3.3 Models of provision

3.3.1 Public defender schemes: decision-making and appeals

Public defender schemes are in place in all the Nordic countries, but the details of the selection, appointment and timing of defenders vary.

The relevant provisions in Denmark are included in the Administration of Justice Act,³²⁹ which contains the criminal public defender scheme at Chapter 66. Under § 729a, an accused is entitled to choose his legal counsel³³⁰ who must usually be a qualified advocate or on the list of public defenders appointed by the Minister of Justice.³³¹ The court may refuse to appoint the chosen representative³³² or dismiss the representative³³³ if the appointment will cause a significant delay or there is a demonstrable risk that the advocate might interfere with the resolution of the case. If the defendant has not organised his or her own legal representative, or if that representative has been rejected by the court, the court must appoint a public defender if certain conditions are met.³³⁴ These include that conviction might result in a penalty higher than a fine, in which case (and for victims entitled to a public attorney) an appointment can only be made upon request of the person to be assisted;³³⁵ in other cases the court can act of its own motion. Other factors leading to mandatory appointment of a public defender include: pre-trial detention; trial by jurors or lay assessors; appeal against conviction which is not immediately dismissed; questioning of the defendant behind closed doors or cross-examination of family members. If the conditions for the obligatory appointment of public counsel are not met, the court can be asked to use its discretionary powers to appoint a defender if the nature of the case, the accused or the general circumstances make it desirable and the accused has not arranged his own representation.³³⁶

328 Stutt 2015, Chapter 14.

329 Retsplejeloven, 2017.

330 *Ibidem*, § 729a, 730.

331 *Ibidem*, § 730 (2). The selection criteria are set out at § 733-735.

332 *Ibidem*, § 733(2).

333 *Ibidem*, § 736(2).

334 *Ibidem*, § 731.

335 *Ibidem*, § 731(2).

336 *Ibidem*, § 732.

Decisions on mandatory appointments are not appealable, but those concerning discretionary appointments can be appealed to the higher court in the usual way. Decisions ancillary to the appointment of defence counsel in Denmark, such as refusal to accede to the defendant's choice of counsel, are appealable to the Special Court of Indictment and Revision ('Den Særlige Klageret'), rather than the regular appeal courts.³³⁷ No further appeal is possible from these decisions.³³⁸

The public defender in Denmark will normally be appointed at the point when a suspect is charged (which takes place before interview), upon request of the police to the court.³³⁹

In Sweden, also, it is the role of the court dealing with the criminal prosecution to decide whether a defence lawyer will be provided by the state. The court "shall consider the appointment of a public defence counsel upon request, or when the court otherwise considers reason therefore".³⁴⁰ In practice, the court should be notified by the prosecutor, who themselves should be notified by the police, that an accused person has been arrested. At this point, or at the first later point when the court becomes aware of the prosecution, consideration will be given to the appointment of a Public Defence Attorney. For the avoidance of doubt, the National Courts Administration's online Handbook on criminal proceedings³⁴¹ confirms that a defendant can request such an attorney at any time, verbally or in writing.³⁴² However, if a suspect is already being represented by an attorney she or he has engaged privately, no public defence attorney will be appointed.³⁴³ If the court refuses to appoint a public defence attorney or appoints a person other than the attorney requested by the accused, the decision can be appealed in the same manner as any other decision of the court, to the appeal court.³⁴⁴

Icelandic public defence attorneys are appointed under the Act on Criminal Procedure.³⁴⁵ If a suspect is arrested, the police must appoint a public defender³⁴⁶ and if they refuse to do so the accused may ask the court to appoint a defender.³⁴⁷ In a situation where the accused has not been arrested, the police may, at the request of the individual, appoint a public defence attorney if this is needed in light of the nature of the case or the overall circumstances.³⁴⁸ An appointment by the police lapses when the suspect is released or brought before a judge; at that point the judge must appoint a public defender if there is to be

337 *Ibidem*, § 737(1).

338 *Ibidem*, § 737(2).

339 *Ibidem*.

340 Rättegångsbalken, 1942, Chapter 21, 4 §.

341 Domstolsverkets handböcker, brottmål, Chapter 3.3.

342 *Ibidem*.

343 Rättegångsbalken, 1942, Chapter 21, 3a §.

344 *Ibidem*, Chapter 52, 1 §; Domstolsverkets handböcker, brottmål, chapter 3.3.

345 Lög um meðferð sakamála, 2008, Chapter 4.

346 *Ibidem*, § 30.

347 *Ibidem*, § 31(4).

348 *Ibidem*, § 29(2).

continued custody on remand or investigations, or if the suspect is charged with an offence.³⁴⁹ A public defender must be appointed for the main trial, unless the defendant has employed a private attorney to represent him.³⁵⁰ If the accused refuses a public defender, none will be appointed as long as the police or judge believe that the individual is competent to defend himself.³⁵¹

The public defence counsel system in Norway is governed by Chapter 9 of the Criminal Procedure Act 1981.³⁵² If a person is entitled to defence counsel, they are specifically excluded from the legal aid scheme as part of the principle that legal aid is to be subsidiary.³⁵³ The Act establishes a two-stage process for the appointment of 'official defence counsel', i.e. defence counsel paid for by the state. Section 94 sets out that "the person charged is entitled to the assistance of defence counsel of his own choice at every stage of the case" and shall be so informed.³⁵⁴ This provision establishes the right to instruct counsel once charged and receive assistance throughout the case but it does not mandate such assistance. However, subsequent sections go on to specify the situations in which defence counsel is obligatory. In particular, defence counsel shall be available during pre-trial detention of over 24 hours,³⁵⁵ the main hearing of the case³⁵⁶ and the judicial recording of evidence.³⁵⁷ The entitlement to defence counsel is generally irrespective of the seriousness of the charge; the basic rule is that a defendant will be entitled to defence counsel,³⁵⁸ but there are exceptions for some minor matters in the District Court.³⁵⁹ If the defendant expressly renounces his right to defence counsel then such assistance may be dispensed with, but only if the court finds this unobjectionable.³⁶⁰ In some specified circumstances, such as if the defendant suffers from a mental disability, it is obligatory for defence counsel to be appointed.³⁶¹

However, all these provisions relate to the general right to be represented in the proceedings and do not in themselves establish a right to have such representation paid for by the state. Official defence counsel are appointed by the court under § 100, which provides that the court 'shall' appoint an official defence counsel where the preceding sections 96 to 99 provide that defence counsel is mandatory. There is thus a comprehensive right to have a defence lawyer paid for by the state during the main hearing of most cases, the judicial recording of evidence, whilst arrested or in pre-trial detention of more than 24

349 *Ibidem.*, § 31.

350 *Ibidem.*, § 31(2).

351 *Ibidem.*, § 29.

352 Straffeprosessloven, 1981.

353 Lov om fri rettshjelp, 1980, § 5.

354 Straffeprosessloven, 1981, § 94.

355 *Ibidem.*, § 98.

356 *Ibidem.*, § 96.

357 *Ibidem.*, § 97.

358 *Ibidem.*, § 94.

359 *Ibidem.*, § 96.

360 *Ibidem.*, § 96.

361 *Ibidem.*

hours or during hearing or sentencing of a summary judgment on a confession. In addition, however, an official defence counsel may be appointed where there are 'special reasons' for doing so. This has proved important in the conduct of interviews whilst a suspect is in police custody. There is only an absolute right to defence counsel pre-charge if police detention lasts over 24 hours but in practice suspects are generally permitted to be accompanied by their own lawyer at interview, if they refuse to give a statement unless accompanied.³⁶² If the period in custody subsequently ends before 24 hours have elapsed, the defendant will retrospectively be found not to have had a statutory right to defence counsel and therefore payment by the state will be dependent upon the court accepting that there were special reasons. There is a proposal to slightly relax the rule on representation whilst in police custody by changing the provision to entitle a suspect to an attorney if 'there is reason to believe' that a suspect will be in custody for more than 24 hours (rather than the current rule that it must be clear that he will not be released within 24 hours).³⁶³

Defence counsel are appointed by the court,³⁶⁴ although as regards the period between arrest and first court appearance, defence counsel may also be appointed by the prosecuting authority.³⁶⁵ Such an appointment is only possible if the need arises outside court opening hours or if for some other reason a court cannot deal with the matter sufficiently quickly,³⁶⁶ and the prosecution's failure to appoint counsel, or choice of counsel, can be referred to the court by the defendant.³⁶⁷ If the defendant requests a particular lawyer, that person must be appointed as defence counsel unless significant delay would result or other circumstances make the appointment of that person inappropriate.³⁶⁸ However, in the situation that no particular lawyer is requested, the court will appoint defence counsel from the register held by the court.³⁶⁹ The court can make an appointment to cover the whole case or a particular court appearance.³⁷⁰ Appeals against decisions of the courts can be made to a higher court.³⁷¹

It is important to note that the right to a public defence attorney in Norway applies to those under arrest or in pre-trial detention, and during the main trial and the judicial recording of evidence. Unlike the other schemes being considered here, there is no general availability of state-funded advice during the investigations phase, unless the suspect is in custody. This is a gap which has been recognised as problematic by the Norwegian government and a

362 Straffeprosessloven, 1981, § 230 provides that no suspect or witness can be compelled to make a statement.

363 NOU 2016: 24, para. 9.4.3.4.

364 Straffeprosessloven, 1981, § 102.

365 *Ibidem*.

366 FOR-1985-06-28-1679, § 9A-2.

367 *Ibidem*, § 9A-7.

368 Straffeprosessloven, 1981, § 102.

369 According to the procedure laid down in FOR-2011-03-04-251.

370 Straffeprosessloven, 1981, § 102.

371 See e.g. Supreme Court cases HR-2015-01406-A and HR-2015-01405-A.

proposal has been made to extend the right to assistance to this stage other than in minor cases.³⁷²

In Finland, civil and criminal legal aid are dealt with largely through the same system, under the auspices of the Ministry of Justice, as the provisions of the Legal Aid Act apply equally to criminal, civil and administrative cases. However, in criminal matters the Criminal Procedure Act³⁷³ also provides for the appointment of a public defender if no legal aid lawyer has been instructed. A public defender can be requested by the suspect or, in some cases, appointed by the court without such a request (see below). If the suspect in a criminal investigation is under arrest, they have the right to a public attorney.³⁷⁴ Public defenders are appointed by the court dealing with the criminal proceedings and appeals against such decisions are possible to the Court of Appeal as with all court decisions.

All the Nordic jurisdictions thus 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, as will be seen below, defendants who are subsequently convicted may be required to repay a proportion of the costs incurred. Provision is made for legal assistance at the police station through the public defence attorney schemes, which as seen above is required for compliance with the European Convention of Human Rights.

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.³⁷⁵ However, the Nordic countries all describe their systems as public defender schemes and administer them separately from legal aid, and the schemes share characteristics which are absent from criminal legal aid schemes, as will be seen below. Therefore the suggestion that an essential part of a public defender scheme is the state employment of the lawyers delivering the service is rejected.

3.3.2 Criminal legal aid schemes: decision-making and appeals

The alternative model for state funding of criminal defence is that of legal aid. Unique among the jurisdictions under consideration is Finland, where despite the existence of a public defence attorney scheme, a person charged with a

³⁷² NOU 2016: 24, para. 9.4.3.2.

³⁷³ Lag om rättegång i brottmål, 1997, Chapter 2.

³⁷⁴ *Ibidem*, Chapter 2 § 1.

³⁷⁵ See e.g. Republic of Ireland Criminal Legal Aid Review Committee First Report 1999, p. 9.

criminal offence may instead choose to apply for legal aid for representation.

Under Finnish legal aid legislation, simple criminal matters are excluded³⁷⁶ on the basis that such matters do not require the help of an attorney. However, even in cases excluded from scope, advice and assistance with preparation of documents can be provided by a public legal aid attorney under the usual financial eligibility rules.³⁷⁷ The 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. These lawyers, despite being state employees, are given independence in exercising this power, and no official guidance is given on the interpretation of the law. The discretion must, naturally, be exercised within the legislative framework and the lawyer is individually liable for the decisions. To encourage consistency of decisions across the Legal Aid Offices, a working group of senior Legal Aid Office staff has produced a handbook of agreed interpretation of the legislation, which is published by the Ministry.³⁷⁸ Refusals of legal aid can be submitted to court for ‘reconsideration’³⁷⁹ in a specific process outside the normal appeal process for administrative decisions.³⁸⁰ Legal aid reconsideration decisions made by courts can be appealed in line with the usual routes for appeals of decisions.³⁸¹

In the remaining jurisdictions, i.e. those of the UK and the Republic of Ireland, there is no public defence attorney scheme and criminal legal aid is the only option for those seeking publicly-funded legal assistance when arrested or charged with a criminal offence. 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, whilst the courts are largely unified, the legal aid schemes for civil and criminal matters are very different. A review of criminal legal aid in the Republic of Ireland is currently underway with an expectation that responsibility for criminal legal aid will eventually be moved from the courts to the Legal Aid Board, which currently only administers civil legal aid. The Legal Aid Board already administers and pays for the Garda (Police) Station Legal Advice Scheme which provides telephone and in-person advice to those who have a legal right to be advised at a police station but whose means are insufficient to enable private payment for a solicitor.³⁸²

376 Rättshjälpslag, 2002, 6 §, para. 2(2).

377 *Ibidem*, 6 §, para. 3.

378 Oikeusavun käsikirja 2013.

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

380 See commentary on this process in Chapter 4.

381 Rättshjälpslag, 2002, 26 §.

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

Criminal legal aid in the Republic of Ireland was set on a statutory footing in 1962 with the Criminal Justice (Legal Aid) Act, which came into force in 1965³⁸³ and remains the governing legislation for criminal legal aid, accompanied by Criminal Justice (Legal Aid) Regulations 1965. Under the scheme set up by this legislation, criminal legal aid is administered by the Department of Justice and Equality, which deals with policy and payments under the scheme. However, “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”.³⁸⁴ 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 defendant may request a particular solicitor, in which case that person will be appointed as long as they are on the panel, unless there is good and sufficient reason to refuse to assign that solicitor.³⁸⁵ There is, though, no right to choose a lawyer who is not on the panel. Whilst the wording of the legislation suggests that legal aid will be granted ‘on application’,³⁸⁶ decided cases have established that the court must inform defendants of the right to legal aid, if they are unable to afford representation.³⁸⁷ Failure to do so amounts to a denial of justice and will render any subsequent conviction void.³⁸⁸

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 Court³⁸⁹ 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.

In Scotland, the Scottish Legal Aid Board deals with all applications for legal aid: criminal, civil and children’s legal aid. All three types of legal aid are sub-divided into Advice and Assistance, Assistance by Way of Representation (ABWOR) and a final category which covers representation at court but is, confusingly, simply referred to as ‘civil legal aid’, ‘children’s legal aid’ or ‘criminal legal aid’. Advice and Assistance is rarely used in criminal cases other than in connection with advice at a police station.³⁹⁰ The criminal legal

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

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

385 *State (Freeman) v. Connellan*, 1986.

386 Criminal Justice (Legal Aid) Act 1962, ss.2, 3(2)(a), 4(2)(a), 5(2)(a) and 6(2)(a).

387 See e.g. *Carmody v. Minister for Justice Equality and Law Reform and the Attorney General*, 2010.

388 *McSorley v. Governor of Mountjoy Prison*, 1996, p. 331.

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

390 Law Society of Scotland 2014, p. 6.

aid scheme is established in the Legal Aid (Scotland) Act 1986 and specific procedures and criteria for applications are set out in regulations, particularly the Criminal Legal Aid (Scotland) Regulations 1996, which have been amended several times. Guidance is also provided in the online handbook published by the Scottish Legal Aid Board, which indicates the approach which will be taken in interpreting the statutory provisions.

Criminal legal aid is automatically available to an accused person in certain situations non-means tested and without application.³⁹¹ Automatic criminal legal aid covers, *inter alia*, representation at an identification parade, some sexual offences, trials *in absentia* and cases where on appeal the High Court has granted authority for a new prosecution for the same or a similar offence. Where a defendant is being dealt with under solemn procedure (more serious offences), they are given the benefit of automatic criminal legal aid while they are in custody, but must apply for full legal aid once they are bailed or fully committed; in prosecutions brought under summary procedure (less serious offences), automatic criminal legal aid is only available when the accused is in custody or has been released on an undertaking to appear, and it ends when a plea of not guilty is tendered. Automatic criminal legal aid thus provides non-means tested assistance whilst a person is in custody at a police station, whatever the gravity of the offence. Police station assistance is provided by a rota of qualified participating criminal solicitors, if the arrested person does not request a particular solicitor. The processing of a guilty plea in summary cases can also be covered by automatic legal aid if the other circumstances for such legal aid apply,³⁹² or by ABWOR.³⁹³ Full legal aid can be applied for in summary proceedings if the accused has pleaded not guilty, but will only be granted if the Legal Aid Board considers that it is in the interests of justice that the defendant be granted legal aid (see below).³⁹⁴

The statutory provisions concerning appeals against refusals of criminal legal aid in Scotland are almost identical to those in civil and children's matters; the Board has a statutory duty to establish a procedure allowing someone refused legal aid to apply for a review of his application.³⁹⁵ The procedure so established provides that a review application must be lodged within 10 days of notification of the refusal, unless the Board accepts that there are special reasons for a late submission.³⁹⁶ The review is considered internally by the Board.

The complexity of the funding arrangements leads to some potentially inappropriate results within Scottish criminal legal aid. For example, the financial eligibility test for ABWOR, which is used for representation where the

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

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

393 *Ibidem*, para. 11.1.

394 Legal Aid (Scotland) Act 1986, s. 24(1)(b).

395 *Ibidem*, s. 24(5) (summary proceedings) and 23A(4) (solemn proceedings).

396 Criminal Legal Aid (Scotland) Regulations 1996, Regulation 7A(3)(b).

defendant is pleading guilty, is stricter than that for criminal legal aid used for representation on a not guilty plea. Furthermore, a recipient of ABWOR may have to pay financial contributions towards the cost of legal assistance, which is not the case for criminal legal aid. This leads to a possible incentive for some defendants to plead not guilty in order to obtain free representation through the legal aid scheme. When combined with a fees structure that means lawyers are better paid for guilty pleas, there is a risk that the legal aid scheme is encouraging decisions on plea to be made for reasons related to legal aid rather than reasons related to the client and the case, albeit that these pressures operate in opposing directions. This issue was pinpointed as problematic by the 2018 Independent Strategic Review, which recommended a comprehensive criminal fees review.³⁹⁷

Although the majority of criminal legal aid work in Scotland is carried out by private practitioners, there is also a government-employed service which contributes to provision. The Public Defence Solicitors' Office was established as a pilot in 1998; following positive evaluation³⁹⁸ the office was maintained and expanded. 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. There is some resentment among private solicitors that the PDSOs are given a larger share of the police station duty roster to ensure they are sufficiently busy. This of course makes sense in terms of value for public money but impacts on the access of private practitioners to new clients. PDSOs also enable the government to have a window into how legal aid and the justice system are working.

Similarly to the situation in Scotland, representation in criminal cases in England & Wales is not in general provided through a public defender scheme but through criminal legal aid which, like civil legal aid, pays the fees of private solicitors and barristers who undertake the work. There is a small employed Public Defender Service with four local offices, but this was set up to provide comparative information on the costs and performance of such a service and was not intended to be extended to cover any significant proportion of criminal defence work.³⁹⁹ Criminal contracts for private firms (unlike civil contracts) do not specify a maximum number of cases, but do provide a considerable amount of detail on how a case must be conducted in order to claim payment from the Legal Aid Agency, the government agency responsible for the scheme. There are in addition duty solicitor schemes whereby solicitors are contracted to attend courts to provide immediate advice and representation assistance to members of the public who attend criminal courts unrepresented.

Standard criminal contracts divide work into several classes: investigations (pre-charge work); proceedings (most post-charge work); appeals and reviews (work done in relation to appeals or reviews of conviction or sentence); prison

³⁹⁷ Evans 2018, p. 82.

³⁹⁸ Goriely, McCrone *et. al.* 2001.

³⁹⁹ Ling and Pugh 2017, para. 18.41.

law; and civil work associated with criminal proceedings (e.g. habeas corpus cases). Different financial eligibility criteria and other criteria apply to the various classes of work.

The investigations class of work includes police station advice and other pre-charge advice and assistance. In the police station, allocation of cases is coordinated by a government telephone service, which may divert less serious cases to a telephone advice helpline, Criminal Defence Direct.⁴⁰⁰ Advice at the police station, whether by a lawyer in person or over the telephone, is not means-tested and can be provided without a formal application by the client; the solicitor provides the necessary assistance and claims payment after the work is completed. Criminal Advice and Assistance outside the police station is, however, subject to a means test which is administered by the solicitor. The lawyer must also assess merits and decide whether there is “sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out”.⁴⁰¹ Advice and Assistance can be awarded by the solicitor without application to the Legal Aid Agency; the application forms must be kept on file but need not be submitted to the Agency unless required to do so as part of an audit.

Once a person is charged with a criminal offence, the ‘proceedings’ class of funding becomes relevant. This class includes assistance provided by court duty solicitors, and representation orders. 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. Applications must be submitted online and guidance on applications is available in a manual for criminal practitioners issued by the Agency.⁴⁰²

If funding is refused on application of the interests of justice test, a reconsideration by the Agency may be requested, with reasons, in writing.⁴⁰³ 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.⁴⁰⁴ The English & Welsh legal aid structure includes Independent Funding Adjudicators who conduct reviews in civil cases (see below Chapter 4). In criminal cases, however, the adjudicators’ role is limited to appeals concerning advice and assistance preceding the charge of an offence.⁴⁰⁵ There is no right to review or appeal of a refusal of criminal legal aid on grounds of financial ineligibility.

400 Standard Crime Contract 2017 Specification para. 9.9.

401 *Ibidem*, para. 3.10.

402 Legal Aid Agency *Criminal Legal Aid Manual: Applying for legal aid in criminal cases in the magistrates’ and Crown Court* July 2016.

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

404 *Ibidem*, Regulation 29 and 30.

405 *Ibidem*, Regulation 17.

The legislative basis for Northern Irish legal aid is, as set out above in Chapter 1, complex. The civil legal service and criminal defence service each have sub-categories, the most significant of which in organisational terms is the distinction between advice and assistance on the one hand and representation on the other. Criminal advice and assistance covers advice for individuals who are under investigation, or who have been the subject of criminal proceedings,⁴⁰⁶ and a separate scheme covers assistance at the police station,⁴⁰⁷ which is not means-tested and provides assistance before and during police interviews. Both types of advice and assistance are granted by the solicitor, who in non-police station cases also applies the means test and collects any contribution.

The granting of legal aid by solicitors at the advice level in Northern Ireland, England & Wales and Scotland is an example in the criminal sphere of indirect public administration, which is more common in civil legal aid and will be discussed further in section 4.5.1, below.

Once charges are brought in a criminal case in Northern Ireland, advice and assistance will no longer cover the work required and a legal aid certificate must be applied for. Criminal legal aid certificates can be granted subject to limitations as to time or proceedings⁴⁰⁸ but this is rarely done, except for bail hearings. There is statutory authority for regulations to be made allowing the Legal Services Agency to award and withdraw legal aid in criminal cases but no such regulations have been made.⁴⁰⁹ 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”.⁴¹⁰ However, no such prescription has been made and there is therefore no formal route for appeal against decisions.

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.⁴¹¹ 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,⁴¹² an impossibility in the English & Welsh system as well as in Northern Ireland.

As has been seen, the legal aid schemes of Finland, the UK and the Republic of Ireland provide means-tested criminal legal aid to pay for legal advice and representation to suspects and defendants. Other than in Finland, legal

406 Access to Justice (Northern Ireland) Order 2003, s.23(1)(b).

407 *Ibidem*, s.23(1)(a).

408 *Ibidem*, s.26(5).

409 *Ibidem*, s.27.

410 *Ibidem*, s. 28.

411 UNODC 2012, Guideline 1(e).

412 *Ibidem*, Guideline 1(d).

aid also covers assistance in the police station which may be means-tested (in the Republic of Ireland) or not (the UK jurisdictions). As will be seen below, financial contributions towards the cost of legal aid may be repaid to defendants who are not convicted in some jurisdictions and circumstances, and those who paid for their defence privately due to financial ineligibility for legal aid may also sometimes be reimbursed.

3.3.3 Financial implications for defendants of the different models

It has been seen that there are two structurally very different models of provision of legal assistance for those under investigation for or accused of criminal offences in the jurisdictions of North-West Europe. In the Nordic countries, the usual model is a public defender system whilst in the UK and Republic of Ireland, criminal legal aid is in place. Finland operates a dual system with both options available, at the choice of the accused.

Public defender systems are not means-tested and thus accessible to any person accused of a sufficiently serious crime. Those of sufficient means can choose to instruct a lawyer privately, but are entitled to use the public defender service if they prefer, although in Norway the court retains a power to appoint public counsel in addition to a private lawyer already instructed, if necessary or desirable.⁴¹³ However, in each of the relevant jurisdictions a person convicted of an offence may have to repay the costs of their unsuccessful defence in whole or in part.

In Denmark, for example, the legislation provides that if the defendant is found guilty he is obliged to reimburse the public purse.⁴¹⁴ The amounts can be substantial and it is feared that the possibility of an attachment of earnings order for recovery of the debt may act as a deterrent to obtaining regular employment after conviction and even be an incitement to further criminal activity.⁴¹⁵ Approximately a third of the costs ordered to be paid are actually recovered.⁴¹⁶ The requirement to repay defence costs in Norway is less absolute; upon conviction the defendant should 'normally' be ordered to pay the costs incurred in the prosecution,⁴¹⁷ however, "costs shall only be imposed if it is deemed possible to obtain payment thereof, and they shall be proportionate to the financial capacity of the person charged"⁴¹⁸ with the result that in practice recovery of prosecution costs is often symbolic in cases other than white-collar crime.

The consideration of the means of the convicted person is in Sweden linked to the rules on financial eligibility for civil legal aid,⁴¹⁹ resulting in a percentage

413 *Straffeprosessloven*, 1981, § 100.

414 *Retsplejeloven*, 2017, § 1008(1).

415 Danmarks Nationale Menneskerettighedsinstitution 2016, Chapter 5.4.

416 *Ibidem*. In 2014, 450 million Danish Krone were ordered to be paid and 150 million Krone were recovered.

417 *Straffeprosessloven*, 1981, § 436.

418 *Ibidem*, § 437.

419 *Rättegångsbalk*, 1942, Chapter 31, 1 §.

contribution to be applied to the costs of the Public Defence Attorney and any fee for counsel for the victim.⁴²⁰ However, if the defendant has been sentenced to a long prison term it is usual for the fee to be waived.⁴²¹ Similarly, under the Finnish scheme, a person found guilty will be ordered to reimburse the state for the amount paid to the public defence attorney from state funds, up to the level which would have been payable under legal aid according to the defendant's financial situation (as in Sweden, a percentage contribution).⁴²²

An equivalent issue arises if a legally aided criminal defendant is convicted and, again, a range of approaches is taken. In England & Wales, prior to the introduction of means-testing for legal aid for criminal representation before the Crown Court (i.e. more serious offences), legal aid defence costs could be recovered from wealthy, convicted defendants by means of a Recovery of Defence Costs Order.⁴²³ Since the introduction of means-testing for all criminal legal aid such orders no longer apply in the Crown Court, presumably on the assumption that those now receiving legal aid will not have the means to repay their legal aid defence costs upon conviction. There is a partial exception to this rule; if the convicted defendant has more than £30,000 assets, including the value of their home, they may be required to repay the costs of their legal aid defence from this capital.⁴²⁴ The general result in England & Wales, though, is similar to that in Sweden and Finland, where those within the financial eligibility rules for legal aid will not be required to repay defence costs upon conviction, but may have paid contributions towards the cost of the case, which will not be refunded to them (contributions in Sweden and Finland will be paid at the end of the case).

In Northern Ireland, there has since 2012 been the option to recover Crown Court criminal legal aid costs upon conviction,⁴²⁵ though there is currently no mechanism in place to identify suitable cases for such an order. In the first four years of the existence of these powers only one recovery order was issued and no recoveries were actually executed.⁴²⁶ A government review recommended that the question of a convicted defendant's liability to repay legal aid costs should be "revisited after implementation of the [proposed] stricter means test".⁴²⁷ Potential recovery of costs orders are subject to a test of reasonableness and a judge making such an order must consider whether it would cause undue financial hardship to the assisted person, their dependants or immediate family.⁴²⁸ The closest Nordic comparator is Norway with the rule of 'deemed

420 Lag om målsägandebitråde, 1988, 8 §.

421 Rättegångsbalk, 1942, Chapter 31, 1 §, para. 4.

422 Lag om rättegång i brottmål, 1997, Chapter 2, 11 §.

423 Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 7 and the Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2013.

424 The Criminal Legal Aid (Contribution Orders) Regulations 2013, Part 2.

425 Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012.

426 Northern Ireland Audit Office 2016, para. 3.10.

427 Stutt 2015, para. 13.23.

428 Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012, s. 5(3).

possibility' of obtaining payment, and requirement of proportionality to the financial capacity of the person charged.

A further distinction can be seen in the outcomes for better-off defendants, which vary significantly between the two models. Whilst there is a strong correlation between low socio-economic status and experience of criminal justice interventions, and therefore high levels of financial eligibility for legal aid amongst those prosecuted for crime, means-tested schemes will result in some defendants paying for their own defence during investigation and trial. Schemes are in place in some jurisdictions for the recovery of defence costs from the state by defendants found not guilty, but these do not provide full recompense. In England & Wales, for example, the rules on recovery of defence costs by acquitted defendants do not equate to the provision of public defence counsel, as defence costs can only be refunded at legal aid rates, and not at all after Crown Court acquittals unless the defendant applied for legal aid and was refused on the basis of his means.⁴²⁹ Whilst the restriction to legal aid rates can be justified by the need to limit public expenditure, it is highly unlikely that a defence lawyer would charge the same, very low, rates to a private client as those received under the legal aid scheme. This leaves a large proportion of the fees to be paid by the client, despite the acquittal. Contributions paid towards criminal legal aid will, though, be fully refunded with interest if the defendant is acquitted.⁴³⁰

However, the rules are more generous in Northern Ireland. If an accused person is acquitted, their private defence costs can be reimbursed by the prosecution if the court so orders⁴³¹ at an amount "reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence". Contributions are not required under the criminal legal aid scheme in Northern Ireland and therefore an acquitted defendant will only be out of pocket if the court awards an amount which, although 'reasonably sufficient', do not in fact cover all the costs.

Scotland has no scheme for the recovery of defence costs by acquitted defendants whether publicly or privately funded; thus private lawyers' fees and contributions paid under legal aid are not recoverable. The Justice Committee of the Scottish Parliament asked the Scottish Government to consider the issue when legislation on legal aid contributions was being prepared in 2012 but the Government declined to introduce such a rule, noting that "recovery of costs in defending criminal proceedings has never been a feature of the Scottish criminal system, whatever is the case in other jurisdictions".⁴³² Concern was expressed that refunds in all acquittals would be prohibitively expensive, yet to refund in only some cases might result in a perception that some acquittals

429 Prosecution of Offences Act 1985, s. 16A(5A).

430 The Criminal Legal Aid (Contribution Orders) Regulations 2013, Regulation 37.

431 Costs in Criminal Cases Act (Northern Ireland) 1968, s.3.

432 Scottish Civil Justice Council and Criminal Legal Assistance Bill; Response from the Scottish Government to the Justice Committee Stage 1 Report, 2012, p. 9.

were less conclusive than others. Furthermore, “prosecution is undertaken in the public interest, on the basis of the test outlined in the prosecution code, that there is sufficient admissible evidence and that it is in the public interest to take action. An acquittal does not equate to a finding that it was not in the public interest to take proceedings.”⁴³³

In the Republic of Ireland the District Court, in summary criminal proceedings, may make an order for costs against a party except the Director of Public Prosecutions or a prosecuting police officer.⁴³⁴ The Circuit Court⁴³⁵ and Central Criminal Court⁴³⁶ (the courts having jurisdiction to try on indictment) have a discretion to award costs in the case of an acquittal (which award is appealable to the Court of Criminal Appeal) and the Court of Criminal Appeal itself has discretion to make costs orders in the interests of justice.⁴³⁷ However, the award of costs in criminal cases is extremely rare in practice and it is usual for a privately-funded acquitted defendant to pay for their own defence in full.

3.3.4 The case of Finland

It may be possible to gain further insights into the comparative merits of public defender and criminal legal aid schemes by examining the case of Finland, which has both systems running concurrently. The public defender scheme is newer than the legal aid scheme, having only been in place since 1998.⁴³⁸ A consideration of the preparatory papers for the legislation introducing the public defender scheme makes it clear that the principle behind the new scheme is qualitatively different from that embodied by the legal aid scheme. The relevant parliamentary proposal is based upon the idea that “a person suspected of a crime shall always, irrespective of his economic situation, have the right to a defence counsel at the state’s expense during investigation and trial when he cannot sufficiently protect his rights without expert representation”.⁴³⁹ Explicitly, “the right which this law gives a suspect, irrespective of his economic circumstances, to a defence counsel implies a system which is primary in relation to the system of representatives within the Legal Aid Act”.⁴⁴⁰ This primacy of public defenders over legal aid representation is illustrated by the provision that legal aid cannot be granted to an accused who has already been allocated a public defender, but that if a defendant with a legal aid attorney requests a public defender that lawyer will become the public defender.⁴⁴¹ It is accepted that “there should not in practice be a need to assign both a legal aid lawyer and a public defender, but the provision underlines

433 *Ibidem*, p. 10.

434 District Court Rules, Order 36, Rule 1.

435 Circuit Court Rules, Rule 66.

436 Rules of the Superior Courts, Order 99.

437 The Courts of Justice Act, 1924, s. 34.

438 Lag om rättegång i brottmål, 1997, Chapter 2, as amended by statutory instrument 6.2.1998/107.

439 Regeringens proposition 132/1997, p. 32.

440 *Ibidem*.

441 Lag om rättegång i brottmål, 1997, Chapter 2, 2 §.

that the public defender system is primary”.⁴⁴² The two routes for obtaining assistance in defending a charge apply the same rates of lawyers’ pay, through the mechanism of fixing public defenders’ pay at legal aid rates.⁴⁴³

From the point of view of a client who is financially eligible for legal aid there is very little difference between the schemes; the work covered by each scheme is identical and the financial outcome for the assisted person is also the same, albeit by a different route. As a matter of principle, as seen above, public defenders are non-means tested. However, if the defendant is found guilty, he or she will be ordered to reimburse the state for the amount paid to the public defence attorney from state funds, up to the level which would have been payable under legal aid according to the defendant’s financial situation.⁴⁴⁴ Conversely, if the defendant is acquitted, the state will be liable to reimburse him or her for the costs of the defence,⁴⁴⁵ which will only apply in practice if the defence lawyer was paid privately or under legal aid, as no ongoing contributions are paid in respect of public defence attorneys. Thus whatever the source of the defence representation, the defendant will pay the defence (as well as prosecution⁴⁴⁶) costs at legal aid contribution levels if they are convicted, and will not pay for the defence if acquitted.

Separate statistics are not collected but it is understood to be the case that far more criminal defence takes place through legal aid than through the public defender scheme. It is not clear why this might be so; it is unlikely to have much to do with the question of principle which differentiates the two schemes in the political sphere. One possible explanation is that legal aid was already working well in criminal as well as civil cases when the public defender scheme was introduced and, given the similarity of the schemes for both lawyers and clients, there was no incentive for lawyers to change their practice and embrace the public defence scheme. Defendants who are financially ineligible for legal aid can of course only use the public defender scheme, although as approximately 75% of the Finnish population is financially eligible,⁴⁴⁷ the numbers of such defendants are likely to be low, given the correlation between low income and involvement in the criminal justice system. Those who are eligible for legal aid but with a financial contribution may prefer the public defender scheme as this is completely free at point of use, although as seen above the ultimate financial outcome is the same.

Affecting both schemes is the possibility of tactical decision-making by private lawyers; if the lawyer feels the client is very likely to be acquitted it may be preferable not to apply for either legal aid or public defender status, as the hourly rate will then not be tied into the legal aid scheme and the lawyer’s remuneration will be higher when the state repays the legal costs on acquittal.

442 Regeringens proposition 132/1997, Chapter 1.3.

443 Lag om rättegång i brottmål, 1997, Chapter 2, 10 §.

444 *Ibidem*, Chapter 2, 11 §.

445 *Ibidem*, Chapter 9, 1a §.

446 *Ibidem*, Chapter 9, 1 §.

447 See Chapter 7 on legal aid in context, below.

The usage levels of criminal legal aid and the public defender scheme in Finland might be thought to indicate that legal aid is a more attractive scheme for clients and lawyers, but caution is needed. The specificities of the Finnish system, not least the high level of financial eligibility for legal aid, make the schemes difficult to differentiate in practice. Ultimately, it may be that the main practical difference between the two models overall in all the jurisdictions under consideration is in the timing and level of payments by defendants who were convicted and the financial burden on those who are acquitted. In public defence schemes a person who is acquitted will not have had any financial outlay during the investigation and trial, whatever their financial circumstances, and has no need to go through the process of recovering costs from the state. In criminal legal aid schemes this protection is only afforded to those financially eligible for assistance without a contribution, and recovery of private fees or legal aid contributions is very limited (except in Finland). Convicted parties in public defence attorney jurisdictions will only have to pay any contribution after that conviction has been handed down. In legal aid scheme jurisdictions, contributions or private fees will be paid at the time defence work is carried out, pre-judgment, and additional amounts may also be demanded post-conviction.

3.4 Interests of justice tests

All the jurisdictions under consideration apply some restriction on the range of criminal cases for which publicly funded assistance is available. It was seen at the beginning of this chapter that some limitation to state assistance in criminal cases is permissible under the applicable international treaties and states in general aim to avoid paying for the defence of minor matters which should be capable of fair resolution without the benefit of representation for the defendant. The disqualification measures used in the jurisdictions of North-West Europe, as appropriate in the international context, relate explicitly or implicitly to the question of whether the interests of justice require that the defendant is represented.

Broadly speaking, the tests either adhere to an overall assessment of the interests of justice, with guidance as to factors which should be considered relevant; or dictate the factors which, if present, mean that the interests of justice will require assistance to be provided. The first approach leaves the discretion with the decision-maker in the individual case whilst the second pre-judges cases according to certain characteristics.

The three UK jurisdictions all base their merits test for criminal legal aid on an explicit interests of justice test, as described in a set of factors known as the 'Widgery criteria'. These criteria set out certain factors which must be taken into account in deciding whether the interests of justice require the defendant to be granted free representation: risk of imprisonment; risk of loss of

employment; potential for serious damage to reputation; need for interviewing of witnesses and need for expert cross-examination. The Widgery criteria were first established as principles in case-law, and spread to all parts of the UK due to the close relationship of the justice systems.⁴⁴⁸ Subsequently the English & Welsh Departmental Committee on Legal Aid in Criminal Proceedings,⁴⁴⁹ chaired by Lord Widgery, recommended that the rules be codified into statute. This has been done in all three UK jurisdictions, as will be seen below, and all the jurisdictions continue to use the criteria in the determination of whether legal aid shall be granted for a particular case.

The statutory organisation of criminal legal aid eligibility in England & Wales is such that only two tests apply: a financial means test and the interests of justice test,⁴⁵⁰ although it is assumed to always be in the interests of justice that a defendant is represented in the Crown Court.⁴⁵¹ In Magistrates' Court matters, it is mandatory for certain factors to be taken into account in deciding whether legal aid is necessary in the interests of justice, and these closely mirror the Widgery criteria. Consideration must be given to the potential for loss of liberty or livelihood or for serious damage to reputation; the presence of a substantial question of law; the ability of the individual to understand the proceedings or to state his or her own case; evidential and witness complexities; and whether it is in the interests of another person that the individual be represented.⁴⁵² The list of factors is not exhaustive and other factors may be relevant. The guidance published online provides a useful indication of how the test is applied by the Legal Aid Agency. It clarifies that:

other reasons may be taken into account as part of the interests of justice test beyond the criteria listed above. Additional factors may be sufficient in themselves to justify grant, but will usually be matters to be considered alongside other criteria in the application. Examples in this category could include the need for expert examination of defence witnesses or expert cross-examination of a co-defendant or co-defendant's witness. [...] Each case turns upon its own individual circumstances and combination of factors and it is very difficult to establish general rules about the weight that each factor should be given.⁴⁵³

448 The Supreme Court (formerly the House of Lords) is the highest court for England & Wales and Northern Ireland, as well as for civil Scottish cases. Whilst the Scottish criminal justice system has no formal overlap with that of England & Wales, decisions of the higher courts have been highly persuasive in both directions.

449 CMND 2934, 1966.

450 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 17.

451 The Criminal Legal Aid (General) Regulations 2013, Regulation 21.

452 Legal Aid, Sentencing and Punishment of Offenders Act 2012 s. 17(2).

453 Legal Aid Agency *Guidance on the Consideration of Defence Representation Order Applications*, 2013, p. 14.

Very similar statutory provisions apply in Northern Ireland, where the criminal courts determine applications for legal aid in all cases “according to the interests of justice”.⁴⁵⁴ Certain factors, to all intents the same as those applicable in England & Wales, must be taken into account in deciding whether the interests of justice require the defendant to be granted free representation. These are: whether there is a likelihood of loss of liberty or livelihood or serious damage to reputation if convicted; whether there is a substantial question of law involved; whether the individual may be unable to understand the proceedings or to state his own case; whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and whether it is in the interests of another person that the individual be represented. No additional guidance is given to judges on the application of the criterion. A recent governmental review formed the view that the test is satisfactory and should remain the sole merits criteria for criminal legal aid. Suggestions that other factors could be added to the list for consideration were rejected as this “might lead to an unjustified expansion of the range of cases currently satisfying the test”.⁴⁵⁵ The Widgery test had stood the test of time and should not be altered. However, it was suggested that the test could be computerised and applied by the Legal Services Agency in the future and that, pending such reform, judges should be required to give their reasons for granting or refusing legal aid by reference to the criteria.⁴⁵⁶ This change has not been implemented, possibly as a result of fears that such a requirement could cause significant delay in the courts, where many legal aid decisions are made daily, under pressure of time.⁴⁵⁷

The statutory formulation of the interests of justice test for summary cases (less serious offences) in Scotland is slightly different to those in England & Wales and Northern Ireland. Regulations provide for a number of types of proceedings for which criminal legal aid will not be available;⁴⁵⁸ a list of minor matters such as removal of a driving disqualification and variation of a non-harassment order. In other matters, as in the other two jurisdictions, criminal legal aid shall be granted if “in all the circumstances of the case it is in the interests of justice that legal aid should be made available”,⁴⁵⁹ although similarly to the English & Welsh position there is no interests of justice test in solemn cases (due to the seriousness of the charges covered), and only a financial assessment is made.⁴⁶⁰ Compared to the other UK jurisdictions, the factors which must be taken into consideration when assessing the interests of justice are slightly extended and elaborated upon. The elements to be taken into account must include: the likelihood of a loss of livelihood or liberty; the

454 Access to Justice (Northern Ireland) Order 2003 s.29.

455 Stutt 2015, para. 12.4.

456 *Ibidem*, para. 28.

457 *Ibidem*, para. 12.7.

458 Criminal Legal Aid (Scotland) (Prescribed Proceedings) Regulations 1997.

459 Legal Aid (Scotland) Act 1986, s. 24.

460 *Ibidem*, s. 23A.

existence of any substantial question of law or evidence of a complex or difficult nature; difficulties for the defendant in understanding the proceedings or to state their own case due to age, language skills, mental illness, other mental or physical disability or otherwise; whether it is in the interests of someone other than the accused that the accused be legally represented; that the defence to be advanced by the accused does not appear to be frivolous; and that the accused has been remanded in custody pending trial.⁴⁶¹ It has been made clear by the courts that the criteria are only to be considered when applying the interests of justice test and do not replace it. As in England & Wales, the list of factors is not exhaustive and the Court of Session has confirmed that the decision as to the interests of justice is for the Scottish Legal Aid Board in each case:

According to the system which is set out in sec. 24 of the Act the granting of legal aid does not depend upon whether the applicant has accumulated a sufficient number of points in his favour but whether he has satisfied the [Board] that it is in the interests of justice that he should be granted legal aid for the purpose of obtaining representation in the criminal proceedings to which the application relates. It is to that end that the [Board is] enjoined to take into account, so far as applicable, the factors set out in the various heads contained in the subsection. Whether a particular head is satisfied and, if so, what weight should be attached to that factor is a matter for the [Board] in the particular circumstances of the case.⁴⁶²

The presence of a factor relating to the quality of the defence is noteworthy and potentially problematic. Almost certainly an outright ban on legal aid for defendants with a ‘frivolous’ defence would be a breach of Article 6 of the European Convention on Human Rights. However, the fact that the criteria is only one to be considered as part of a whole should prevent a refusal on this ground alone unless there were no other factors indicating that representation was needed. The Scottish Legal Aid Board in their guidance to practitioners confirm that they will “take a balanced view in deciding whether it is in the interests of justice to grant criminal legal aid in any particular case”,⁴⁶³ thus rooting the test firmly in the internationally accepted standard.

A slightly different formulation of the criminal legal aid merits test is found in the Republic of Ireland. The statutory test itself refers to matters in addition to the bare interests of justice test. For trial on indictment (more serious crimes), the merits test is that “having regard to all the circumstances of the case (including the nature of such defence (if any) as may have been set up), it is essential in the interests of justice that the person should have legal aid”. The interests of justice test is not imposed for prosecutions for murder.⁴⁶⁴ A grant of legal aid for summary (more minor) matters⁴⁶⁵ and for appeals against

461 *Ibidem*, s. 24(3).

462 *K v. The Scottish Legal Aid Board No. 3*, 1989 S.C. 21 Lord Cullen.

463 Scottish Legal Aid Board *Criminal Legal Assistance Handbook* Part III para. 11.16.

464 Criminal Justice (Legal Aid) Act, 1962, ss. 3(c)(i) and 4(c)(i).

465 *Ibidem*, s.3.

conviction or sentence⁴⁶⁶ should be approved if “by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that [the person charged] should have legal aid”.⁴⁶⁷ Thus both the severity of the offence and exceptional circumstances form part of the test itself, rather than just featuring on a list of factors to be considered, as in the UK. Decided cases have shown that exceptional circumstances can include personal characteristics of the defendant such as age, immaturity, lack of illness or disability.⁴⁶⁸ They can also relate to the consequences of a conviction on an accused’s employment⁴⁶⁹ or potential damage to the reputation of the accused.⁴⁷⁰

No guidance is issued to judges in the Republic of Ireland by the Ministry of Justice and Equality on the application of the criminal merits test. It is considered important that the clear line between the executive and the judiciary should be maintained and that it is for judges to decide what is in the interests of justice. The wording of the 1962 Act reflects prior Supreme Court judgments which had established the circumstance in which legal assistance should be given under the non-statutory scheme and it was felt that the judicial formulation should be respected as sufficient for this decision to be made. The Judicial Researchers’ Office has, however, produced an internal guide which gives easy access to the most pertinent decided cases and legislation, for use by judges in their daily work. Decided cases confirm that the question of the gravity of the charge is for the judge,⁴⁷¹ who may not ‘fetter discretion’ by making her own restrictive policy such as that she will never award legal aid in motoring offences.⁴⁷²

Furthermore, the ‘gravity of the offence’ is not to be understood as synonymous with the risk of a custodial sentence. Whilst this is a tempting shortcut, the Supreme Court stated in a 2011 judgment that the determining factor should in fact be unfairness; if the trial would be unfair without legal aid, it must be concluded that the charge is of sufficient gravity or the circumstances are sufficiently exceptional as to require legal aid.⁴⁷³ The reasoning behind this decision refers back to the constitutional right to legal aid, and finds that the Criminal Justice (Legal Aid) Act 1962 is the practical implementation of the constitutional guarantee. As the constitutional right is to a fair trial, the Act must be interpreted in accordance with this principle.

The Nordic states do not explicitly refer to the interests of justice in the legislative foundation of their public defence attorney schemes⁴⁷⁴ although, interestingly, the Finnish legal aid scheme does. These jurisdictions tend to set

466 *Ibidem*, s.4.

467 *Ibidem*, s. 2.

468 *State (Healy) v. Donoghue*, 1976, at p. 357.

469 *O’Neill v. Butler*, 1979.

470 *Carmody v. Minister for Justice*, 2010, at p. 658.

471 *Neeson v. Brady and the Director of Public Prosecutions*, 2008.

472 *Whelan v. Fitzpatrick*, 2008.

473 *Joyce v. Brady*, 2011, O’Donnell J.

474 Or in the legal aid scheme as it applies to criminal cases, in Finland.

a benchmark based on eligibility if the potential sentence is above a certain severity and also provide for assistance to be provided in lesser offences if other factors indicate that the trial may be complex or that the defendant will require professional input.

The Danish system operates on the basis of a list of circumstances in which a public defender will be appointed, which is very similar to the lists used to identify the interests of justice in the UK and Republic of Ireland. This provides that there is a right to a public defender if the charge can lead to imprisonment or if there are other particularly serious consequences or complexities to the proceedings.⁴⁷⁵ *Inter alia*, a public defender will be appointed where: a decision is to be made as to pre-trial detention; the trial will take place before a jury or lay judge; in appeals which are not immediately dismissed; cross-examination of close family members will take place or questioning of the defendant will take place in closed court. In direct contrast to the approach in Scotland and in England & Wales, the list is fixed and a public defender should be appointed if any one of the criteria is met. Thus, for instance, if a more serious penalty than a fine is indicated, defence counsel must be appointed whatever the other circumstances; it is not open to the court to find that the defendant will be able to fairly represent himself because, for example, the case is straightforward. Furthermore, a public defender may also be appointed if the court considers it desirable in light of the nature or circumstances of the cases or the characteristics of the accused.⁴⁷⁶

With regard to the seriousness of penalty which will trigger the appointment of a public attorney, two points are important. Firstly, where the court assesses that a higher penalty than a fine is indicated, the appointment of an attorney relies on a request for public counsel being made by the defendant.⁴⁷⁷ However, this provision is very rarely used because jurors are appointed in all cases where there are indications that a higher penalty than a fine will be imposed⁴⁷⁸ and thus a public attorney will be appointed without the need for a request from the defendant, under the criteria that this must happen in jury cases.

An attorney will always be appointed in Sweden if the suspect is detained or if the offence is punishable by imprisonment of six months or more, but also possibly in less serious cases if there are special reasons, as set out in the Code of Judicial Procedure:

If a suspect under arrest or detained so requests, a public defence counsel shall be appointed for him. A public defence counsel shall also be appointed upon request for a person who is suspected of an offence in respect of which a less severe sentence than six months imprisonment is not prescribed. A public defence counsel shall also be appointed (1) if a defence counsel is needed by the suspect in connection with the inquiry into the offence, (2)

475 Retsplejeloven, 2017, § 731.

476 *Ibidem*, § 732.

477 *Ibidem*, § 731, para. 2.

478 *Ibidem*, § 686, para. 2.

if a defence counsel is needed in view of doubt concerning which sanction shall be chosen and there is reason to impose a sentence for a sanction other than a fine or conditional sentence or such sanctions linked together, or (3) if there are otherwise special reasons relating to the personal circumstances of the suspect or the subject of the case.⁴⁷⁹

Accordingly, any charge relating to an offence with a minimum sentence of six months' imprisonment will be covered, as will a lesser charge if in the particular case there are grounds for imposing an unconditional custodial sentence. The online handbook does not provide any further elaboration of these tests, but some guidance can be found in decided cases. In a prosecution for violent resistance, relating to injuries allegedly inflicted by the defendant on security guards attempting to evict him from a nightclub, the Supreme Court was asked to overturn the lower courts' decision that no public defence counsel was needed. The court held that although the offence was relatively minor, with a maximum penalty of a fine or imprisonment for of six months, the course of events was not quite clear and several witnesses were to be heard giving different perspectives on the events. The defendant was therefore in need of a public defence counsel "in connection with the inquiry into the offence".⁴⁸⁰ Defendants under the age of 18 will always be allocated a public defence counsel unless it is clear that this is not necessary.⁴⁸¹

A public defence counsel will thus be appointed if any one of four criteria are met: the offence has a minimum sentence of six months; a custodial sentence might be imposed in the particular case; assistance is needed during the criminal investigation or there are special reasons. Whilst no reference is made to the interests of justice, it might be assumed that in applying the 'special reasons' test judges will pay heed to the Article 6 requirement.

Finnish public defenders are only available on request by the defendant for more serious offences, i.e. those punishable by imprisonment of four months or more, or if the suspect is under arrest or being held on remand before trial. In some cases a public defender can be appointed by the court of its own motion even if the potential penalty is less severe: when the suspect is incapable of defending himself or herself; is under 18 years of age (unless it is clear that there is no need of a public defender); the lawyer retained by the suspect does not meet the qualifications required of a public defender or is incapable of defending the suspect in an appropriate manner; or where there are other special reasons.⁴⁸²

In the same jurisdiction, the level of potential penalty which will lead to legal aid is set lower than that for a public defender. Legal aid excludes simple criminal matters, defined as those where the expected penalty is no greater than a fine or where the likely penalty in conjunction with the outcome of the

479 Rättegångsbalken, 1942, Chapter 21, 3a §.

480 Ö5079-13, 2014.

481 Lag med särskilda bestämmelser om unga lagöverträdare, 1964, 24 §.

482 Lag om rättegång i brottmål, 1997, Chapter 2, 1 §.

criminal investigation lead to a conclusion that the defendant will have access to justice even without an attorney.⁴⁸³ This is interpreted such that legal aid is generally granted in all cases where imprisonment is likely and in situations where this is not the case but other factors indicate that legal assistance is needed. These could be personal to the defendant, such as age or difficulty in understanding the proceedings or relate to the potential effects of the sentence such as a risk to livelihood if a driving ban is imposed. However, the interpretation handbook also suggests that a criminal matter may be ‘simple’ and thus not eligible for legal aid even if there might be a punishment greater than a fine, in some situations. This would be the case for example if the facts are clear and the penalty will be determined according to a schedule, as in some drink driving, theft and criminal damage cases. Legal aid will not usually be granted for an application to reduce the level of a fine imposed or to defend an application by the prosecution to transmute a community service order into imprisonment, unless there are special circumstances. If witnesses will be heard, a case will generally not be considered simple.⁴⁸⁴

In Norway, as has been seen above, a defendant will in general be entitled to official defence counsel during the main hearing,⁴⁸⁵ although in the District Court, defence counsel is not required for some road traffic offences, cases concerning only confiscation and optional penalty writs.⁴⁸⁶ An exception is also provided such that during a main hearing in the District Court, where the defendant has made a full confession which is supported by other evidence, no defence counsel will be needed if the proposed sentence is under six months’ imprisonment, unless the court finds that due to the nature of the case and other circumstances a defence counsel is in fact necessary.⁴⁸⁷ The rule also applies to summary judgments on confession.⁴⁸⁸ The general presumption is, though, 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. It is proposed to extend the right to a defence attorney to all defendants where there is a likelihood of imprisonment, youth detention or community service, regardless of other circumstances such as the existence of a confession.⁴⁸⁹

In the relatively rare situations where there is no statutory entitlement to defence counsel, for example because the matter is minor, a court may nonetheless appoint defence counsel where there are ‘special reasons’ for doing so. Under statute, ‘special reasons’ include reduced capability or a physical or psychological impairment which indicates that there is a particular need for a

483 Rättshjälpslag, 2002, 6 §, para. 2(2).

484 Oikeusavun käsikirja, 2013, para. 2.2.1.

485 Straffeprosessloven, 1981, § 94.

486 *Ibidem*, § 96.

487 *Ibidem*, § 96 and 99.

488 *Ibidem*, § 99.

489 NOU 2016: 24, para. 9.4.3.5.

defence lawyer.⁴⁹⁰ The Supreme Court has held that § 100 must be interpreted in accordance with Article 6 of the European Convention on Human Rights.⁴⁹¹ Whilst the Court did not find that this led to a right to paid defence counsel in all cases at the investigation stage, it did hold that the interests of justice should also be considered when considering whether ‘special reasons’ are present for the purposes of § 100 of the Criminal Procedure Act.⁴⁹² Amongst other factors, this will require the consideration of the severity of the potential penalty.⁴⁹³ Furthermore, the means of the accused are relevant and a wealthy person would not be entitled to official defence counsel under the ‘special reasons’ provision to the same extent as a poorer person.⁴⁹⁴

In Iceland, a public defender will be appointed for any arrested suspect and for any person charged with an offence, during investigations if needed and in any event for the main trial.⁴⁹⁵ This is the most generous system under consideration, as there is no financial eligibility, scope or merits limitation applied.

The complex combinations of factors constituting the merits test for criminal legal aid 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 carries a potential term of imprisonment; court sentencing guidelines and the likelihood of imprisonment being ordered in that particular case are the relevant factors.⁴⁹⁶ 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.

The Swedish approach of providing a public defence attorney in any case where the penalty for the offence is six months’ imprisonment or more puts an emphasis on the provision of assistance in all serious cases whatever the surrounding circumstances, although it must be noted that there is a saving provision that assistance must also be given if it is unclear whether imprisonment (of any length) will be ordered. In Finland, a potential punishment of four months’ imprisonment is the trigger for automatic public

490 *Straffeprosessloven*, 1981, § 100 (2).

491 HR-2015-01405-A, para. 22.

492 *Ibidem*, para. 48.

493 *Ibidem*, para. 49.

494 *Ibidem*, para. 54.

495 *Lög um meðferð sakamála*, 2008, § 30-31.

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

defender eligibility but any length of potential imprisonment may lead to a grant of legal aid, or to a public defender if other circumstances so require. In Denmark a public defender will be appointed if imprisonment of any length is envisaged.

Thus it can be seen that there is a distinction between legal aid schemes and public defender schemes which, on the evidence of Finland, is connected to the type of scheme rather than the location of the jurisdiction. All the legal aid schemes 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. The public defender schemes in Sweden and Finland 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.

Iceland and Norway are unusual in paying very little (and in the case of Iceland, no) attention to the likely penalty when deciding whether to appoint a public defence attorney. In Norway, six months' imprisonment is in some situations a benchmark, but only if there has been a full confession and, again, other factors may lead to a need for official defence counsel even if the potential penalty is lower. Attorneys are not generally provided for a charge of driving under the influence, even though this offence commonly results in a short prison term of up to 30 days. Aside from these situations and some other minor exceptions from the general right to public defence counsel, counsel will be appointed regardless of the likely or possible sentence; even cases where no imprisonment is possible will in most cases lead to the appointment of defence counsel, thus making the situation in practice close to the Icelandic situation. However, under current Norwegian proposals to extend coverage to include the period post-police detention but pre-trial, it is being suggested that public defence attorneys should only be granted at this stage for cases in which there is a real possibility of imprisonment, youth detention or community service.⁴⁹⁷

None of the jurisdictions fully comply with the UN Principle that "anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment [...] is entitled to legal aid at all stages of the criminal justice process",⁴⁹⁸ as they all have circumstances where, despite a possible sentence of imprisonment for the offence, legal aid or a public attorney may be refused. However, all the schemes, of both types, provide that other circumstances may trigger the availability of assistance even if

497 NOU 2016: 24, para. 9.4.3.2.

498 ONODC 2012, Principle 3.20.

imprisonment is not in contemplation. This is clearly necessary for compliance with international obligations. In their various ways, the schemes provide good cover following the principle that:

Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty.⁴⁹⁹

3.5 Legal aid for appeals

Across Europe, many jurisdictions, having provided legal aid at a criminal trial at first instance, limit the availability of legal aid upon appeal. The European Court of Human Rights has ruled upon the necessity for legal aid in criminal appeal cases in terms which focus on broadly the same issues as the requirement under the 'interests of justice' test at first instance.

Helpfully, in *Quaranta v. Switzerland*,⁵⁰⁰ the Court set out criteria to be considered when deciding whether legal assistance is necessary at appeal: the seriousness of the offence, the severity of the potential sentence, the complexity of the case and the personal situation of the accused.⁵⁰¹ These factors need not all be present in order for legal aid to be required, as illustrated in a subsequent case where a custodial sentence of 5 years was found sufficient to require legal representation in the interests of justice even though the appeal did not disclose particularly complex legal issues.⁵⁰² It was decisive in that case that the applicant was "unable competently to address the court on [the] legal issues and thus to defend himself effectively". Echoing many of the relevant considerations in civil cases, the Court has recently confirmed that the issues pertinent to the question of whether the interests of justice require the provision of legal aid in an appellate court are:

the nature of the proceedings, the wide powers of the appellate court, the complexity of the legal issues involved, the limited ability of the unrepresented applicant to present a legal argument and, above all, the importance of the issues at stake in view of the severity of the sentence and the statutory requirement for mandatory legal representation in such cases.⁵⁰³

It is thus incumbent on states to provide legal aid for appeals against criminal conviction if the interests of justice so require. This is achieved in a very comprehensive manner in Finland, where a legal aid certificate covers work on the case at all levels of the court hierarchy and appeals are thus covered by the

499 *Ibidem*, Principle 3.21.

500 *Quaranta v. Switzerland*, 1991.

501 *Ibidem*, paras. 33-35.

502 *Maxwell v. UK*, 1994. For a very similar decision concerning a custodial sentence of 8 years, issued on the same date, see *Boner v. UK*.

503 *Shekhov v. Russia*, 2014, para. 46.

same certificate.⁵⁰⁴ Similarly, if a defendant is represented by a public defence attorney, the attorney will also represent him in any appeal to a higher court, as needed.⁵⁰⁵

Denmark has a scheme for representation in criminal appeals which is nearly as comprehensive, consisting of the compulsory appointment of a public defender in any appeal which is not immediately dismissed by the court.⁵⁰⁶ Thus, the convicted defendant will always be represented in any appeal which proceeds to consideration. The President of the court can appoint the original defence attorney to be the representative also at the appeal, as long as that attorney is entitled to appear before the appeal court.⁵⁰⁷

In Norway and Northern Ireland, legislation provides that the official defence counsel or legal aid lawyer in the original trial must advise on the possibility of appeal⁵⁰⁸ and in Norway the drafting of the notice of appeal is also included.⁵⁰⁹ The role of Norwegian defence counsel for the initial hearing ends at this point, but if the appeal is referred for a hearing (rather than being dismissed or allowed on the papers), defence counsel must be appointed immediately⁵¹⁰ as in Denmark. As is the case for all other appointments of official defence counsel, the defendant has the right to indicate which lawyer they wish to be appointed and the court must comply with this request unless there are relevant reasons against the appointment.⁵¹¹

In Northern Ireland, any representation which is required after the advice on an appeal must be the subject of a separate application for legal aid, which is subject to the interests of justice test in the same way as legal aid for the initial prosecution and trial. In the Republic of Ireland, a similar situation exists, but appeals against convictions for murder are exempt from the interests of justice test; other cases must satisfy the court that by virtue of the seriousness of the offence or exceptional circumstances, the interests of justice make it essential that legal aid be granted.⁵¹²

Swedish courts have the right to assign a public defender even after the case has passed out of their hands if the defendant needs assistance appealing the verdict,⁵¹³ and if there was already a public defender dealing with the case, they can continue to assist in the higher court if the matter is appealed.⁵¹⁴

In England & Wales, legal aid granted for trial in the Magistrates' Court is explicitly stated to not include appeals to the Crown Court, for which

504 Rättshjälpslag, 2002, 13 §, para. 1.

505 Lag om rättegång i brottmål, 1997, Chapter 2, 7 §.

506 Retsplejeloven, 2017, § 731(1)(f).

507 *Ibidem*, § 735.

508 Access to Justice (Northern Ireland) Order 2003, s.26(2)(b).

509 Straffeprosessloven, 1981, § 313.

510 *Ibidem*, § 328.

511 *Ibidem*, § 102

512 Criminal Justice (Legal Aid) Act, 1962, s. 4.

513 Rättegångsbalken, 1942, Chapter 21, 4 §.

514 *Ibidem*, 8 §.

a separate application for legal aid must be made.⁵¹⁵ Unlike the position for first-instance trials in the Crown Court, appeals to the Crown Court against a decision of the Magistrates' Court are subject to the interests of justice test⁵¹⁶ and the Guidance states that:

If the test was not met in the magistrates' court in the first instance it is very unlikely that it will be satisfied for the appeal case unless there has been a material and relevant change in circumstances (e.g. the defendant in fact received a custodial sentence when previously loss of liberty was deemed unlikely).⁵¹⁷

Appeals to the Court of Appeal are exempt from the interests of justice test and from the financial eligibility test.⁵¹⁸

Similarly, appeals against conviction or sentence are treated as distinct proceedings for the purposes of legal aid in Scotland, and a fresh application must be made to the Scottish Legal Aid Board. There are a number of possible routes for criminal appeals in Scotland; if the appeal being pursued requires the leave of the court, then no additional merits test will be applied by the Legal Aid Board, but if there is a right to appeal without needing permission, an interests of justice test is applied.⁵¹⁹ However, if legal aid is refused on the interests of justice ground, the court dealing with the appeal may, either at the request of the appellant or of its own motion, determine that the interests of justice do require representation and if the court takes this step then the Legal Aid Board must immediately make legal aid available to the appellant.⁵²⁰ This process mirrors the requirement in the UN Principles and Guidelines, referred to above, that:

A court may, having regard to the particular circumstances of a person and after considering the reasons for denial of legal aid, direct that that person be provided with legal aid, with or without his or her contribution, when the interests of justice so require.⁵²¹

All the jurisdictions thus provide either automatic assistance in appeals or apply an interests of justice test in sifting applications, thus complying with the European Court of Human Right's interpretation of Article 6.

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

516 *Ibidem*, Regulation 21.

517 *Legal Aid Agency Guidance on the Consideration of Defence Representation Order Applications*, p. 15.

518 The Criminal Legal Aid (General) Regulations 2013, Regulation 21.

519 Legal Aid (Scotland) Act 1986, s. 25.

520 *Ibidem*, s. 25(2A) and (2B).

521 UNODC 2012, Guideline 1(e).

3.6 Conclusions

The above comparison of state-funded assistance for criminal suspects and defendants has shown differences in the organisation of such help and in the merits eligibility tests applied. It has been seen that there is significant variation in outcomes for better-off defendants, which may be the main practical difference between the public defender schemes and criminal legal aid schemes in North-West Europe. However, the financial implications for individual defendants are not the only consequence of the choice of system. Whatever the extent of the duty to repay upon conviction, there is an important point of principle expressed through the public defender schemes: any person accused of a sufficiently serious crime is entitled to a defence, which will be paid for by the state. The fact that repayment of costs only arises after conviction is a practical commitment to the principle of ‘innocent until proven guilty’. Unlike in systems relying on criminal legal aid, no-one wrongly accused of a crime will suffer financially through having to fund their defence. Public defence attorneys, appointed by the courts irrespective of means, can also be considered an indication that representation for defendants is an integral part of the justice systems in these jurisdictions; structurally bound into the fabric of the criminal justice system as a whole.

Criminal legal aid schemes, in contrast, position defence work alongside civil legal aid. Entitlement depends on a certain level of poverty and thus may encourage a view of publicly funded criminal defence as a social welfare benefit rather than a fundamental civil right. This may result in a different public attitude to criminal legal aid clients and different public and political commitment to proper funding for the system. A general awareness that a public defender would be appointed for each individual, if ever accused of crime, seems likely to engender a more positive appreciation of the system than a perception that legal aid takes tax-payers’ money to fund the defence of a ‘criminal underclass’ who are unemployed and do not themselves pay tax. This difference in perception may be exacerbated by the fact that in the UK and Republic of Ireland, legal aid is funded by taxes (rather than social insurance payments which are also made by employers and government):

It has been argued that a system based on tax-finance, encouraging as it does the drawing of comparisons between those who pay into the system and those who receive benefits from the system, immediately raises questions of stigma and desert, particularly in the context of non-universal services.⁵²²

In addition, there may be a difference in public perception of the quality of state-funded defence lawyers: a skilled band of public defenders is expected to represent any defendant well, whereas legal aid lawyers are only for those who cannot afford to pay for a ‘better’ lawyer. In England & Wales and Scotland, criminal legal aid is not administered by the courts and this distance between

522 Byrom 2017, p. 229.

the criminal justice system and the funding of criminal defence might also be considered significant. It could be argued that the right to a defence loses symbolic power by being relegated in this manner.

As seen at the beginning of this chapter, applicable international treaties require the provision of free assistance where this is necessary in the interests of justice and all the jurisdictions under consideration could reasonably claim to base their merits test on this criterion. It is not surprising that all the jurisdictions make a connection between the interests of justice and the severity of the offence as these are closely linked concepts: the investigation and trial of a serious offence are likely to be lengthier and more complex and thus harder for a defendant to navigate fairly without legal assistance, and the potential consequences of conviction are more momentous. However, other factors may also increase the risk of a trial being unfair without representation and all the schemes allow for special reasons to be taken into account. Structurally, the tests vary, with two main types seen. In the UK jurisdictions and the Republic of Ireland, an all-encompassing interests of justice test is applied, with an inexhaustive list of factors to be considered when assessing the interests of justice provided in the legislation. The public defender schemes provide lists of circumstances in which public defenders must be appointed, with an additional catch-all provision to provide for special situations. It is therefore evident that all the schemes are implementing similar intentions through their various combinations of tests, albeit through a range of mechanisms with potentially different outcomes in specific cases.

**Case study 1:
Mikkel in Denmark, Mike in Scotland and Mikko in Finland have all been charged with assault following a fight outside a bar. All have previous convictions for assault and have been released pending trial.**

Denmark – Mikkel	Scotland – Mike	Finland – Mikko
<p>While Mikkel was in police custody, when the decision to charge him with the offence was made, the police contacted the court to inform them of the situation. As it is likely that Mikkel will receive a prison sentence if convicted, the court appointed a public defender without needing to consider whether there could be a fair trial without defence counsel. No means test was applied. If Mikkel is convicted and appeals, defence counsel will automatically be appointed as long as the appeal is not immediately dismissed. The cost of the defence must be paid by Mikkel if he is convicted, and will be waiting for him as a debt when he is released from prison.</p>	<p>Whilst in the police station under investigation, Mike received automatic legal aid and was advised by a solicitor from the duty rota. On his release on bail, he went to see a local solicitor who applied for legal aid to the Scottish Legal Aid Board (SLAB). Mike's means were assessed and, as the prosecution had decided to pursue the charge as a summary matter, the interests of justice test was applied. SLAB took into account the statutory criteria and decided that, overall, representation was necessary in the interests of justice. Mike's likely difficulty in understanding the proceedings and the likelihood of a prison sentence were significant in the decision. If Mike wishes to appeal against conviction, he will have to make a fresh application for legal aid. He will not be asked to repay any of the defence costs.</p>	<p>At the police station, Mikko refused the services of a public defender. He later changed his mind and went to see a lawyer he had used previously. Mikko is financially eligible for legal aid with a 0% contribution so the lawyer explained that it makes little difference whether they apply for her to be appointed as his public defender or apply for legal aid. Either way, the costs which in theory should be paid back on conviction will be assessed at nil due to Mikko's low means. They apply for legal aid and the application is assessed by a Legal Aid Office, which decides that as imprisonment is likely, legal aid will be granted irrespective of the other circumstances. The legal aid certificate issued will cover the case at all levels of the court hierarchy without the need for further application.</p>

4. Chapter 4: Civil legal aid decision-making

4.1 Introduction⁵²³

Civil legal aid decisions are very different in different jurisdictions, primarily for the obvious reason that the rules of eligibility for legal aid vary dramatically. Financial limits and merits tests, as well as the overall scope, are configured in myriad ways resulting in a wide variety of schemes. In addition to these substantive differences, the structure of legal aid can differ widely both in terms of delivery of services and in administration of the system.

This chapter examines one aspect of the differing administration of legal aid: the making and oversight of decisions on applications for civil legal aid. Decisions on the granting of government funded assistance at the advice level are generally taken by the acting lawyer, who may be a private practitioner or a government employee. Above this level, applications are made either to courts or to government agencies in all the jurisdictions of the Nordic countries, the United Kingdom and the Republic of Ireland. This has not always been the case, as decisions in England & Wales were until 1988 made by the Law Society,⁵²⁴ which is the professional body for solicitors in that jurisdiction. Within courts, some aspects of legal aid decisions are routinely delegated to administrative staff although final responsibility and some more complex decisions rest with the judiciary. These modes of working do not vary significantly across the courts of the jurisdictions considered in this study. There is, though, considerable difference in the distribution of decision-making responsibility within the governmental legal aid agencies. Some systems concentrate decisions within a central bureaucracy which is not involved in the delivery of legal aid services to clients, whilst others delegate decision-making to the public organisations providing casework assistance, and to a greater or lesser extent to lawyers involved in casework.

Initial grants and refusals of legal aid for representation are thus made by civil servants of one kind or another working within various public bodies

523 This chapter is partly based on the previous published work by the author: Barlow 2017a and Barlow 2017b. Barlow 2017a compares only Finland and England & Wales, and the arguments and analysis are here extended to all nine jurisdictions.

524 In that year the Legal Aid Act 1988 established the Legal Aid Board, a government quango with its own governing board.

(including courts). The processes involved in an application are markedly different, depending on whether an application must be made to a government agency or whether the court dealing with the substantive matter can also grant legal aid. However, the identity of the decision-maker may conceivably impact the content of the decision as well as the procedure for applications. Each actor within the system has different priorities due to her particular role and responsibilities; potentially conflicting perspectives such as a desire for access to justice for the individual, the need to save public money and pressure to avoid court inefficiency are all present. Particularly when considered *en masse*, decisions on legal aid have implications not only for the individual concerned but also for the public purse and for the smooth operation of the justice system as a whole.

There is no decision-maker without his own perspective, and no completely neutral viewpoint can be found. As a decision is needed, but must be acknowledged as potentially flawed due to this inherent bias, the possibility of re-examination is crucial. External review can counter the risk of inappropriate factors being taken into account in legal aid decision-making by balancing the interests of the various bodies involved in the process. This improves the chance of a proper outcome in the case under consideration and can also improve the quality of future decisions if an appropriate feedback mechanism is used. In all of the jurisdictions, such procedures are in place although they vary considerably: in Denmark the Appeals Permission Board, the body which grants leave to appeal to higher courts, also hears appeals from the Legal Aid Office of the Department of Civil Affairs; in England & Wales, Independent Funding Adjudicators drawn from the profession hear appeals and report back to the Director of Legal Aid. In Sweden, independent oversight is extended to legal aid decisions made by the courts in addition to those made by the Legal Aid Agency; all decisions can be monitored by the Chancellor of Justice who has *locus standi* to instigate appeals to the higher courts.

Before considering the review and appeals procedures, initial decision-making must be examined. The jurisdictions under consideration place initial civil decision-making responsibility with lawyers, government agencies and/or courts. These will now be considered in turn, with the government agencies sub-divided those which also provide direct legal services to clients, and those which are remote from service delivery.

4.2 Initial decision-making patterns

4.2.1 Decisions by private lawyers

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

Sweden has a distinctive approach to advice, which is available for any matter of Swedish law, to both natural persons and legal persons.⁵²⁵ Whilst the state pays for or contributes towards the cost of legal assistance at the levels of both legal advice and legal aid, it is a necessary pre-condition of legal aid that between one and two hours' legal advice on the issues has been received, unless this is clearly unnecessary or there are special reasons why legal aid should nonetheless be granted.⁵²⁶ The requirement is strictly applied and decided cases show, for example, that the applicant having already been in receipt of legal aid for a related matter⁵²⁷ or being outside the country⁵²⁸ will not result in preliminary advice being held clearly unnecessary.

Advice has been held by the Supreme Court of Sweden to be particularly meaningful in cases involving relationship breakdown and related matters, as an important stage assisting in early resolution and agreement between the parties.⁵²⁹ However, where an applicant had a learning disability⁵³⁰ or was a mother involved in proceedings brought by the state to establish paternity of her child,⁵³¹ advice was not required before legal aid could be granted. In a decision which is referred to several times in the various guidance documents, the Legal Aid Board has also emphasised that the requirement for prior advice entails at least partial payment by the client.⁵³² It is not clear from the decision what the perceived relevance of such payment is, but it is conceivable that the reasoning is the same as that concerning the minimum 2% contribution to fees in representation cases. In the preparatory documents to the 1996 Legal Aid Act, the government stressed the importance of the assisted person being aware of the costs of the help being given, through the imposition of easily understood contributions.⁵³³

The fee for advice given under the Legal Aid Act is paid by the client directly to the lawyer providing the advice, although if the client's means are low enough, part of the fee can be paid by the Legal Aid Authority upon application by the lawyer. At most half of the fee will be paid, which means that all clients

525 Legal aid for representation is not usually available in Sweden for legal persons. In the jurisdictions under consideration, it is only in Denmark that legal persons have a general right to apply for legal aid, although in exceptional circumstances they may also do so in Norway, England & Wales and the Republic of Ireland.

526 Rättshjälpslag, 1996, 2 §.

527 RH 1998:25.

528 Rättshjälpsnämnden 363-1998.

529 NJA 1999 s.149 I.

530 Rättshjälpsnämnden 46-2001.

531 Rättshjälpsnämnden 682-1998.

532 Rättshjälpsnämnden 216-2000.

533 Prop. 1996/97:9 s. 160-161.

(with the exception of indigent minors, for whom the Authority will pay the whole advice fee) must pay at least half an hour's lawyer's fee before entering the legal aid scheme. At 2018 rates, this amounts to a payment of at least 680 Swedish kronor. However, in practice lawyers do not always insist upon payment of the fee and some municipalities may pay the advice fee from their social security budget if a client cannot afford to pay. As advice is available on all areas of law and to all clients regardless of their economic situation, the only decision needed at this point is whether to reduce the fee by 50%. This decision is made by the lawyer,⁵³⁴ following the guidelines drawn up by the National Courts Administration (Domstolsverket).

In Denmark, civil legal aid is divided into two types: legal advice (retshjælp) and legal representation (fri process). The Administration of Justice Act sets out three stages of legal advice.⁵³⁵ Step 1 provides, in theory, free oral advice for anyone on all subjects and is expected to cover the legal issues in the case and also the economic and practical matters which will enable the client to make an informed decision about whether to continue with the case.⁵³⁶ Although the Act states that this advice is 'granted' by the Minister of Justice, there is no duty on lawyers to provide such advice and no payment scheme is provided to reimburse lawyers if they do so. Generally, step 1 advice is provided through voluntary clinics (which are usually open only a few hours per week, staffed by local lawyers) or Law Centres, many of which receive grants from the government.⁵³⁷ However, coverage is far from complete.

Step 2 advice, which is defined as assistance including letter-writing, and step 3 (negotiation) are also 'granted' but these types of help are remunerated, by way of a fixed fee of which the client pays (in theory) respectively 50% or 25%.⁵³⁸ Step 2 advice includes applications for legal aid for representation, drafting of divorce settlements, simple wills and marriage contracts.⁵³⁹ Advice at step 3 should only be undertaken if the lawyer reasonably believes that there is a possibility of resolving the dispute by agreement.⁵⁴⁰ In practice, there are very few lawyers providing legal aid at levels 2 and 3, due to concerns about the low level of fee and the difficulties of enforcing the fee against clients. It may be that work is being carried out *pro bono* instead at this level to avoid the bureaucracy of claiming small fees. However, where advice at levels 2 and 3 is provided, it is the lawyer carrying out the work who must ensure that the matter falls within the scope of the scheme and that the client is financially eligible. If legal aid is provided through incorrect application of the rules, the lawyer's request for payment to the Department of Civil Affairs (Civilstyrelsen) will be rejected.

534 Rättshjälpslag, 1996, 4 §.

535 Retsplejeloven, 2017, § 323(1).

536 BEK nr 1463 af 11/12/2017, § 5.2.

537 Retsplejeloven, 2017, § 324.

538 *Ibidem*, § 323(6).

539 BEK nr 1463 af 11/12/2017 § 5.3.

540 *Ibidem*, § 5.4.

In the UK, the decision to provide at least initial advice under legal aid funding is always taken by the lawyer from whom the advice has been sought. As seen in Chapter 3 above, Scotland divides legal aid into three categories: the familiar advice class (called Advice and Assistance) and representation but also an intermediate category of Assistance by Way of Representation (ABWOR). The category which covers representation at court is simply referred to as 'legal aid'. Non-criminal work in Scotland is further divided into civil and children's Advice and Assistance or legal aid. The Law Society has recommended that consideration be given to merging these distinct categories into a single grant system,⁵⁴¹ and has argued more generally for simplification, stating that "court users may have difficulty understanding what type of legal assistance is available [...] and] there are frequent disagreements between solicitors and [the Scottish Legal Aid Board] over interpretation of legal assistance regulations".⁵⁴² This call is echoed in the 2018 Independent Strategic Review, which suggests a new statutory framework with a single legal aid type.⁵⁴³

Currently, in civil and children's cases (as well as in criminal matters), Advice and Assistance is granted by the solicitor giving the advice,⁵⁴⁴ subject to a financial eligibility test and to the requirement that assistance can only be given in a matter of Scots law.⁵⁴⁵ Not all matters on which a client asks advice are necessarily legal questions and the Scottish Legal Aid Board online handbook for civil legal aid lists the types of matters which will be accepted as legal and about which a solicitor can therefore give advice under civil Advice and Assistance. The list can be amended by the Board and suggestions for additional categories can be made by solicitors directly to the Board or via the Law Society of Scotland.⁵⁴⁶ ABWOR is administered within the same scheme as Advice and Assistance and the statutory basis is the same section of the Legal Aid (Scotland) Act.⁵⁴⁷ As a result, ABWOR is also granted by the solicitor.

In England & Wales, as part of the contraction of legal aid services following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), access to a legal aid solicitor in some subject areas is only possible by referral through the government Civil Legal Advice telephone helpline ('Gateway work').⁵⁴⁸ Solicitors are not entitled to take clients other than by such a referral in debt, discrimination or education cases unless they are exempted.⁵⁴⁹ The Gateway was introduced to increase access, provide savings and maintain

541 Law Society of Scotland 2014, p. 34.

542 *Ibidem*, p. 4.

543 Evans 2018, p. 51.

544 Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996, Regulation 8.

545 Legal Aid (Scotland) Act 1986 s.6.

546 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part III para. 1.15.

547 Legal Aid (Scotland) Act 1986 s.6.

548 The Civil Legal Aid (Procedure) Regulations 2012, Part 2. This is in addition to the removal of many areas from scope altogether (see Chapter 5).

549 Minors, detainees and those who have already been assessed within the last 12 months on the same matter. The Civil Legal Aid (Procedure) Regulations 2012, Regulation 20.

quality, but an independent assessment of its operation has suggested that due largely to low awareness of the service, “at least in some respects, the Gateway may have constituted a barrier to access to justice”, that savings have not materialised and that quality is of concern.⁵⁵⁰

Once a Gateway referral to a solicitor has been made, or in non-Gateway case types, the supplier may provide civil legal aid under three main categories: Legal Help (advice, correspondence, negotiation); Help at Court (help and advocacy at a specific hearing but without formal representation) and Legal Representation (full conduct of litigation including advocacy). It will be noted that these divisions are essentially the same as in Scotland, although differently named. In the first two categories, the solicitor assesses the financial eligibility of the client and decides whether the case is covered by their contract. Many areas of law are excluded from scope (see Chapter 5). A claim for payment is made at the end of the case and, if the Legal Aid Agency on assessing the claim decides that the case was in fact not eligible for funding, the solicitor will not be paid.

The classification of cases is slightly different in Northern Ireland, with the categories being Advice and Assistance, Representation Lower Courts and Representation Higher Courts. Advice and Assistance is granted by the solicitor providing the service,⁵⁵¹ who applies any relevant financial eligibility test and takes responsibility in civil matters for ensuring that the subject-matter is not excluded. The self-grant by the solicitor enables advice and assistance up to a value of £88,⁵⁵² after which an application for extension must be made to the Legal Services Agency before any further work is carried out. The extension will only be granted if it is considered reasonable to incur the further expenditure, and will indicate the additional amount awarded.⁵⁵³

In Norway, legal aid for advice matters is not always granted by the acting lawyer. The structure is built through onward delegation of powers granted by statute to the Ministry of Justice.⁵⁵⁴ In all cases the power to decide applications for free legal advice has been delegated by secondary legislation to the County Governors⁵⁵⁵ and further, in priority cases (both means-tested and non-means tested) the power can also be exercised by the applicant’s lawyer.⁵⁵⁶ As a result, at the level of advice, priority cases are decided by the lawyer providing the service and other matters are forwarded to the County Governor for decision. However, it should be noted that the lawyer is only authorised to award free legal advice to the level of the fixed fee; if further advice is required the County Governor must authorise the extension.⁵⁵⁷ The lawyer is not, either, authorised

550 Public Law Project 2015.

551 Access to Justice (Northern Ireland) Order 2003, s.14(2)(b).

552 Approximately 98€.

553 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 32.

554 Rettshjelploven, 1980, § 13.

555 FOR-2005-12-12-1443, § 3-1.

556 *Ibidem*, § 3-2.

557 *Ibidem*, §§ 3-4 and 3-5.

to grant dispensation from the means test and cases where this exception is sought must be decided by the County Governor. In the hope of encouraging consistency and quality of decision-making by the County Governors, the Civil Affairs Authority publishes useful appeal decisions online.⁵⁵⁸

The Republic of Ireland and Finland both restrict the supply of legally-aided services such that they are very largely provided by lawyers employed by the state in, respectively, Law Centres and Legal Aid Offices. Decisions made by these lawyers are dealt with in the following section.

4.2.2 Decisions by government agencies

4.2.2.1 Agencies directly delivering services to clients

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. The main governing legislation is in two parts: the Legal Aid Act of 2002⁵⁵⁹ and the State Legal Aid and Public Guardianship Districts Act⁵⁶⁰ of 2016. Responsibility for legal aid at government level sits with the Ministry of Justice and a small team (4 or 5 dedicated legal aid staff, plus assistance from others) oversees the system. However, the Ministry has no role in legal aid decision-making and even training on legal aid grants, arranged by the Ministry, is delivered by Legal Aid Office lawyers. There are 23 Public Legal Aid Offices around the country, divided into six districts, each with a director. As described in Chapter 3, a working group of senior Legal Aid Office staff has issued recommendations for best practice in decision-making, published online by the Ministry in a Legal Aid Handbook which has advisory status.⁵⁶¹

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 (see Chapter 2 for more detail); 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.⁵⁶² Each legal aid office will make its own decisions on the cases which it is handling, but there is an allocation system for applications made electronically by private practitioners. These are dealt with by a smaller number of Legal Aid Offices, on a rotating allocation, with the result that there is not necessarily any geographical proximity between the lawyer conducting the case and the Legal Aid Office deciding the application. A public legal aid attorney at a Legal Aid Office may not make the decision on an application for legal aid if he represents

558 At www.lovddata.no. A subscription is required to access the case decisions.

559 Rättshjälpslag, 2002.

560 Lag om statens rättshjälps- och intressebevakningsdistrikt, 2016.

561 Oikeusavun käsikirja 2013.

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

the other party in the case.⁵⁶³ In order to reduce the risk of conflicts of interest between Legal Aid Offices, the district director plays no part in individual decisions on legal aid or in individual case management.⁵⁶⁴

The Republic of Ireland also grants and delivers legal aid mainly through a single body, the Legal Aid Board, which is an independent publicly funded organisation. The Board is appointed by the Corporate Services Division of the Ministry of Justice and Equality, to whom it also reports. Civil legal aid was developed much later than criminal legal aid in the Republic of Ireland and despite the recommendation of a government committee that such a scheme should be set up,⁵⁶⁵ it was only after the Irish government lost the *Airey v. Ireland*⁵⁶⁶ case before the European Court of Human Rights that this was done.⁵⁶⁷ Civil legal aid was introduced in 1979 on an executive basis and was eventually put on a statutory footing nearly two decades later with the Civil Legal Aid Act 1995, which established the Legal Aid Board.

Unlike in Finland, though, 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, certificates are to be granted by the Board.⁵⁶⁸ Many decisions on the grant of legal aid are made by the Head Office, as will be seen below, but some are within the remit of Law Centre solicitors. Law centres have delegated authority to: grant legal advice given by a law centre solicitor;⁵⁶⁹ refuse legal aid for any case on financial grounds;⁵⁷⁰ grant legal aid for clients who will be represented by a Law Centre solicitor in certain family cases commencing before the District Court⁵⁷¹ 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, as detailed in Chapter 2).⁵⁷² 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.

In types of legal aid in the Republic of Ireland in which decision-making is not delegated to the Law Centres, it is exercised by the Corporate Services team based in Cahirciveen, County Kerry. If the solicitor advising the client at the Law Centre believes that the person is entitled to a legal aid certificate,

563 *Ibidem*.

564 RP 26/2016 rd, 11.

565 Committee on Civil Legal Aid and Advice 1977.

566 *Airey v. Ireland*, 1979.

567 See a discussion of the link in Bodnick 2002, pp. 432-433.

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

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

570 *Ibidem*, Part 3, p. 3-2.

571 *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.

572 *Ibidem*, Part 3, p. 3-4.

she submits an application internally and provides her recommendation as to whether a certificate should be granted.⁵⁷³ This is “of critical importance ... as the solicitor is best placed to offer a view on the matter”⁵⁷⁴ but the decision is taken centrally by the Corporate Services team.⁵⁷⁵ Whichever arm of the Legal Aid Board makes the decision, guidance is provided by a detailed Circular on Legal Services⁵⁷⁶ which expands upon the legislation and reminds decision-makers of their general duties under, for example, administrative law.⁵⁷⁷ The Republic of Ireland thus divides the responsibility for decision-making in civil legal aid representation cases between practising lawyers and centralised decision-makers, but within the same quasi-governmental agency.

4.2.2.2 Agencies not conducting client casework

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.⁵⁷⁸ The precise nature of the bodies varies:

- In England & Wales, the Legal Aid Agency is an executive agency of the Ministry of Justice. Previously the legal aid scheme in the jurisdiction has been in the hands of the Law Society, then the Legal Aid Board (a government quango) and the Legal Services Commission (an executive non-departmental public body) from 2000-2013.⁵⁷⁹ The Legal Aid Agency is headed by an executive director who has always to date also been designated as the Director of Legal Aid Casework, the statutory post-holder with responsibility for legal aid decisions.
- The Northern Ireland Legal Services Agency is a body of the Northern Ireland Executive, which is the administrative branch of the devolved legislature for Northern Ireland. The Agency was established in April 2015 as an executive agency of the Department of Justice and its Chief Executive has been since the inception of the Agency also the Director of Legal Aid Casework, a statutory post within the Department of Justice.⁵⁸⁰ The Scottish Legal Aid Board is slightly further removed from government, being an executive non-departmental public body of the Scottish Government. Such public bodies are distinct from executive agencies of the Scottish Government, are not considered to be part of the Government and their staff are not civil servants. However, Board members are appointed by government Ministers and the Board reports

573 *Ibidem*, Part 3, p. 3-9.

574 *Ibidem*, Part 5, p. 5-6.

575 *Ibidem*, Part 5, p. 5-2. See also Value for Money and Policy Review of the Legal Aid Board 2011, para. 2.16.

576 Legal Aid Board Circular on Legal Services 2017.

577 *Ibidem*, Part 5, p. 5-3.

578 There is a minor exception in respect of delegated power to solicitors to grant emergency legal aid in England & Wales, see below section 5.7.

579 For more history of the English & Welsh system see Hynes and Robins 2009.

580 Legal Aid and Coroners' Courts Act (Northern Ireland) 2014, s.2.

to the Scottish Government's Justice Directorate. The recent Independent Strategic Review proposed that the Board be replaced by an independent public interest body, at a still greater distance from government.⁵⁸¹

Despite these 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.

In England & Wales, in civil Legal Representation cases, an application for a legal aid certificate must be made at the outset of the case to the Legal Aid Agency who will make the decisions on both financial eligibility and merits. The certificate will indicate the proceedings which are covered, a financial ceiling and potentially a particular limitation such as obtaining a barrister's opinion. Decisions are made by caseworkers who are not necessarily legally qualified.

Responsibility for grants⁵⁸² and amendments⁵⁸³ of civil legal aid certificates in Northern Ireland is given by legislation to the Director of Legal Aid Casework. As seen above, this role rests for the time being with the Chief Executive of the Legal Services Agency, which thus has responsibility for considering applications for civil legal aid as well as assessing and making payments for civil and criminal legal aid bills.⁵⁸⁴ When assessing applications, the Agency must apply the legislative tests and follow guidance issued by the Department of Justice.⁵⁸⁵ Guidance is issued on a topic-by-topic basis as needed and does not cover all aspects of the assessment, but when issued is binding on the Agency.

In the same vein, in Scotland, legal aid for representation is granted by the Scottish Legal Aid Board in all types of case, including all civil and children's cases. The procedures and criteria for applications are set out in regulations⁵⁸⁶ and, as for criminal cases, guidance on how the regulations will be interpreted in practice is provided in the online handbooks published by the Legal Aid Board.⁵⁸⁷

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.⁵⁸⁸ Applications for legal aid are made freeform in writing,

581 Evans 2018, p. 93.

582 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 15(2).

583 *Ibidem*, Regulation 18.

584 Legal Services Agency Northern Ireland 2015, p. 7.

585 The Guidance is issued under powers contained in Article 14 (2A) and (2B) of the Access to Justice (Northern Ireland) Order 2003 and section 3 of the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014.

586 Notably the Civil Legal Aid (Scotland) Regulations 2002, the Legal Aid (Scotland) (Children) Regulations 1997 and the Criminal Legal Aid (Scotland) Regulations 1996.

587 Available at <http://www.slabb.org.uk/providers/handbooks/>.

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

with supporting documentation required by secondary legislation,⁵⁸⁹ to the Ministry. The application is 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 (Statens sivilrettsforvaltning), a subordinate agency of the Ministry of Justice and Public Security. The Civil Affairs Authority 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. This support includes the publication of a Circular on Legal Aid⁵⁹⁰ which contains detailed non-binding guidance on the application of the law, including information on useful caselaw.

This allocation of decision-making powers comes about despite the situation on the face of the legislation. Applications for free legal representation are, according to the statute, decided by the Ministry of Justice,⁵⁹¹ but as with free legal advice (see above) the power is delegated by secondary legislation. Legal aid in non-priority cases and in cases where exemption from the financial eligibility requirement has been requested are to be decided by the County Governor.⁵⁹² Norway is divided into 428 administrative municipalities, which are gathered into 18 counties, each of which has a County Governor who is a representative of the King and Government. As well as acting as an appeal body against municipal decisions, the County Governors also have some specific duties, amongst them the granting of much civil legal aid. The legal aid staff in the County Governors' offices are very aware of the need to maintain consistency in decision-making, and to this end hold meetings and conferences to discuss and agree a common approach. The division of cases between the courts and the County Governors is not always straightforward and mistakes in selection of the proper recipient of an application for legal aid can, anecdotally, cause problems including delay for claimants.

589 Regulation 616/2012, Article 2.

590 SRF-1/2017.

591 Rettshjelploven, 1980, § 19.

592 FOR-2005-12-12-1443, § 4-2. This covers *inter alia* any matters which will not come before a court.

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. The Administration of Justice Act defines certain categories of case for which legal aid will be granted or refused by the court dealing with the substantive matter,⁵⁹³ and provides that all other matters will be decided by the Minister of Justice.⁵⁹⁴ In practice, decisions are made by the Legal Aid Office within the Department of Civil Affairs, which is staffed largely by law graduates, but not by lawyers currently carrying out casework of their own. There is an optional application form for legal aid, but applications can be in any form, even oral. However, in order to satisfy the Legal Aid Office that the conditions for grant of legal aid have been met, it is generally considered necessary to provide a comprehensive summary of the case and evidence. This provides a conundrum for lawyers conducting cases: a well-prepared application has a greater chance of success but if legal aid is not granted, the time spent preparing the application will not be compensated financially. Decision-makers have access to a book written by the Head of the Legal Aid Office which gathers together legislation and practice in an accessible format;⁵⁹⁵ the book is not binding but is a useful tool.

In Sweden, as will be seen below, most cases are decided by the courts. The Legal Aid Authority (Rättshjälpsmyndigheten), which is a relatively small department based in Sundsvall, 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.⁵⁹⁶

4.2.3 Decisions by court

Sweden, Denmark and Norway all rely heavily on courts for assessing applications for civil legal aid, in addition to the legal aid agencies or other public bodies which make decisions on some types of application.

The strongest reliance on courts as legal aid decision-makers is in Sweden, where the courts make the bulk of decisions on applications. The only exception is in situations where court proceedings have not been issued and are not anticipated, in which case, as seen above, the Legal Aid Authority makes the decision. 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.⁵⁹⁷ The court makes the decision taking into account the advisory guidance contained in the online handbooks issued by the National Courts Administration and in decided cases,

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

594 *Ibidem*, § 328(5).

595 Mavrogenis 2012.

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

597 Rättshjälpslag, 1996, 39 §.

which are also collated into handbooks.⁵⁹⁸ A grant of legal aid must be given in writing⁵⁹⁹ and a refusal must be accompanied by reasons.⁶⁰⁰ These decisions are independent of the Legal Aid Authority but grants of legal aid must be reported to them by the courts.⁶⁰¹ The reporting requirement also applies when a court case is instituted in a matter for which legal aid has been granted by the Legal Aid Authority,⁶⁰² which is of course not the usual situation as the Legal Aid Authority grants legal aid in cases in which court proceedings are not anticipated. Decisions on cessation or withdrawal of legal aid by the courts must also be notified to the Agency.⁶⁰³ At the conclusion of a court case the outcome of the proceedings and the court's decision on the legal aid costs to be paid must be sent to the Legal Aid Authority for payment of the bill.⁶⁰⁴

In Denmark, the types of cases for which legal aid will be dealt with by the courts are prescribed in legislation,⁶⁰⁵ 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, as will be seen below in Chapter 6, 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 (see further detail in Chapter 6 below). 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 advice⁶⁰⁶ and free legal aid.⁶⁰⁷ Free legal representation in the Supreme Court is always decided by that court and is not subject to a means test,⁶⁰⁸ but other courts can only grant free legal representation in non-means tested priority cases⁶⁰⁹ and also, by delegated authority, in means tested priority cases.⁶¹⁰ Other cases, which have a more involved merits test, are decided by the Norwegian regional government authorities (see above).

598 Renfors and Arvill 2012.

599 Rättshjälpsförordning, 1997, 12 §.

600 Rättshjälpslag, 1996, 39 §.

601 DVFS 2012:15, 17 §.

602 *Ibidem*, 16 §.

603 *Ibidem*, 18 §.

604 *Ibidem*, 19 §; Rättshjälpsförordning, 1997, 30 § places responsibility for payment on the Legal Aid Authority.

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

606 Rettshjelploven, 1980, § 11.

607 *Ibidem*, § 16.

608 *Ibidem*, § 18.

609 *Ibidem*, § 19.

610 FOR-2005-12-12-1443, § 4-1.

No civil legal aid decision-making is undertaken by courts in Iceland, Finland, the Republic of Ireland, Scotland, Northern Ireland or England & Wales.

4.2.4 Legal aid termination decisions

In addition to granting or refusing legal aid when a claim is made, decision-making authorities also may have the power to terminate legal aid. Common situations where this may be deemed appropriate are if the applicant's financial circumstances have improved, if it is discovered that the grant of legal aid was made on incorrect information or if the case is no longer eligible on merits grounds, even if it was correctly granted.

The jurisdictions of the UK, and the Republic of Ireland, in their legal aid legislation specify the circumstances in which a certificate of legal aid can be terminated and divide these circumstances into those where the termination will have only future effect and those with retrospective effect. Suspension is also possible in some circumstances.

Under the Civil Legal Aid (Scotland) Regulations 2002, the Scottish Legal Aid Board has the power to suspend or terminate civil legal aid after it has been granted. Legal aid can be suspended for up to 90 days if, *inter alia*, the solicitor named in the legal aid certificate has ceased to act for the client, the client has failed to provide information requested by the Board or while the Board is considering whether to terminate legal aid.⁶¹¹ Legal aid can be terminated if a change of circumstances means that the assisted person is no longer entitled to it (either financially or because they no longer meet the merits criteria),⁶¹² if legal aid was granted in error or if the assisted person has required the proceedings to be conducted unreasonably.⁶¹³ If the legally aided person has in their application knowingly made an untrue statement regarding either finances or other aspects then the Board can terminate the legal aid such that the assisted person will be deemed never to have been assisted and will be liable to repay any sums spent on his case up to that point.⁶¹⁴

In the Republic of Ireland, the situation is very similar. Legal aid can be terminated if the recipient is no longer eligible, has failed to comply with a condition of the grant or has behaved unreasonably in respect of the conduct of the case.⁶¹⁵ If the assisted person has made an untrue statement or failed to disclose relevant information, the certificate may be revoked, in which case the formerly assisted person becomes liable for costs incurred.⁶¹⁶ However, if the individual manages to persuade the Legal Aid Board that the error arose even

611 The Civil Legal Aid (Scotland) Regulations 2002, Regulation 29.

612 *Ibidem*, Regulation 30.

613 *Ibidem*, Regulation 31.

614 *Ibidem*, Regulation 32.

615 Civil Legal Aid Regulations 1996, Regulation 9(3).

616 *Ibidem*, Regulation 9(4).

though she had used due diligence in her application, the certificate may be terminated rather than revoked, thus avoiding the costs liability.⁶¹⁷

In Northern Ireland, the Legal Services Agency may suspend a legal aid certificate in certain circumstances, mostly relating to concerns about financial eligibility.⁶¹⁸ Terminations of legal aid are divided into two categories: discharge and revocation. A certificate may be discharged by the Agency in a number of situations, including arrears of financial contributions, failure to instruct the acting solicitor, unreasonable conduct of the case or relevant change in circumstances.⁶¹⁹ The courts may also discharge a certificate, although in a narrower range of circumstances. A legal aid certificate can also be revoked by the Agency⁶²⁰ or the court⁶²¹ if it becomes apparent that the applicant made a false statement in their application or if they refuse to cooperate with a financial assessment. Further, a certificate can be revoked if the beneficiary has failed to attend for an interview or to provide information when so required.⁶²² Discharge has the effect of ceasing the right to assistance through legal aid⁶²³ but revocation has the more serious consequence, as in the Republic of Ireland, that the certificate is deemed never to have been granted and the previously assisted person will become liable for all the costs incurred under the certificate.⁶²⁴ Equivalent rules apply in England & Wales.⁶²⁵ These two jurisdictions have, as can be seen, slightly harsher rules than Scotland and the Republic of Ireland, as an assisted person can become retrospectively liable for the legal costs incurred if they fail to attend an interview or to provide requested information.

The Swedish Legal Aid Act details the provisions for the cessation of legal aid for economic and other reasons, and also addresses the issue of whether costs must be repaid by the legal aid recipient.⁶²⁶ The authority with the power to grant legal aid in the case (the court or Legal Aid Authority) can terminate legal aid if: the required financial contributions have not been paid; the claimant has provided incorrect information which was decisive in the grant of legal aid; the claimant intentionally or grossly negligently provided incorrect information for the purpose of obtaining legal aid or a lower contribution; the economic circumstances of the applicant have changed; the legal aid lawyer is dismissed without another being appointed; or it is no longer reasonable for the state to provide legal funding in view of the merits test (see Chapter 6 below). Whilst the statute simply provides that upon cessation of legal aid,

617 *Ibidem*.

618 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 19.

619 *Ibidem*, Regulation 22.

620 *Ibidem*, Regulation 26.

621 *Ibidem*, Regulation 27.

622 *Ibidem*, Regulation 26.

623 *Ibidem*, Regulation 24.

624 *Ibidem*, Regulation 28.

625 The Civil Legal Aid (Procedure) Regulations 2012, Regulation 42.

626 Rättshjälpslag, 1996, 32 §-37 §.

the assisted person must reimburse the state's costs at a reasonable level,⁶²⁷ the online handbook clarifies that repayment will not be sought where the reason for termination is that the lawyer has ceased to act or the merits assessment has changed. Where the contribution has not been paid, it is only this sum which will be sought, but in the remaining situations all the legal aid costs will be recovered from the assisted person.⁶²⁸

In Denmark, the legislative provisions are less detailed; legal aid can be withdrawn if the grounds on which it was granted are found not to have existed or if they cease.⁶²⁹ The withdrawal of legal aid is not retroactive and the lawyer will be entitled to reimbursement for the work up to the date of withdrawal. However, the client may be required to refund the costs of the case to the authorities. No guidance is given as to the circumstances in which this should occur, but the Appeals Permission Board (Procesbevillingsnævnet) has confirmed that recovery of costs is lawful.⁶³⁰ Norwegian legal aid legislation only provides for cessation of legal aid and recovery of costs from the assisted party in circumstances where that person's economic circumstances have improved.⁶³¹

In Finland, legal aid can be either amended or terminated by either the Legal Aid Office or by the court dealing with the substantive matter if the circumstances change or if it becomes apparent that legal aid should never have been granted.⁶³² However, the Supreme Administrative Court has ruled that this power must not be exercised by the courts so as to reduce access to legal aid unless the decision to grant was plainly unlawful. The case concerned the termination of legal aid granted to a child whose parents were acting on the child's behalf in the Administrative Court. As the Legal Aid Act does not explicitly state whether legal aid can be granted to a child in these circumstances, the court was wrong to terminate the grant of legal aid.⁶³³ If legal aid is terminated, a decision is made as to whether the assisted person must reimburse all or any of the costs expended until the point of termination. As with other legal aid decisions of Legal Aid Offices, termination and amendment decisions can be reconsidered by the court.

As can be seen, the decision-makers for termination of legal aid are in general the same as the decision-makers for grants of legal aid, with the exception that in Northern Ireland and Finland, courts can terminate, but do not have the power to grant, civil legal aid.

627 *Ibidem*, 35 §.

628 Domstolsverkets handböcker, Rättshjälp, 19.2.1.

629 Retsplejeloven, 2017, § 331(7).

630 Mavrogenis 2012, p. 196.

631 Rettshjelploven, 1980, § 8.

632 Rättshjälpslag, 2002, 16 §.

633 HFD:2017:188.

4.3 Appeals patterns⁶³⁴

4.3.1 Court oversight of court decisions

Having examined the initial decision-making structures, attention can now be given to the review and appeal mechanisms. In order to consider the effectiveness of an appeal in counteracting potential inherent bias in the initial decision, it is useful to group appeal mechanisms according also to the nature of the initial decision-maker whose determination is being challenged.

In North-West Europe, 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.⁶³⁵

4.3.2 Court oversight of bureaucratic decisions

In a small group of situations, legal aid decisions made by civil servants can be appealed to court. The most straightforward example of this is Finland. Refusals of legal aid can be submitted to court for ‘reconsideration’⁶³⁶ in a specific process outside the normal appeal process for administrative decisions.⁶³⁷ Under Finnish administrative law, the Administrative Court is charged with oversight of administrative decisions but in the preparation of the current legal aid legislation it was proposed that this may not always be the best venue for a legal aid reconsideration as there may be a court with direct knowledge of the substantive case for which legal aid is sought, which would be better placed to make a well-informed legal aid decision.⁶³⁸ Thus, if there is a court already dealing with the substantive matter or with jurisdiction in the case, that court will hear the renewed legal aid application. If the substantive matter is not one which is within court jurisdiction, the renewed application will be dealt with by the Administrative Court.⁶³⁹ If the Administrative Court overturns a refusal of legal aid by the Legal Aid Office, the Legal Aid Office cannot further appeal the decision.⁶⁴⁰

Within the jurisdictions under consideration, this is the only general right of appeal to court from administrative legal aid decisions. Elsewhere, the possibility

634 See Barlow 2017b.

635 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.

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

637 ‘Besvär’.

638 RP 82/2001 rd, 3.2.4.

639 Rättshjälpslag, 2002, 24 §, para. 2. Further appeals against Administrative Court reviews of Legal Aid Office decisions and appeals in relation to substantive matters which can only be appealed to the Supreme Administrative Court can be taken to the latter court, with leave.

640 HFD:2004:56

is very limited. In Sweden, in immigration cases, Public Attorneys are appointed by the Migration Agency,⁶⁴¹ which also processes immigration and asylum applications and from which appeals can be made to the Immigration Courts,⁶⁴² which are specialist Administrative Courts. Scotland permits an appeal to court against a refusal of legal aid to conduct proceedings (which would be judicial review 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.⁶⁴³ 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.

It should be remembered that decisions on applications for legal aid are administrative decisions and, as such, the possibility of review or appeal can be expected to follow the pattern for the exercise of administrative power in general in a jurisdiction. This is indeed the case broadly speaking but some modifications are apparent, for example the situation described above for Finland. However, it is the norm for administrative decisions to be appealable to court in Finland overall, and thus the same possibility for legal aid decisions, albeit adapted somewhat, is not out of keeping.

In the jurisdictions of the UK, and in the Republic of Ireland, the possibility of court oversight of administrative decisions is very limited across all areas, due to the application of the rule of separation of powers as understood there. When a power is conferred by statute upon a Minister or a public body, inherent in the grant is "the power to decide freely whether rightly or wrongly, without liability to correction, within the area of discretion allowed by the law".⁶⁴⁴ Thus, as a matter of political principle, reviews of decisions are generally only carried out internally in the body to which the decision-making power has been granted, as will be seen below. However, if a decision may have strayed outside the area of discretion allowed by the law, the courts have an important role to play as it is the role of the courts, under separation of powers, to ensure that the other arms of government act lawfully, and such a decision would be unlawful. Court oversight is exercised through 'judicial review', a specific type of action discussed further in Chapter 8 below. Judicial review is a possibility in legal aid decisions, because of their nature as administrative decisions, but it should not be confused with a general right of appeal to court. The nature of judicial review as a remedy is such that a challenge can be made to the lawfulness of a policy or of secondary legislation, as well as to the lawfulness

641 Utlänningslag, 2005, Chapter 18.

642 *Ibidem*, Chapter 14, 8 §.

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

644 Wade and Forsyth 2014, p. 207.

of the decision in a particular case.⁶⁴⁵ It should furthermore be noted that there are barriers to bringing judicial review in England & Wales, in particular difficulties in obtaining legal aid to fund cases, which can lead to a suspicion that government is attempting to reduce challenges to their legal aid decisions. As Moore and Newbury note:

If the state has latterly reduced financial support for the most vulnerable in our society, the decision to limit people's access to judicial review of these life-changing decisions seems designed to entrench the resulting social inequalities. Add to this that the recent reforms have involved the Lord Chancellor having greater oversight of legal aid provision, and the argument that legal aid has become an instrument of the state becomes all the more persuasive.⁶⁴⁶

Judicial review is thus not equivalent to a right of appeal to court against legal aid decisions of government bodies.

4.3.3 Bureaucratic oversight of bureaucratic decisions

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 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;⁶⁴⁷ 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,⁶⁴⁸ which was originally established for hearing requests for leave to appeal to higher courts but gained legal aid jurisdiction in addition in 2007. When sitting as the appeals instance for legal aid, the Board, which is appointed by the Minister for Justice, consists of a High Court Judge, a District Court Judge and a lawyer.⁶⁴⁹ 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 according to the division described above. The remainder of applications are decided by the Legal Aid Authority, a public authority within the Department of Justice. Appeals against refusals of legal aid by the Legal

645 See e.g. *R (on the application of Ben Hoare Bell Solicitors and others) v. The Lord Chancellor*, 2015 and *IS (By the Official Solicitor as Litigation Friend) v. Director of Legal Aid Case Work*, 2015.

646 Moore and Newbury 2017, p. 2.

647 Retsplejeloven, 2017, § 328(5).

648 *Ibidem*, § 328(5).

649 *Ibidem*, Chapter 1a.

Aid Authority can be made to the Legal Aid Board (Rättshjälpsnämnden),⁶⁵⁰ 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 Appeal⁶⁵¹ 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 further.⁶⁵² 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. There is also a difference in the transparency of decision-making, which will be discussed below.

Legal aid decisions of the County Governor in Norway are subject to appeal to the Ministry of Justice;⁶⁵³ in practice the Civil Affairs Authority. Such appeals are to be dealt with according to the provisions of the Public Administration Act and are not subject to any further appeal.⁶⁵⁴ There is thus no possibility of a judicial appeal of a Norwegian legal aid decision unless the original decision was also taken judicially. 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.⁶⁵⁵ If the decision is still not accepted, a further appeal is possible in some cases. Following recent legislation, an independent appeal panel is available to hear appeals against refusal of legal aid for representation in the higher courts.⁶⁵⁶ The panel consists 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. There are a number of categories of decision which are not capable of appeal, including: extension of advice and assistance funding; refusal of an emergency certificate; financial eligibility decisions; exceptional funding decisions and statutory charge determinations.⁶⁵⁷ Additionally, decisions on civil legal services for representation in the lower courts are excluded and thus the only possible

650 Rättshjälpslag, 1996, 44 §.

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

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

653 Rättshjelploven, 1980, § 26.

654 *Ibidem*.

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

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

657 *Ibidem*, Schedule.

challenge to such decisions is review by the Legal Services Agency. However, in 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.⁶⁵⁸

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.⁶⁵⁹ Adjudicators hear appeals against refusals or withdrawals of civil legal aid⁶⁶⁰ and if the decision is that the original decision was unlawful or unreasonable the Legal Aid Agency must reconsider the decision.⁶⁶¹ Although the adjudicator's view is only binding in certain circumstances,⁶⁶² the Legal Aid Agency does usually follow the recommendations. Unless the Legal Aid Agency's new decision raises novel points which can lead to a second appeal to an adjudicator, this is the final appeal stage for civil legal aid. Appeals in high cost or complex hearings may be heard by a panel of adjudicators, known as the Special Controls Review Panel,⁶⁶³ whose decisions are only binding if they concern prospects of success.⁶⁶⁴ There is no possibility of judicial appeal in civil legal aid cases. Again, as in Northern Ireland, adjudicators are not employees of the Legal Aid Agency and are as such independent. However, the powers of the 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,⁶⁶⁵ either centrally or through delegated powers at the Law Centres. A negative decision can be reviewed⁶⁶⁶ internally by the Board, in theory by the original decision-maker but in practice by a more senior decision-maker.⁶⁶⁷ If the review is unsuccessful, an appeal may be made to a committee of Board members,⁶⁶⁸ consisting of a chairperson and four other members of whom two were practising barristers or solicitors prior to their appointment as Board members. There is no appeal from this decision. The placing of power

658 *Ibidem*, Regulation 27.

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

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

661 *Ibidem*, Regulation 46.

662 *Ibidem*, Regulation 47.

663 The Funding & Costs Appeals Review Panel Arrangements 2013, paragraph 1 and The Civil Legal Aid (Procedure) Regulations 2012, Regulation 58.

664 The Civil Legal Aid (Procedure) Regulations 2012, Regulation 58.

665 A statutory, independent body.

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

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

668 Civil Legal Aid Regulations 1996, Regulation 12.

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,⁶⁶⁹ children's⁶⁷⁰ or criminal⁶⁷¹ legal aid. Reviews are conducted internally by the Board and no further appeal is possible. 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.

It has been seen in Chapter 3 above that there are instances in criminal legal aid in these jurisdictions where no appeal is possible against a negative decision. However, in civil cases there is some form of appeal or review against all refusals.

4.3.4 Additional oversight

There is an interesting oversight mechanism operating in Sweden in addition to the appeals processes described above. Since 2005, a monitoring role previously within the remit of the National Courts Administration has been held by the office of the Chancellor of Justice (Justitiekanslern)⁶⁷² in a move to "improve and streamline the [legal aid] payment system and its control mechanisms".⁶⁷³ The function involves receiving reports on particular types of legal aid decisions felt to indicate a possible risk to the public purse, such as grants made in exception to the usual rules concerning legal costs insurance, grants of legal aid in certain exceptional cases and cases where costs exceed 150,000 SEK.⁶⁷⁴ Reports come from both the courts⁶⁷⁵ and the Legal Aid Authority and if it is concerned about the decision, the Chancellor's office has *locus standi* to make an appeal to the Appeal Court or Administrative

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

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

671 *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).

672 At the time of the transfer of responsibility for this task, the Chancellor of Justice expressed concerns that there might be a perceived conflict of interests between her office and lawyers acting in cases against the state. However, this concern was not sufficient to counteract the benefits of the transfer. *Justitiekanslerns remissyttrande över departementspromemorian* (Ds 2003:55) *Rättshjälp och ersättning till rättsliga biträden* document number 3866-03-80 of 9 February 2004.

673 Ds 2003:55.

674 Approximately 15,600 EUR. DVFS 2016:16.

675 DVFS 2013:7, § 28.

Appeal Court against the decision in question.⁶⁷⁶ This standing in appeals is a general one and applies equally to decisions for which there is no reporting duty,⁶⁷⁷ however, such decisions are of course highly unlikely to come to the attention of the Chancellor in order for an appeal to be contemplated by her. The intended effect of this arrangement is not only the saving of funds in particular individual cases but also wider benefits to the legal aid system. The original decision-makers will in principle think more carefully about their high-impact and high-value decisions as they know these are being monitored. Furthermore, it is believed that consistency of decisions between the numerous courts and the Legal Aid Authority can be improved by having a central body scrutinising decisions and taking appeals which will clarify the proper application of funding rules. Approximately 2,500 decisions are reported to the Chancellor's office each year and about 35-40 appeals are brought by them annually.

In Finland, the Chancellor of Justice also oversees the work of the Legal Aid Offices, and has dealt with complaints concerning, *inter alia*, failure to fully inform a client of the reasons for refusal of legal aid,⁶⁷⁸ the need to take account of changed circumstances and re-consider a legal aid refusal⁶⁷⁹ and late submission of court applications by Legal Aid Offices.⁶⁸⁰ The Parliamentary Ombudsman has in addition been called upon on occasion to make findings concerning legal aid decisions.⁶⁸¹ However, the system is *ad hoc* and, unlike in Sweden, there are no reporting duties to bring legal aid decisions to the attention of the Chancellor as a matter of course. In Sweden the Chancellor's role is explicit within the legal aid legislation whereas in Finland the general remit of the Chancellor includes legal aid but the role does not form part of the legal aid oversight scheme set up in the subject-specific legislation. Furthermore, the Finnish Chancellor of Justice has no mandate over the legal aid payment system and its control mechanisms, which is the stated purpose of the Swedish Chancellor's involvement.

4.4 International human rights requirements

The need for a decision-making process for civil legal aid is universal within Europe due to the requirements of the European Convention on Human Rights and other applicable international treaties. Treaty provisions dealing with legal aid for criminal and civil proceedings differ significantly, and the explicit requirement for criminal legal aid has been dealt with above in Chapter 3. With regard to civil matters, the international provisions relevant to legal aid are the

676 Rättshjälpslag, 1996, 45 §.

677 See e.g. Rättshjälpslag, 1996, 45 § and Lag om offentligt biträde, 1996, 8 §.

678 OKV / 708/1/2011.

679 OKV / 856/1/2011.

680 OKV / 1420/1/2015 and OKV / 931/1/2013.

681 E.g. Dnro 1973/4/14.

more general provisions on fair trial:

International Covenant on Civil and Political Rights, Article 14 (1):	All persons shall be equal before the courts and tribunals. In the determination of [...] his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]
European Convention on Human Rights Article 6 (1):	In the determination of his civil rights [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]
Charter of Fundamental Rights of the European Union, Article 47:	Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. ⁶⁸²

As can be seen, the right to legal aid in civil cases is only explicit in the EU Charter. However, decided European Court of Human Rights and UN Human Rights Committee cases have established a right to civil legal aid in certain circumstances, based on the general provisions for fair trial⁶⁸³ and also on the concept of right of access to court developed initially in the 1975 case of *Golder v. UK*.⁶⁸⁴ This right of access to court has become so thoroughly incorporated into understanding of Convention rights that it is often referred to on an equal basis with the right to a fair and public hearing⁶⁸⁵ despite the fact that none of the treaties mention it explicitly. The General Court of the European Union has “accentuated that access to the courts is one of the essential elements of a community based on the rule of law, and that such access is guaranteed in the legal order based on the EC Treaty”.⁶⁸⁶

Access to court does not always require legal aid, but there are two kinds of situation in which it may be necessary. Firstly, a formal barrier to access to court arises if a lawyer is necessary under national law for a claim to be brought (e.g. in appeals to the Court of Cassation in France and Belgium) and the potential litigant cannot afford a lawyer. This situation does not arise in any of the jurisdictions under consideration in this thesis as there is no bar to self-representation in any level of court.⁶⁸⁷ There are however frequent examples of the second, informal obstacle that “for most people, the prospect of making or defending a civil claim is daunting, and they need or want professional

682 This study will not consider the impact of Council Directive 2003/8/EC, adopted on 27/1/03, which establishes minimum common rules relating to legal aid in cross-border disputes. This exclusion is due to the specialist nature of such disputes.

683 International Covenant on Civil and Political Rights, Article 14 (1) and European Convention on Human Rights Article 6 (1).

684 *Golder v. UK*, 1975, para. 36. Confirmed, *inter alia*, in *Roche v. UK*, 2005.

685 Walker 1999, p. 5.

686 Bårdson 2007, p. 103, commenting on *Jégo-Quéré & Cie SA v. Commission of the European Communities*, 2002, see especially para. 41.

687 Aside from a couple of very specific exceptions in Finland and Norway discussed in section 2.3.2 above.

assistance”⁶⁸⁸ The direction available from the international treaty bodies on the question of when civil legal aid will be necessary for the realisation of the right to fair trial or access to court will be considered in Chapter 6 below, which discusses the merits criteria for civil legal aid.

In the course of making decisions on the right to fair trial or hearing in individual cases, the European Court of Human Rights has also made a number of statements which concern the general method of implementation of the legal aid aspects of Article 6. The most fundamental question these statements address is whether it is necessary for a state to have a legal aid system as such, or whether the state can fulfil its obligations by deciding each case on an *ad hoc* basis. A clear in principle answer to this question was given in 1997 in *Andronicou and Constantinou v. Cyprus*:

The Court notes that whilst Article 6 § 1 of the Convention guarantees to litigants an effective right of access to the courts for the determination of their ‘civil rights and obligations’, it leaves to the State a free choice of the means to be used towards this end. The institution of a legal-aid scheme constitutes one of those means but there are others. It is not the Court’s function to indicate, let alone stipulate, which measures should be taken. All that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 § 1. The Court [...] considers that the Attorney-General’s *ex gratia* offer [...] provided a solution to help overcome the applicants’ lack of resources.⁶⁸⁹

Thus, the institution of a civil legal aid scheme is one possible means of guaranteeing an effective right of access to the courts, but it is not the only one. At the relevant time in Cyprus there was no legal aid scheme for civil cases and the prospective claim was an action against the police in respect of the fatal shooting of two people in a hostage incident. The inhabitants of Cyprus at the end of 1996 numbered approximately 740,000⁶⁹⁰ and arguably with that size of population an *ex gratia* system might be capable of providing appropriate access to justice. However, the fact that the European Court of Human Rights found no violation in the case before it does not, of course, mean that the overall position in Cyprus at that time was satisfactory. Iceland, which has a population considerably lower, does have a formal legal aid scheme, as seen.

Some commentators express the view that the requirement for a system of legal aid was established from the outset in civil cases, by the *Airey v. Ireland* case which will be further discussed in Chapter 5. Bårdsen, discussing *Airey*, states that “the right to a fair trial could not at all be fulfilled passively, or by incidental, individual measures. It requires structural, multifaceted, continuous and coherent governmental action”.⁶⁹¹ However, in *Airey* itself the European Court of Human Rights specifically stated that Article 6:

688 Le Sueur 2000, p. 459.

689 *Andronicou and Constantinou v. Cyprus*, 1997, paras. 199 & 200.

690 ACFC/SR(1999)002 rev.

691 Bårdsen 2007, p. 106.

leaves to the State a free choice of the means to be used [...]. The institution of a legal aid scheme [...] constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken.⁶⁹²

Nonetheless, Bårdsen is, it is submitted, correct in assuming that a structured system for the provision of legal aid is likely to be required in practice, certainly in a jurisdiction of any size. The European Commission on Human Rights held in 1980 that, "it is self-evident that where a state chooses a 'legal aid' system to provide for access to court, such a system can only operate effectively, given the limited resources available, by establishing machinery to select which cases should be legally aided".⁶⁹³ This approach is a realistic one and in line with the practice of most states including Cyprus, since 2002,⁶⁹⁴ and Ireland since 1980.⁶⁹⁵

Given the likely demand for legal aid in any other than very small jurisdictions, most states choose to set up a system which allows for the application of rules, usually set out in primary or secondary legislation, to be applied by one or more administrative or judicial bodies. Such a system has advantages over an *ad hoc* scheme: it limits the discretion exercised by the decision-makers, who are often unelected bureaucrats; enables the legislature to take policy decisions and set parameters for the decision; enables greater consistency throughout a jurisdiction where the jurisdiction is so large that more than one decision-maker will be needed and gives government better control over expenditure. In addition, a system can act as a safeguard against inappropriate use of discretion and make it more likely that fair trial rights will be secured.

When such a system is in place, the European Court of Human Rights has been willing to discuss not only the outcome in the case before it but also the criteria which that system should fulfil for the state to comply with its Article 6 duty. The main criteria established by the Court are that decision-making by legal aid authorities must not be arbitrary⁶⁹⁶ and must ensure the appearance of the fair administration of justice,⁶⁹⁷ applications for legal aid must be dealt with diligently⁶⁹⁸ and reasons must be given for rejection of an application for legal aid.⁶⁹⁹ Of particular relevance to the issue of decision-making structures is the repeated statement of the Court that a legal aid system must offer "guarantees

692 *Airey v. Ireland*, 1979, para. 26.

693 *X v. UK*, 1980, para. 16, repeated in e.g. *A. W. Webb v. UK*, 1983.

694 Legal Aid Law, 2002.

695 A non-statutory scheme which was put on a statutory footing 15 years later with the Civil Legal Aid Act 1995.

696 *Gnahore v. France*, 2000, para. 41; *Del Sol v. France*, 2002, para. 26.

697 *Laskowska v. Poland*, 2007, para. 54.

698 *Ibidem*.

699 *Ibidem*.

to protect [applicants] from arbitrariness”⁷⁰⁰

The term ‘arbitrariness’ is one which does not have a single clear and unambiguous meaning as applied by international human rights treaty bodies. Before the UN Human Rights Committee, arbitrariness is often seen as the absence of equality; the Committee has developed “the principle of equality before the law as an effective protection against arbitrariness”⁷⁰¹ and has accepted the concept that “equality is antithetical to arbitrariness”⁷⁰² This meaning is also occasionally used in the jurisprudence of the European Court of Human Rights⁷⁰³ and is close to the ordinary meaning of the term.

However, the Human Rights Committee does not only use the term ‘arbitrary’ in the context of equality before the law and equal protection of the law, but also as the converse of ‘reasonable’, such as in cases where requirements were found “arbitrary, and consequently a discriminatory distinction between individuals”.⁷⁰⁴ This does not appear to mean ‘unequal’, but rather ‘without justification’ or ‘unreasonable’. The European Court of Human Rights also appears to use ‘arbitrary’ to mean unreasonable or unwarranted, as in a case concerning restrictions on the right to privacy which the state argued were necessary in the interests of public security. Here, the Court found that “the law must indicate the scope of any [...] discretion conferred on the competent authorities [...] having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference”.⁷⁰⁵ The legal aid cases referring to arbitrariness could arguably be using the term in either sense: as the opposite of ‘equal’ or as ‘unreasonable’.

The avoidance of arbitrariness requires individual decisions to be appropriately made, and protection against arbitrariness can be afforded by establishing suitable decision-making structures. The European Court of Human Rights has approved of systems which endeavor to provide neutrality or balance in the composition of decision-making bodies. For example, in *Del Sol*⁷⁰⁶ the inclusion of judges and legal professionals as well as neutral members of the public in the group making the decision on legal aid, and the possibility of appealing against refusal to a judge, appear to have been important in deciding that sufficient protection against arbitrariness was in place.

The European Court of Human Rights has also indicated that, in order for the requirements of Article 6 to be satisfied, there must be a possibility of a grant of legal aid at a later point in proceedings, even if an application was correctly refused at an early stage. The refusal of legal aid must remain capable

700 e.g. *Gnahore v. France*, 2000, para. 41; *Del Sol v. France*, 2002, para. 26.

701 Edelenbos 2009, p. 80.

702 *Love et al v. Australia*, 2003, Individual Opinion of Mr. Prafullachandra Natwarlal Bhagwati (concurring).

703 e.g. in *Fabris v. France*, 2013, para. 60: ‘The Court [...] cannot remain passive where a national court’s interpretation of a legal act [...] appears unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Art. 14’.

704 *Lange v. Czech Republic*, 2011, para. 7.3; *Klain and Klain v. Czech Republic*, 2011, para. 8.3; *Jünglingová v. Czech Republic*, 2011, para. 7.3.

705 *Malone v. UK*, 1984, para. 68.

706 *Del Sol v. France*, 2002.

of review and revision throughout the proceedings, so that a litigant can obtain the necessary assistance for a fair trial, if proceedings become more complex than anticipated.⁷⁰⁷

4.5 Analysis

4.5.1 Indirect public administration in legal aid

It was seen above that decision-making power in civil legal aid in the jurisdictions under consideration is not always placed in government departments. Some powers are given to bodies outside the State, providing examples of indirect public administration within the sphere of legal aid. As decisions to grant or refuse legal aid involve the exercise of public power and the performance of a public task, it can be concluded that the responsible body or person has “public organisational competence”⁷⁰⁸ which, if performed outside the traditional State administrative structures (whether national or local), amounts to indirect public administration.

It is particularly noteworthy that indirect public administration plays a significant role in legal aid at the level of initial advice. The authority to grant legal aid for advice in civil cases is delegated to the lawyer providing the advice in all the jurisdictions other than Iceland (where legal aid is not available for advice). Legally-aided advice in criminal matters is also granted by the acting lawyer in Northern Ireland, England & Wales and Scotland. In Finland, the lawyers making grants of legal aid for both civil and criminal advice are public employees and thus the decisions are part of the direct public administration in that jurisdiction. However, in all the other jurisdictions the placing of this public task with practising lawyers amounts to a system of indirect public administration. In Sweden, Norway, Denmark, Scotland, Northern Ireland and England & Wales, the lawyers granting legal aid for advice-level civil legal aid are in private practice and are thus completely private entities, often in some form of partnership or private company. This form of indirect public administration is the most extreme, as public powers are in the hands of private actors.

In the Republic of Ireland, the lawyers are staff of the Legal Aid Board, which is a corporate body established by statute⁷⁰⁹ to perform the public task of administering legal aid. Although the Board members and chairperson are appointed by the Minister for Justice and Equality, and the Board is publicly funded, it is an independent non-governmental entity. Thus, its work which consists of the exercise of public powers is also indirect public administration. This categorisation applies equally to the role of the Legal Aid Board of the Republic of Ireland in deciding legal aid applications for civil legal aid for

707 *Granger v. UK*, 1990.

708 *Suksi* 1989, p. 7.

709 Civil Legal Aid Act 1995, s. 3.

representation, and to its administration of the Garda (police) station advice scheme. The Legal Aid Board is not an unusual phenomenon in the Republic of Ireland, where “there is a complex system of state agencies at national level” which “has evolved pragmatically”.⁷¹⁰

Legal aid decisions regarding civil representation in the Nordic countries, as well as grants of public defender assistance, are often made by the courts, as has been seen above. The power to grant criminal legal aid is also with the courts in the Republic of Ireland. Whilst this allocation places legal aid grants outside government control, the courts are organs of the State and thus the arrangement does not amount to indirect public administration.

In the Nordic countries, decisions on civil legal aid for representation which are not made by courts are generally made by central or local government departments. These are the Finnish Legal Aid Offices, the Norwegian Civil Affairs Authority and County Governors’ Offices, the Danish Department of Civil Affairs and the Swedish Legal Aid Authority. The Icelandic approach, as seen above, is to place decisions in the hands of a committee established by statute⁷¹¹ and appointed by the Minister; clearly a public body within the Ministry of Justice.

The situation in the United Kingdom is more nuanced: as described above, each of these three jurisdictions has a specific public body dealing with legal aid administration, either within a government department or external to the executive branch. In England & Wales the Legal Aid Agency is within government, as is the Northern Ireland Legal Services Agency;⁷¹² both are executive agencies of their respective justice departments. The Scottish Legal Aid Board, however, is a ‘non-departmental public body’ with a status somewhere between an independent statutory corporate body (as seen in the Republic of Ireland Legal Aid Board) and a branch of the executive. In both England & Wales and Northern Ireland, tellingly, the statutory powers to make decisions on legal aid are given to ‘Directors of Legal Aid Casework’,⁷¹³ both of whom have *de facto* always to date been the executive directors of the respective governmental legal aid agencies. The power is not given to the agency itself, which operates as the enabling organisation for the exercise of the administrative powers of the governmental statutory post-holders, the Directors.

The extent to which indirect public administration has been used in legal aid in England & Wales has varied dramatically over time. When the legal aid scheme was administered by the Law Society, the administration could clearly be characterised as indirect. This remained the case when responsibility transferred to the Legal Aid Board, a government quango (in place from 1988),

710 Smyth 1988, p. 151.

711 Lög um meðferð einkamála, 1991, Article 125.

712 Legal Services Agency Northern Ireland 2015, p. 7.

713 Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014, s.2 and Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 4.

but the administration of legal aid moved much closer to government control with the introduction of the Legal Services Commission, an executive non-departmental public body, in 2000-2013.⁷¹⁴ At this point it might be argued that legal aid became a part of the executive and therefore indirect public administration ceased. This is certainly the case since 2013 when the Legal Aid Agency replaced the Legal Services Commission.

It thus seems clear that the power to grant legal aid for representation in civil cases currently remains a core government function in the Nordic countries, England & Wales and Northern Ireland, but falls within the “third sphere”⁷¹⁵ of indirect public administration in Scotland and the Republic of Ireland. This is a notably lower level of use of such structures than for decisions concerning civil advice work which, as seen, are routinely delegated to privately practising lawyers, as are decisions on legally aided criminal advice in the UK jurisdictions. The only jurisdiction within this study not using any indirect public administration for legal aid at any level is Finland.

The low use of indirect public administration for representation cases, which of course are generally more expensive than advice cases, may be due to the fact that such mechanisms “may create a number of problems of accountability and control, both political, financial, administrative, and legal”.⁷¹⁶ Problems of control will be returned to in the following section, which considers the possible reasons for the choice of decision-making structure in legal aid.

4.5.2 Reasoning behind choice of initial decision-makers⁷¹⁷

It has been seen that there are several types of decision-maker taking initial decisions on applications for legal aid for representation. In order to analyse possible reasoning behind the placement of decision-making power, three groupings will be considered: lawyers acting for the applicant; government departments or agencies; and courts. These groupings do not follow the division of direct or indirect public administration seen above, but may be useful in considering the practical implications of the selection of a decision-maker.

The choice of a decision-making structure for a legal aid system has consequences, not least that the process of considering the documents submitted with a legal aid application, assessing compliance with eligibility requirements and reaching a conclusion requires human and practical resources which are potentially expensive. If structures which already exist outside the specialist legal aid arena can absorb the additional task of assessing legal aid applications, it may be possible to make costs savings. Making use in legal aid decision-making of courts, regional governmental administration or the lawyers conducting the client work, for example, will reduce the need for specific legal

714 For more history of the English & Welsh system see Hynes and Robins 2009.

715 Rosas 1988, p. 31.

716 *Ibidem*, p. 35.

717 See Barlow 2017b.

aid administration and thus have an impact on the overall cost of a legal aid system. Placing legal aid decisions with the acting lawyers (usually in advice cases, as seen above), or with the courts dealing with the substantive issue, also brings an advantage of speed and simplicity. In these instances legal aid can be dealt with seamlessly as part of the proceedings without the need to apply to an external party and wait for a response before continuing. Arguably, those with an involvement in the case are also best placed to judge whether legal aid is needed in the interests of a fair hearing, although they may also be affected by sympathy for the applicant, as discussed below.

Mitigating against this 'outsourcing' approach is the need of those responsible for the final budget for legal aid to control expenditure. Whilst the main mechanism for cost limitation is of course amendment of the substantive rules of legal aid, keeping individual case decisions within government is often seen as enabling additional control. When legal aid systems are changed by bringing decision-making closer to central government, the need for greater control over expenditure is a common rationale.

There is a tension here between cost and control which different jurisdictions address in different ways. Some jurisdictions seem not to have difficulties with escalating expenditure and are content to leave decisions to be made outside government with little or no opportunity for government to intervene other than by changing eligibility rules. Finland is an example of a system where expenditure has remained within acceptable limits despite a very hands-off approach to decision-making; only 'soft' methods for steering the decisions of the Legal Aid Offices are used. Others find that expenditure spirals easily out of control unless legal aid decision-making is kept within government. This has been the experience in England & Wales where over time decision-making has been removed from the legal profession and, via several intermediate stages, brought into the Ministry of Justice. Each non-governmental or quasi-governmental body in turn was found to be unable to exercise adequate control over legal aid spend,⁷¹⁸ leading to the creation of an executive agency within the Department of Justice to administer legal aid.

In some jurisdictions there has also been a concern that it can be difficult to achieve consistency of decision-making if legal aid is determined by the courts. This may result in a degree of arbitrariness in decisions, which as seen above is unacceptable according to the legal aid jurisprudence of the European Court of Human Rights, in addition to being contrary to domestic administrative law principles. Centralised government agencies are better placed to maintain consistency than disparate first-instance courts across the country. Most legal aid decisions do not cause controversy or lead to reported appeals and the everyday habits of decision-making may diverge over time in different places.

718 Magee 2010.

A further specific issue applies to legal aid decision-making by the courts. There are two diverging views on the appropriateness of legal aid being decided by a court which is or will be dealing with the substantive case. Civil legal aid decisions, as will be seen in Chapter 6, often require some assessment of likely prospects of success or other judgment of the merits of a case. Some of these criteria involve measuring a case against technical legal standards, and it could be argued that a judge would be best placed to evaluate this. A caseworker at a legal aid agency may not be legally qualified and will inevitably be less legally skilled than the judge. Following this logic, it makes little sense to ask a caseworker to make the assessment when a judge is available, particularly when the judge already has the documents and is reading them in preparation for hearing the case. The opposing view is based largely on a concern about pre-judgment of cases. Legal aid decisions take place at the start of a case, or even before formal proceedings commence. There is a valid concern that if a judge makes an assessment of likely prospects of success, or another merits test, this will send a signal to the parties as to the court's initial view and may for example affect settlement negotiations. Many judges are also concerned not to make any assessment of a case until they have heard all the evidence; even to decide that there are reasonable prospects of success is, for some, an unacceptable pre-judgment of a case.

An interesting case study of this dilemma is Norway. As has been seen above, some decisions are made by courts and some by the County Governors. However, the division of cases between the two has the maybe surprising result that courts have very limited discretion (the only element for their consideration being the application of a 'not unreasonable' criterion in means-tested matters) whilst cases requiring the greatest exercise of discretion are reserved to the County Governor. There is an argument that courts could and should deal with all civil legal aid applications as the papers required in support of an application are to a large extent replicated in the court papers anyway and thus the administrative burden on the applicant and the state would be reduced overall. Furthermore, the decisions required in 'exceptional cases' are complex, including *inter alia* assessments on whether a case is 'not unreasonable', the matter is 'especially pressing for the applicant' and similar to priority case types, and arguably these should not be left to caseworkers. The contrary argument, which is currently accepted in Norway, is that as a matter of principle courts should not take substantial decisions on legal aid to avoid the risk of prejudgment.

A similar situation can be seen in Denmark, where the court only deals with cases where there is an assumption of legal aid. Other cases are decided by the Civil Affairs Agency who must assess whether there are reasonable grounds to litigate.

Whoever makes the initial legal aid decision, there is always the potential for error, either due to simple mistake or unconscious bias. The review and

appeal mechanisms available should be able to correct both types of error so as to reduce the potential for arbitrariness in the legal aid scheme.

4.5.3 Error in decision-making⁷¹⁹

4.5.3.1 Human error

The possibility of appeal against a legal aid decision is important for several reasons. Of primary importance is the need to correct a wrong decision. Legal aid forms part of a system for upholding the core human right to fair legal hearings, which in turn is fundamental to the protection of the rule of law. It is thus of evident importance that efforts be made to ensure that decisions within a legal aid system should be as accurate as possible. Legal aid applications are assessed by individuals and as humans are not infallible there is always a possibility of error. The availability of a check of some kind is therefore important so that there is an opportunity for mistakes to be rectified.

4.5.3.2 The risk of unconscious bias in decision-making

In addition to the risk of occasional poor quality decision-making, there is also a possibility of unconscious bias. There are a number of conflicting interests involved in legal aid; indeed, one group of actors may even have several contradictory interests. Amongst the various groups given the power to make decisions on legal aid applications there is ample potential that inappropriate factors, i.e. those which do not arise from the statutory eligibility provisions, might influence a decision.

Maybe the most obvious potential conflict of interests occurs when decisions are made by government. The department which employs the decision-makers may also be responsible for the legal aid budget and subject to political pressure to ensure that 'deserving' claimants receive legal aid and others do not. The same government department may in addition be accountable for the proper functioning of the justice system as a whole, in which context legal aid has a complex interactional functionality. Further pressure will be felt by government if international tribunals criticise the legal aid system's compliance with human rights accords.

Courts, on the other hand, have a different range of interests which are relevant when assessing applications for legal aid. In general, courts are under considerable pressure of time and therefore speed and efficiency are at a premium. Enabling a hearing to go ahead with the minimum of delay and in a time-effective manner are important considerations, and may generate a positive attitude to legal aid applications. Likewise, the fairness of a hearing is of immediate importance to the court and may be a much more evident consideration than it would be for a civil servant making a legal aid decision in an office away from the parties, whom they have never met. Some judges, on the other hand, are reluctant to have a role in legal aid decision-making if

719 See Barlow 2017b.

any merits assessment is involved, because of the risk that they will be seen to be pre-judging the substantive case as discussed above. Legal aid systems such as Denmark and Norway, as seen, deal with this potential problem by giving courts jurisdiction over legal aid only where there is minimal, or no, merits testing involved.

In situations where the lawyer who may also conduct the case decides on legal aid eligibility, there may again be various competing interests. Most obviously, a grant of legal aid may result in additional income for a lawyer who is not a government employee. However, if demand is very high and the available lawyers cannot deal with all the potentially eligible clients, there may be a subconscious tendency to reduce the numbers of applicants receiving assistance. Against this impetus will be the likely empathy between the lawyer and the client before them.

4.5.4 Efforts to reduce arbitrariness⁷²⁰

4.5.4.1 Approaches at the initial decision-making stage

The existence of such potentially conflicting interests results in a risk of arbitrariness. It is important for the legitimacy of legal aid decisions that this risk is minimised as far as possible. Some jurisdictions make the attempt to remove potential conflicts from the decision-making parties. In Sweden and Denmark, for example, the government agencies responsible for some legal aid decisions (the Legal Aid Authority and Legal Aid Office, respectively) intentionally have no target for legal aid spend or budgetary responsibility.

Likewise, in Finland the Legal Aid Offices, who make initial legal aid decisions, do not have any budgetary duties; their own costs are paid on a salaried basis and when they assess legal aid applications from lawyers in private practice they do so without any duty to consider the effect on the legal aid budget. Johnsen is of the view that this structure provides good, unbiased decision-making:

The role of the legal aid offices in the administration of the Finnish legal aid schemes has several advantages. It secures a competent use of the discretionary problem criteria without any commercial interest in the outcome. The decision making can be made from a well developed understanding of the service needs and an efficient use of the capacity and competence available both at the legal aid office and in the private profession in the area. They also might function as a detector of weaknesses in the schemes and increase the potential for innovation.⁷²¹

In Iceland the decision-making power is vested in a committee of lawyers, which also has no budgetary responsibility. Within the committee, interestingly, judges as well as other lawyers are represented. This should also help to reduce the risk of arbitrariness, as the judge will understand and possibly promote

⁷²⁰ See Barlow 2017b.

⁷²¹ Johnsen 2009a, p. 26.

the interests of efficiency within the court system, whilst the other lawyers are likely to bring an understanding of the needs of litigants themselves.

4.5.4.2 Appeal as a protection against arbitrariness

Despite the attempts in some jurisdictions to enable more neutral first-instance decisions, it is the possibility of appeal to a different body which, in most of the jurisdictions, reduces the risk of decisions being based on inappropriate criteria.

Appeal or oversight gives the opportunity for a situation to be reconsidered by a body which does not share the same inherent interests as the original decision-making body. As discussed above, all the players in legal aid have a variety of interests which may, albeit subconsciously, affect assessment of legal aid applications. However, if the review or appeal body has different vested interests to the first-tier decision-maker, any initial unintentional bias stands a chance of being neutralised. Additionally, as appeal bodies are often a step removed from the case, any bias which that body might have in an initial legal aid decision has less force. An example of this is court decisions on legal aid which can be appealed to a higher court. Whilst the court of first instance may have the interests described above, these largely relate to the dual role of that court in dealing with the substantive case as well as the application for legal aid. An appeal to a higher court would lead to the legal aid issue being considered separately by a court not handling the substantive case, thus removing some of the conflicting pressures.

Clearly the success of appeal in overcoming the effects of unconscious bias will depend upon the nature of the appeal route, and in particular the identity of the appeal body and its similarity to or links with the primary decision-making body. The European Court of Human Rights has drawn attention to the importance of variety in decision-making and appeal bodies in avoiding arbitrariness.⁷²²

It can be seen from the brief outline above that oversight in the jurisdictions under consideration usually involves a decision-maker of similar nature to the initial decision-maker. Court decisions, when appealable, are reviewed by higher courts. This is of course not surprising as bureaucratic appeal from court decisions would be considered fundamentally inappropriate in all the jurisdictions. In terms of avoiding arbitrariness, these initial decisions are not protected by a change of outlook in the appeal body but rely on the inherently impartial nature of the courts. However, as has been seen above, this neutrality is not necessarily a given in legal aid decisions, as the court itself has an interest. When a court performs the quasi-administrative task of assessing legal aid applications only one of the interested parties, the applicant, is present; the government does not provide an input to the individual case beyond the rules of the scheme. This is in contrast to the courts' usual task of considering a

722 *Del Sol v. France*, 2002, para. 26.

dispute of one kind or another where opposing parties both present their case. The task of assessing legal aid is not one which courts are always comfortable with, nor is government always content to allow the courts to have this impact on public expenditure in circumstances where they may be inclined to be generous. The Swedish oversight by the Chancellor provides a balance to the considerable involvement of courts in legal aid decisions in that country. This oversight role is cleverly designed in that it does not interfere with the integrity of the court process; appeals against court decisions are still to higher courts but the government gains an opportunity to be heard as a party.

Bureaucratic decisions on legal aid are also, as seen above, generally overseen by other bureaucratic bodies. However, within this overall picture there is considerable variation in how far the appeal body is removed from the original decision-making body. In the few instances where only internal reviews are available, there is no division at all between the initial and secondary decision-maker and therefore the protection against arbitrariness is weak; all the same vested interests are present at both levels.

The internal appeals processes in Ireland, Northern Ireland and England & Wales are interesting in that an attempt is made to bring an independent element into the legal aid bureaucracy at the appeal stage. In all three cases reliance is placed on the independence of the legal profession; in Northern Ireland and England & Wales the persons dealing with appeals are still practicing as lawyers alongside their work for the legal aid bodies. In the Republic of Ireland the statutory provision suggests that the appeal committee members need only have been practising lawyers before their appointment to the Board but in practice, as Board membership is not full-time, they are almost certain to be still carrying on their legal practice. However, their position as Board members ties their interests closely to the Board in a way which provides less independence than in the other two jurisdictions. In England & Wales, the recommendation of the Independent Funding Adjudicator is not always binding on the Legal Aid Agency and even though in fact it is almost always followed, this aspect of the system is significant as it maintains ultimate control in the hands of the Legal Aid Agency in many cases.

As has been seen above, the Scottish system of internal review of legal aid decisions does not provide independence other than in the specific circumstances that legal aid has been refused for proceedings against the Scottish Legal Aid Board itself. This lack of independence has been considered by the Administrative Justice and Tribunals Council in Scotland, as part of a review of decisions made by public bodies where there is no, or no satisfactory, right of appeal. In response to the suggestion that an independent review body should be established, the Scottish Legal Aid Board countered that:

The Board is [...] required to balance a range of potentially competing interests: those of the applicant, the courts, the opponent (if relevant), the wider public and the taxpayer. This balance is essential to the preservation of a sustainable legal aid system, but it is hard to see an independent review body having regard to this full range of interests, including financial considerations.⁷²³

In the view of the Board, the fact that the Board itself is independent of government renders it unclear ‘why a further independent body would be needed to review its decisions.’⁷²⁴ Furthermore, the Board suggested that, for legal aid decisions, judicial review is an appropriate and accessible remedy because:

the nature of legal aid decision-making is different to other types of administrative decision-making. The very detailed Act and regulations, supported by comprehensive guidance, and the fact that the Board interacts exclusively with lawyers for many aspects of its decision making, means that the general principle set out in the paper does not apply to legal aid decision making.⁷²⁵

The argument suggests that the nature of legal aid decisions and of the Board itself are such that, unlike other administrative bodies, it can be trusted to take fully balanced, objective decisions and that thus no general independent appeal mechanism is needed. This is an idealistic argument, which denies the presence of any vested interests at the Board. Even if this were the case, which seems highly unlikely, two further factors make independent appeal desirable. Firstly, over time it is very possible that patterns of habit develop which gradually diverge from the intended application of the material rules; independent appeals can help to ensure that first instance decision-makers stay within the appropriate parameters over time. Secondly, even if it were the case that the Board’s decisions are completely objective, decisions by administrative bodies must not only be fair but should be perceived as fair, and independent appeals can increase trust in the decision-making structures.

The Administrative Justice and Tribunals Council in Scotland, whilst accepting some of the Board’s arguments, nonetheless concluded that a strong case can be made for reviews of the refusal of legal aid being heard by a committee which, whilst under the auspices of the Board would consist of external, independent members. Furthermore, the possibility of review by such committee should be a matter of right.⁷²⁶ This recommendation has not, to date, been implemented.

The Norwegian structure is unusual in that appeals from regional government decisions on legal aid go to central government. Whilst the interests of these two bodies differ, it is the appeal body which arguably has a stronger interest

⁷²³ Scottish Legal Aid Board 2012, para. 31.

⁷²⁴ *Ibidem*, para. 11.

⁷²⁵ *Ibidem*, para. 23.

⁷²⁶ Scottish Committee of the Administrative Justice & Tribunals Council 2012, p. 52.

in controlling overall costs of the legal aid system. Thus, appeal is to a less financially neutral organisation. However, because the bodies are not mutually dependent in the way that the UK and Irish decision-making and appeals bodies are, it may be that greater protection against arbitrariness is achieved.

In both Sweden and Denmark, the appeals bodies are positioned within the court structure, although they are not themselves courts. Both are staffed by senior judges and lawyers. The level of separation from the governmental initial decision-making bodies is significant and the vested interests are not shared. Indeed, by keeping the appeal body separate from the courts as well, even greater neutrality should be assured. Thus, whilst nominally of the same basic nature, the appeal bodies do not share the vested interests of the initial decision-making body and it can be presumed that protection against subjectivity is good.

The oversight of bureaucratic legal aid decisions by courts, as seen in Finland and, to a lesser degree, Sweden and Scotland, is a very evident protection against influence from inappropriate factors, as it places the oversight in the hands of a completely separate body with different interests. However, in the context of neutrality it is interesting that the Finnish government rejected the option of oversight through the normal administrative court route in favour of oversight by the court in the substantive matter. The reasoning was to ensure that the court taking the decision on appeal had as much expertise in the matter as possible, but the corollary effect is necessarily to reduce impartiality, as the court re-considering the legal aid application will have all the vested interests applying to first-instance decisions by courts discussed above.

4.5.5 Improving future decision-making⁷²⁷

The impetus for an individual appeal comes from an individual who is dissatisfied with the outcome of their application, in most cases,⁷²⁸ and the motivation for the appeal is the hope that the decision will be reversed and legal aid granted on the terms sought. A successful appeal implies that the original decision in that case was incorrect, for one of many possible reasons. If the reason for the error is only specific to that particular case then the appeal decision is of little benefit beyond that case unless it points to a training need for a particular decision-maker. However, in many cases an appeal decision may have relevance to potential future decisions because it addresses one or more issue of general importance. For example, the interpretation of the applicable legal aid rules may be considered, with an indication that the approach of the first-tier decision-making body hitherto has been flawed. Likewise, an appeal body may find that the wrong weight is being given to various factors in decisions, or even that extraneous circumstances are inappropriately being taken into account. Such findings are an opportunity for future decisions to be

⁷²⁷ See Barlow 2017b.

⁷²⁸ But see the role of the Swedish Chancellor of Justice, above.

improved if steps are taken to feed the results back into the primary decision-making structure. Improving future decisions not only improves the quality of outcomes in individual cases but also reduces systemic costs by lessening the risk of future appeals.

The various appeal routes considered above show different levels of commitment to this potential for improvement. In Norway, the hope of encouraging consistency and quality of decision-making by the County Governors has led the Civil Affairs Authority to publish useful appeal decisions online.⁷²⁹ In Sweden, decisions of the Legal Aid Board and the higher courts on appeal from initial legal aid determinations are considered by the National Courts Administration⁷³⁰ and useful decisions are added to the online legal aid handbook used by the first-instance courts and the Legal Aid Agency in assessing legal aid applications.

In stark contrast in Denmark, the Appeals Permission Board does not give, let alone promulgate, the reasons for its decisions, which makes it very difficult for the Legal Aid Office to improve its practice following Board decisions. The reasoning behind this relates to the original purpose of the Board, before it gained its legal aid function. The Board was set up to decide cases where there is no automatic right to appeal to a higher court but leave is required. It was felt that it was advantageous to keep this function separate from the court which would hear the substantive appeal, and to not release detailed reasons for the decision to grant or refuse leave, to avoid any possible influence over the substantive case. When the legal aid appeal function was added to the Board's remit, it was decided that these cases should be dealt with in the same manner, and the Minister of Justice confirmed that this meant that legal aid decisions would not include detailed reasons.⁷³¹

Where courts hear legal aid appeals or renewed applications, their decisions are of course public records and available for learning or training purposes. As most of the decisions appealed come from lower courts it may be assumed that judges in the lower courts will simply take note of superior court judgments in the usual way and amend their practice accordingly. Likewise, in Finland, lawyers dealing with initial applications for legal aid have access to the decisions of courts in previous cases, for guidance as necessary.

The more internal oversight mechanisms found in the UK jurisdictions can also be used to improve the quality of initial decision-making. In Northern Ireland the new appeals panel is developing a feedback loop to this end, although in England & Wales there is currently no such system. It is to be expected that reviews within the Scottish legal aid system influence future decision-making, although the lack of independent input to review decisions reduces the utility of this mechanism for improving the quality of decisions. Likewise in the Republic of Ireland, decisions on internal appeals to the Board

729 At www.lovdata.no. A subscription is required to access the case decisions.

730 Domstolsverket.

731 Justitsministeren 2010.

have the potential to be used to improve future decisions, within the inherent limitations of such internal review processes.

4.6 Conclusions

The decision-making frameworks for civil legal aid in the Nordic countries, the UK and the Republic of Ireland are varied, as has been described. There seem to be two main rationales for the choice of initial decision-maker: control of expenditure and appropriateness within the justice process. As a costs control measure, keeping legal aid decisions close to government does not appear to be entirely effective.⁷³² The jurisdictions of the UK all have public bodies within or closely tied to government taking initial decisions on legal aid and yet the highest spender on legal aid, Northern Ireland, is in this group. Overall, these jurisdictions have legal aid expenditure which is high within Europe as a whole and similar to the rest of the group of comparator jurisdictions. The jurisdictions with high reliance on courts for legal aid decision-making, Sweden, Denmark and Norway, do not as a group show a higher spend on legal aid. It thus seems that keeping decision-making away from courts is not a direct solution for high spending. Other factors are clearly also important in determining the costs of legal aid, although it is of course possible that an expensive scheme might be even more costly if decisions were in the hands of the courts.

The concern to ensure that courts are not placed in the improper position of pre-judging aspects of a case also appears simplistic, when looked at in the wider legal context. In at least some of the jurisdictions where legal aid decisions are kept away from courts, there are other procedures which require courts to make an initial broad-brush assessment of a case. One example is systems for appeals where leave is required; another is applications for judicial review where an initial 'leave to appeal' stage filters out unmeritorious cases according to certain criteria which vary according to jurisdiction. Such instances clearly indicate that it is sometimes considered acceptable, even desirable, for courts to pre-judge aspects of a case to ensure that the merits are sufficiently strong before it is allowed to continue. Furthermore, as the nature of judgments in such situations are close to the means test for civil legal aid in many cases (see Chapter 6 below) it is difficult to see why the decisions are considered legally demanding and necessitous of the skills of a court in some situations, but as administrative issues when connected with legal aid.

Of course, the current state of play in the structures of legal aid is the result of progression over time and of political decisions made by successive governments. There can be no certain conclusions drawn as to the reasons why the systems are as they are without detailed study of the history of each scheme, which is not achievable here. However, it is possible to hold the structures as

⁷³² See detailed discussion of the costs of legal aid in section 8.2.1 below.

they currently stand to account against the requirements of international law, which in this chapter has been done particularly in the context of the need to avoid arbitrariness. It has been seen that conflicting interests are present in initial decisions on legal aid, whoever makes them, and it has been argued that the presence of reviews and appeals conducted by parties with differing interests are an important element in decreasing arbitrariness.

The short overview has revealed considerable variation in the 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. As discussed, if the vested interests of decision-makers at the initial and appeal stages are the same, there is a risk that inappropriate factors may influence decisions, and that inadvertent bias goes unchecked. It is not suggested that decisions in such jurisdictions are routinely partial; however, it is submitted that there is a real risk of both actual and perceived bias in any system which does not acknowledge and counter potential impartiality.

A number of imaginative approaches to oversight improve neutrality in the jurisdictions considered. The use of the Appeals Permission Board in Denmark adds a clearly independent review mechanism; whilst the Board only reviews bureaucratic initial decisions, its position outside both government and the courts insulates it against vested interests when considering legal aid appeals. Renewal of legal aid applications before the court in Finland, after the initial decision by the Legal Aid Office, also provides a very clear change of inherent interests in the review process.

The system with the most finely-tuned checks and balances, however, is Sweden. As in Denmark, there is a quasi-judicial appeal body for governmental decisions on legal aid, but this is supplemented by over-arching oversight by the Chancellor of Justice, which applies to both bureaucratic and judicial legal aid decisions. The Office of the Chancellor of Justice is an independent administrative organ and the Chancellor herself is a non-political civil servant appointed by the government. This politically independent governmental role provides objectivity when the Chancellor is considering legal aid decisions made by the Legal Aid Authority, and also enables some governmental input on court decisions on legal aid, which are otherwise appealable to higher courts. Furthermore, Legal Aid Authority decisions are subject to appeal to the Legal Aid Board in addition to oversight by the Chancellor, and thus a quasi-judicial perspective is also provided. Thus both judicial and non-judicial initial legal aid decisions are subject to appeal or oversight by a court or quasi-judicial body,

and by the Chancellor. Whilst the reporting duties are limited, the categories of case which must be notified to the Chancellor can be and from time to time are altered by regulation; if it was considered necessary, the reporting grounds could be broadened. As the ability of the Chancellor to intervene as a party and institute an appeal extends to all legal aid decisions,⁷³³ not just those which must be reported, her role thus provides, in theory at least, comprehensive oversight.

Whatever the success of an individual appeal system in rectifying arbitrariness in individual decisions, its reporting and feedback process can magnify the positive effect by ensuring that future decisions avoid repeating the failings identified. This important role is not realised in all the jurisdictions considered, and should be developed wherever possible. Various methods have been used, most commonly the publishing of appeal decisions (in Sweden and Norway) and the collation of useful decisions in handbooks or other practical texts (in Sweden, Denmark and Norway). A feedback mechanism is under development in Northern Ireland, with an exact nature still to be determined. Appeal decisions in situations where courts are overseeing courts may also, as suggested above, influence future decision-making through normal channels.

The Appeals Permission Board in Denmark is in stark contrast to the other appeals bodies, in that it does not give reasons for its decisions, thus preventing future lessons from being learned. As well as being unhelpful, this lack of reasons is striking given the statutory right to written grounds for administrative⁷³⁴ as well as court decisions,⁷³⁵ and hinders further appeal. The reason for the stance is seemingly consistency between the different functions of the Board, but it can be questioned whether this aim is sufficiently compelling to justify the negative impact on legal aid quality improvement.

It must be remembered that the pursuit of good legal aid decisions is only part of the puzzle within a legal aid system, and what is achievable is limited by financial restraints. The choice of decision-making structure in general, and appeals in particular, may be constrained by budget; both the cost of the structure and the control it gives over the total cost of the legal aid system. However, actual and perceived legitimacy of decisions is necessary for public faith in legal aid to be maintained. Structural changes to decision-making and appeals processes could in some jurisdictions improve the quality of legal aid decision-making, and increase trust in the system.

733 Lag om rätt för Justitiekanslern att överklaga vissa beslut, 2005; Rättshjälpslag, 1996, 45 §.

734 Forvaltningsloven, 2014, § 22.

735 Retsplejeloven, 2017, § 218.

Case study 2:

Anne in the Republic of Ireland, Anita in Northern Ireland and Anja in Norway have all been sent court papers saying that their landlords have applied to evict them from their rented homes.

Republic of Ireland – Anne	Northern Ireland – Anita	Norway – Anja
<p>To obtain publicly-funded legal help, Anne must attend a Law Centre run by the Legal Aid Board. Her means will be tested before any further steps are taken. There may be a long queue (several months) for an appointment but if the wait is over 4 months, Anne will be offered a triage appointment within a month for emergency advice.</p> <p>Once she has reached the front of the queue, Anne will see a solicitor who will complete an application for legal aid and send it to the Corporate Services Team within the Legal Aid Board. If legal aid is refused, Anne can ask for a review by the Legal Aid Board and then, if still unsuccessful, lodge an appeal with the appeals committee of the Board.</p>	<p>Anita can get help from any private solicitor willing to take her case. The solicitor will check that she meets the financial eligibility requirements and grant 'Advice and Assistance' worth up to £88. As part of this work the solicitor will help Anita complete an application for legal aid for representation, which will be sent to the Legal Services Agency for a means and merits assessment. If legal aid is not granted, Anita can ask for a review by the Agency. A further appeal will only be possible against refusal on the merits grounds, and only if the case is being heard in a higher court (which is unlikely in such a case). Appeals would be to the independent appeals panel.</p>	<p>Tenancy termination cases are means-tested priority cases and therefore if Anja goes to see a private lawyer about the case, that lawyer can grant legal aid for advice up to the fixed fee amount, as long as Anja meets the financial requirements. If more advice is needed, an application for more time can be made to the County Governor but as the landlord has already issued proceedings it is more likely that an application for legal aid for representation will be made straight away. This application will be to the court dealing with the possession proceedings (because it is a priority matter) and a minimal 'not unreasonable' test will apply, in addition to the means test. Appeal against refusal would be to a higher court.</p>

5. Chapter 5: Civil legal aid scope

5.1 Introduction

One of the ways in which the civil legal aid systems in the Nordic countries, the Republic of Ireland and the UK vary is in the breadth of subject coverage they provide. Some jurisdictions permit legal aid for almost all civil case types whilst others severely restrict the matters for which legal aid is available. Reducing the scope of legal aid is a simple and effective way to reduce the number of legal aid grants; decisions tend to be straightforward compared to merits assessments and lawyers are unlikely to even request legal aid in excluded case types, thus reducing administration costs as well as expenditure on cases. Most of the systems under comparison take the approach of excluding some types of case, but Norway and England & Wales instead list the case types which are included. This is an easier approach for those jurisdictions, as they are very restrictive in the case types covered.

Pertinent international human rights obligations suggest that removing some categories from scope altogether may be unacceptable, and many schemes allow for excluded case types to be funded in exceptional circumstances. Such provisions are of variable effectiveness, as will be seen.

5.2 The usual approach: exclusion of some case types

Schemes which operate by excluding certain case types provide varying coverage across jurisdictions, which is often also different at the levels of advice and representation.

The starting point regarding scope in Finland is the statement of purpose at 1 § of the Legal Aid Act that legal aid will be given if there is a 'need' for expert assistance. As a matter of overarching principle all types of matter will be covered but specific provisions at 6 § set out a number of types of case for which legal aid will generally not be provided, on the basis that such matters do not require the help of an attorney. Three civil case types are explicitly excluded: cases related to membership of a municipality or other public body; tax matters; and cases involving the registration of documents and records. In the latter two

categories, legal aid can nonetheless be granted if there are especially weighty reasons for providing it.⁷³⁶ None of the exclusions are absolute, though, as in all three categories advice and assistance with preparation of documents can be provided.⁷³⁷ The scope of legal aid is also restricted by some other legislation, in particular the Aliens Act, which provides that legal aid representation is not available during an initial asylum interview.⁷³⁸

Thus, all questions of Finnish law can be the subject of legally aided assistance at the advice level, and representation is available in almost all types of case. The non-binding handbook referred to in earlier chapters suggests some case types which will not normally be funded as they do not generally result in a need for legal assistance. These are few in number but include simple debt settlement cases and initial applications for asylum.⁷³⁹ It should be noted that although these case types are not normally funded, assistance can be given if there is a need for expert help.

A similar structure for initial assistance can be found in Sweden, where any legal question can be the subject of publicly funded advice.⁷⁴⁰ However, in respect of representation, scope is more limited than in Finland, and the list identifying types of matter which are completely excluded from scope is considerably longer: the preparation of certain documents such as tax returns, marriage contracts and wills; registration of a property upon inheritance; debt restructuring; land registration and some other property related matters; registration of commercial shipping; the division of property after divorce or separation (apart from appeals against the decision of a division of property official);⁷⁴¹ and cases seeking compensation from an insurance company for personal injury following a traffic accident.⁷⁴²

A further group of matter types is excluded unless there are special reasons to grant legal aid:⁷⁴³ divorce and child support matters, tax and customs issues, matters worth below a certain sum⁷⁴⁴ and cases which will be dealt with outside Sweden. The interpretation of 'special reasons' is a matter for the decision-maker, but guidance is available from the online handbook published by the National Courts Administration. Examples of special circumstances which may justify a grant of legal aid in divorce cases and child support cases are: subsequently arising disputes over the care of children;⁷⁴⁵ issues of right to reside in the family

736 Rättshjälpslag, 2002, 6 §.

737 *Ibidem*.

738 Utlänningslag, 2004, 9 §.

739 Oikeusavun käsikirja 2013, section 2.2.1.

740 Rättshjälpslag, 1996, 4 §.

741 See Chapter 8 for more information about this role.

742 Rättshjälpslag, 1996, 10 §.

743 *Ibidem*, 11 §.

744 Half the "prisbasbelopp", which in 2018 is 45 500 Swedish kronor, with a resultant minimum value of case for legal aid of 22 750 kronor, or about 2 250€. Rättshjälpslag, 1996, 11 §, para. 4 and Rättegångsbalken, Chapter 1, 3d §.

745 RH 1998:66, 1998 and Ö 1754-99, 2000.

home;⁷⁴⁶ the existence of domestic violence⁷⁴⁷ or of an injunction prohibiting contact between the parties.⁷⁴⁸ However, the fact that the applicant was an asylum seeker with limited knowledge of the Swedish language⁷⁴⁹ or in another case that there was no known address for the respondent⁷⁵⁰ did not amount to special grounds for the granting of legal aid. The length of time taken by a lawyer in ultimately dealing with the divorce is also relevant; in a case where this was under five hours the Court of Appeal decided that the matter cannot have been so complex that special reasons existed.⁷⁵¹

In Iceland, the scope assessment is included as part of the merits test; regulations set out together the various considerations to be taken into account when the legal aid committee evaluates an application for legal aid.⁷⁵² The relevant factors include that the case is of such a nature that it is acceptable that it be paid for by public funds, and a list is given of matter types for which legal aid should as a rule not be granted unless special reasons allow for legal aid. These are: that the dispute concerns the business of the applicant and the applicant has by his own actions or inaction caused the dispute; that the case is between closely related individuals; and certain other features which are related more closely to merits and will be dealt with in Chapter 6 below.

In Denmark, scope is more restricted at the advice stage than for representation. Stage 1 advice covers any legal query, but as has been seen above in Chapter 4 there is no duty on lawyers to provide such advice, and no payment by the state for it, rendering the theoretical entitlement to free legal advice at this stage somewhat academic. At advice steps 2 and 3 there is a short list of excluded case types. *Inter alia*, assistance for cases before an administrative board of appeal or private complaints board is out of scope.⁷⁵³ In cases concerning the actions of an administrative authority it is intended that the duty to advise, which applies to all administrative authorities,⁷⁵⁴ should suffice. Whilst this is understandable as a policy position, there are some concerns that the conflict of interests between the authorities and their customers may make the provision of good, impartial advice unlikely.⁷⁵⁵ If a complaint against the actions of an administrative authority is contemplated, advice is available under legal aid.⁷⁵⁶ Commercial and business cases, debt matters and criminal matters are excluded from scope at advice levels 2 and 3.⁷⁵⁷

746 Ö 1209-01, 2001.

747 Rättshjälpsnämnden 401-1999.

748 Rättshjälpsnämnden 227-1999.

749 NJA 1999 s.149 I.

750 RH 1998:9.

751 RH 1998:33.

752 Regulation 45/2008, Article 5.

753 Retsplejeloven, 2017, § 323(4)(4).

754 Forvaltningsloven, 2014, § 7.

755 Ellersgaard Nielsen *et. al.* 2012, p. 35.

756 Retsplejeloven, 2017, § 323(5).

757 *Ibidem*, § 323(4)(1)-(3).

Beyond advice, legal aid for representation in Denmark covers in principle any type of case. As was seen above in Chapter 4, legal aid for certain case types is to be decided by the court⁷⁵⁸ but there is an open power to the Ministry of Justice to grant legal aid for all other matters subject to a merits test (see Chapter 6 below).⁷⁵⁹ However, it should be noted that since the introduction of the small claims procedure, it has been established through case precedent that legal aid can be refused in such cases on the basis that the costs of taking the case are insignificant in relation to the claimant's income.⁷⁶⁰ In practice, small claims are now routinely refused legal aid, which results in a large number of enquiries concerning such cases to private legal aid institutions, as the process can be confusing despite being a simplified version of full litigation.⁷⁶¹ In business cases and defamation actions, legal aid can only be granted in exceptional circumstances, unless the defamation is grave or widely published.⁷⁶²

The statutory frameworks for deciding scope in the Republic of Ireland, Northern Ireland and Scotland are very similar. In these jurisdictions legal aid for representation is constrained to cases before certain venues, widely drawn. In the case of the Republic of Ireland, these are all the normal civil courts (the District Court, the Circuit Court, the High Court and the Supreme Court) as well as any other courts or tribunals which have been prescribed by the Minister for Justice and Equality.⁷⁶³ At present only the Refugee Appeals Tribunal has been so prescribed,⁷⁶⁴ with the consequence that cases before any other tribunals are excluded.

In Northern Ireland, the legislation states that legal aid may not be granted except in proceedings being heard before one of the listed courts or tribunals. This list is relatively comprehensive and includes the Supreme Court, Court of Appeal, High Court and County Court, the criminal courts when dealing with certain civil matters related to the proceeds of crime, and a number of tribunals.⁷⁶⁵ Unlike in the other two similar jurisdictions, in Northern Ireland there is, within the rules on which venues are covered, a list of types of proceedings which will be in scope before the courts of first instance. This aspect is inclusive rather than exclusive, in contrast to the main pattern which, as will be seen below, is to exclude matters from scope. This element of the Northern Irish legal aid scheme thus to a small extent shares the inclusiveness characteristic with the schemes in Norway and England & Wales.

The Scottish arrangement for legal aid for representation is, again, very similar to those in the Republic of Ireland and Northern Ireland. The overall scope of civil legal aid is provided by Schedule 2 of the Legal Aid (Scotland)

758 *Ibidem*, § 327.

759 *Ibidem*, § 328.

760 Mavrogenis 2012, p. 74; Retsplejeloven, 2017, § 325(2).

761 Ellersgaard Nielsen *et. al.* 2012, p. 39.

762 Retsplejeloven, 2017, § 328(4).

763 Civil Legal Aid Act 1995, s. 27.

764 Civil Legal Aid (Refugee Appeals Tribunal) Order 2005.

765 Access to Justice (Northern Ireland) Order 2003, Schedule 2, para. 2.

Act, which first sets out the courts and tribunals for which legal aid may be granted and then lists types of case which are excluded from civil legal aid. Included courts are the Supreme Court, Court of Session, Lands Valuation Appeal Court, Scottish Land Court, Sheriff Appeal Court and the sheriff court. In addition, the Lands Tribunal for Scotland, Employment Appeal Tribunal and Upper Tribunal for Scotland are included.⁷⁶⁶

In all three schemes, after delineating the courts and tribunals covered by legal aid for representation, the legislation goes on to exclude from scope some subject areas. Lists of excluded case types are provided separately for legally aided advice.

The Republic of Ireland, for instance, excludes defamation, small claims, conveyancing, class actions (which are not generally permitted under Irish law) and licensing from the scheme for legal aid for representation.⁷⁶⁷ There is a general bar on legal aid for disputes over land but this is mitigated by a number of exceptions.⁷⁶⁸ At the level of advice, the same category restrictions apply, with the addition of criminal law matters, although advice may be given on conveyancing questions arising from other funded proceedings (presumably most often family breakdown related matters).⁷⁶⁹

A short list of matters is excluded from scope for representation in Northern Ireland: criminal defence matters; defamation; relator actions (where the Attorney General is participating on behalf of a member of the public); cases under electoral law and uncontested debt recovery matters.⁷⁷⁰ The government has published proposals on scope; it is not intended to restrict the case types for which legal aid is available as much as has been done in England & Wales, but there is an aim to make some additional restrictions and to re-structure so that a list of specifically included case types, rather than an excluded list, is provided.⁷⁷¹ The statute gives the power to make such changes by regulation rather than primary legislation.⁷⁷² If these changes are made, the scheme will be closer in structure to England & Wales, as seen below.

Advice and assistance can be given on any area of Northern Irish law other than those specifically excluded: conveyancing, boundary disputes, wills, trust law, defamation or malicious falsehood, company or partnership law, or business-related issues.⁷⁷³ The Access to Justice Review (2) proposed that welfare benefits, debt and damages claims should also be removed from scope but this has not yet been implemented.⁷⁷⁴ In making the proposals, the government was working on an assumption that the introduction of alternative

766 Legal Aid (Scotland) Act 1986 Schedule 2 Part I.

767 Civil Legal Aid Act 1995, s. 28(9).

768 *Ibidem*, s. 28(9)(c).

769 *Ibidem*, s. 26.

770 Access to Justice (Northern Ireland) Order 2003, Schedule 2, para. 4.

771 Stutt 2015, Recommendation 57, para. 23.57.

772 Access to Justice (Northern Ireland) Order 2003 s. 12(6).

773 *Ibidem*, Schedule 2, para.1.

774 Stutt 2015, Recommendation 57, p. 18.

funding arrangements will maintain access to justice in these areas.⁷⁷⁵

In Scotland, having slightly circumscribed the judicial venues for which legal aid may be afforded, the statute lists excluded case types; namely defamation, some debt and bankruptcy matters, election petitions, simple divorce applications and small claims cases.⁷⁷⁶ Maybe somewhat surprisingly, the Law Society of Scotland has suggested that consideration be given to removing some other areas from scope to reduce pressure on legal aid, as long as a well-funded non-lawyer advice sector can be maintained.⁷⁷⁷ The Advice and Assistance scheme is very generous in terms of scope as it covers advice on any question of Scots law.

It should be noted that Scotland operates a separate legal aid scheme for certain proceedings relating to children under the name 'children's legal aid'. This is legal aid for proceedings relating to children, rather than legal aid for children, notwithstanding the name. The recipient of children's legal aid may be the child who is the subject of proceedings⁷⁷⁸ or a 'relevant person',⁷⁷⁹ i.e. a parent or other person with parental responsibility for the child.⁷⁸⁰ Some children's legal aid is available as of right, without a merits or means test but in many cases a merits test and modified means test do apply. The merits tests for children's legal aid will be addressed in Chapter 6 below.

As seen in Chapter 4, advice and assistance in Scotland is intended to cover pre-court work and legal aid is intended to take over when court proceedings are commenced. However, the middle category of Advice By Way of Representation (ABWOR) has become quite important due to its flexibility. The basic legal aid system is set out in legislation which is over 30 years old⁷⁸¹ and subsequent changes in other legislation have left gaps in the coverage by Advice and Assistance and legal aid. As ABWOR is able to be extended by regulation without further primary legislation,⁷⁸² the Scottish Legal Aid Board has been able to increase coverage of the overall legal aid scheme by extending the applicability of ABWOR. However, the results of this approach are a complex mix of coverage; for example in proceeds of crime cases if forfeiture is sought civil legal aid will cover the matter, if confiscation is sought this will be covered by criminal legal aid and an interested third party can have help under ABWOR.

It can thus be seen that despite the existence of the technique specific to the Republic of Ireland, Northern Ireland and Scotland of specifying included courts and tribunals, all the jurisdictions under comparison other than Norway and England & Wales share an approach of restricting scope by excluding certain case types.

⁷⁷⁵ David Ford, Minister of Justice, speech in the Northern Ireland Assembly 3 November 2015.

⁷⁷⁶ Legal Aid (Scotland) Act 1986, Schedule 2 Part II.

⁷⁷⁷ Law Society of Scotland 2014, p. 39.

⁷⁷⁸ Legal Aid (Scotland) Act 1986, s.28D.

⁷⁷⁹ *Ibidem*, s. 28E.

⁷⁸⁰ Children's Hearings (Scotland) Act 2011, s. 200.

⁷⁸¹ Legal Aid (Scotland) Act 1986.

⁷⁸² *Ibidem*, s.9.

5.3 Norway: scope limited to priority cases

Several schemes do not have a starting point that all case types are eligible, and apply exceptions; rather, the base assumption is that a case will not be eligible for civil legal aid, but specific case types are selected for inclusion in legal aid. Within the jurisdictions under consideration in this thesis, the relevant examples are Norway and England & Wales, although there are indications that Northern Ireland may adopt the approach in future, as seen above.

As was seen in Chapter 4, in Norway the Legal Aid Act divides cases into priority non-means tested, priority means-tested and non-priority types, for both free legal advice and free legal aid. Lists are provided of all four priority case categories. Non-means tested free advice is available in the following cases: child welfare; certain immigration cases; compensation claims for wrongful prosecution; claims for compensation by victims of violent crime against the perpetrator; some cases concerning military conscription; advice for victims of domestic abuse and forced marriage cases.⁷⁸³ In representation cases, some of the advice categories are repeated (victims of violent crimes, conscription and forced marriage cases) and in addition non-means tested representation is available in *inter alia*: conscientious objection to military service cases; objection to an order for compulsory medical treatment; some other immigration test cases; public guardianship and to provide representation in child custody cases for a person suspected of child abuse.⁷⁸⁴

For both advice and representation, there is an additional list of cases for which assistance will be provided subject to a means test. For advice, these are: some family cases, some property matters on relationship breakdown, personal injury, termination of tenancy, private sector employment dismissal claims, some compensation claims by victims of violent crimes and social security appeals.⁷⁸⁵ All but the last two categories are also included as means-tested priority cases for representation.⁷⁸⁶

This method of categorisation is relatively simple to administer but has been criticised as having an urban bias and leading to “differential treatment of cases of equal significance”.⁷⁸⁷ The preciseness of the provisions can lead to some surprising and seemingly illogical results, such as that tenancy termination cases are covered if due to a breach of contract but not if due to a gross breach of contract, and deportation cases are included in the scheme if they occur in consequence of a breach of immigration law but not if the trigger was a breach of criminal law.⁷⁸⁸ Criticisms were acknowledged by the Ministry of Justice in 2009⁷⁸⁹ and suggestions for the addition of other case types as well

783 Rettshjelploven, 1980, § 11(1).

784 *Ibidem*, § 16(1).

785 *Ibidem*, § 11(2).

786 *Ibidem*, § 16(2).

787 Johnsen 2009a, p. 23.

788 Halvorsen Rønning 2018, p. 21.

789 St.meld. nr. 26 (2008-2009), para. 9.1.

as first-line advice in all cases were recommended⁷⁹⁰ but these changes were not implemented by Parliament. A coalition of NGOs in 2015 called for the list of priority cases to be extended to include, *inter alia*, school bullying cases, discrimination, patients' rights and all domestic violence matters.⁷⁹¹ The fact that these categories are not currently covered may seem surprising, particularly as discrimination and domestic violence cases are among the few case types still seen as serious enough to warrant legal aid in England & Wales, despite the recent severe scope restrictions there. Amongst the cases not covered by legal aid are also many money cases and social welfare cases.

As well as domestic criticism, the restricted scope of Norwegian civil legal aid has caused international concern, with the UN Human Rights Committee in 2011 recommending that "the State party should review its free legal aid scheme to provide for free legal assistance in any case where the interests of justice so require".⁷⁹²

Scope in Norway is very limited, with the areas in scope presenting an inventory of the legal issues which are felt to be particularly important in individuals' lives. This is clearly, and naturally, a culturally specific choice, as can be seen by the inclusion for example of cases concerning military conscription.

5.4 England & Wales: radical reduction in scope

Prior to 2013, the situation regarding scope in England & Wales was already relatively strict in the context of the group of jurisdictions being compared here, with a group of excluded matters similar to that in Northern Ireland. At the advice level, the categories outside scope were personal injury and damage to property, boundary disputes, conveyancing, defamation, the making of wills, trust law and business cases. Legal aid could cover representation for any case before the county court, the High Court, the Court of Appeal, the Supreme Court and family matters before the magistrates' court, but excluded tribunal proceedings and coroners' courts.

However, dramatic changes to scope took place in 2013, when the legal aid provisions in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force. A considerable reduction in the types of case for which civil legal aid is available was one of the key elements of the legislation. As will be discussed further in Chapter 8, as part of the consideration of legal aid in times of austerity, the changes brought about by LASPO were explicitly about saving money:

790 *Ibidem*, para 9.3.3 and 9.3.1

791 *Rettshjelpsordningen må styrkes*, 2015.

792 CCPR/C/NOR/CO/6, para. C6.

The Government is committed to controlling public expenditure to reduce the deficit. But we also believe in light of the way the scheme has expanded since its establishment, that it is right in principle to reduce its scope. We have concluded that it is no longer affordable to provide legal aid for the extensive range of issues for which it is currently available.⁷⁹³

The policy was indeed successful at reducing expenditure, as confirmed by the National Audit Office:

The reforms have reduced the number of cases the Agency funds. In 2013-14 the Agency funded more than 400,000 fewer legal help matters (a drop of 70%) and granted more than 42,000 (28%) fewer certificates for legal representation than it had in 2012-13.⁷⁹⁴

The government's reasoning when selecting cases which would be removed from scope under LASPO is focused on political policy, as will be seen in the conclusions at the end of this chapter, and almost completely fails to consider the need for fair hearings in civil cases. The new scope limitations apply to all levels of civil legal aid and thus where a solicitor is granting Legal Help (advice and assistance pre-court) to a client, they must ensure that the matter is within scope, as well as applying a merits test. If Legal Help is provided when a matter is out of scope, there will be costs penalties for the lawyer.

Instead of excluding certain areas, the new legislation provides that legal aid is only available for the listed types of case. The scope of the civil legal aid scheme is set out in Schedule 1 of LASPO, but unfortunately it "is not easy to understand and requires a certain amount of cross-referencing and double or even triple negatives to be navigated to understand whether a case is in fact in or out of scope".⁷⁹⁵ The Schedule first lists case types which are in scope, then sets out some specific exclusions within these case types and finally excludes some courts and tribunals. Given the fundamental nature of questions of subject coverage within a civil legal aid scheme, this convoluted construction is most unfortunate.

Whilst the complexity of the current scope provisions makes it inappropriate to attempt a detailed audit here, some of the removals from scope are particularly noteworthy. In 2017 the Law Society of England & Wales reviewed the first four years of operation of LASPO and summarised the losses:

Until 2012, legal aid was available for almost all areas of law, subject to specified exceptions. LASPO Part 1 changed the system, transforming it overnight to a system focusing on a much smaller and more specific list of legal areas which are eligible (or in scope) for legal aid.

793 Ministry of Justice 2010, para. 4.3.

794 National Audit Office 2014, p. 21.

795 Ling and Pugh 2017, para. 3.5.

Areas removed from scope included private family law, such as divorce and custody battles; most clinical negligence cases; most employment law, non-asylum immigration law, where the person is not detained; some debt and housing cases, and most welfare benefit issues. In legal areas that are now no longer in scope, people now have a stark choice: to pay for their own legal advice, represent themselves, or be excluded from the justice system altogether.⁷⁹⁶

The National Audit Office has pointed out that the pressure on more people to represent themselves in court or give up on their case altogether has had unquantifiable financial consequences for the state, both inside and outside the justice system:

The published evidence on the impact of litigants in person on court resources indicates that cases involving litigants in person increase costs to the courts. If, as has been estimated, cases involving litigants in person take 50% longer, the impact of increased numbers of litigants in person in family courts could be £3 million. This estimate does not include additional costs in civil courts.⁷⁹⁷

Individuals who have civil legal issues may experience a range of adverse consequences if they cannot resolve their problem. [...] 50% of respondents who were eligible for legal aid reported that their civil legal problem had a negative effect on their health and wellbeing. Where legal problems remain unresolved, the cost may be met by the taxpayer through additional costs to the NHS or welfare programmes.⁷⁹⁸

As early as two years after the changes were implemented, the House of Commons Justice Committee was highly critical of the reforms:

The Ministry of Justice has failed in three of its four objectives for LASPO: it has not discouraged unnecessary and adversarial litigation at public expense because the courts and tribunals are having to meet the costs of a significant rise in litigants in person and a corresponding fall in mediation; it has failed to target legal aid at those who need it most because it has failed to properly implement the exceptional cases funding scheme; and it has failed to prove that it has delivered better overall value for money for the taxpayer because it has no idea at all of the knock-on costs of the legal aid changes to the public purse. The Ministry of Justice has made significant savings in the cost of the scheme but we conclude that it could have achieved greater savings if it had reduced the knock-on costs of the reforms.⁷⁹⁹

796 Law Society 2017, p. 6.

797 National Audit Office 2014, p. 17.

798 *Ibidem*, p. 19.

799 House of Commons Justice Committee 2015, para. 181.

Many parties now believe that the changes have led to such serious problems with access to justice that they must be at least partially reversed. Forceful arguments to this end have been made by the Law Society, as seen above, and by the Bach Commission, which was composed of respected experts and funded by the politically left-wing think tank the Fabian Society.⁸⁰⁰ The Bach Commission argued that at least “all law concerning children, and some aspects of family law and immigration law” should be returned to scope. A government review of the first four years of operation of LASPO is currently underway.⁸⁰¹

One of the most contentious changes to scope introduced by LASPO was the removal of all private law family cases unless evidence of domestic violence could be provided.⁸⁰² As the Bach commission pointed out, “the scale and impact of these changes has been enormous. There are nearly a quarter of a million fewer people now receiving legal help in family cases each year than there were in 2009-2010”⁸⁰³ Internationally, this change has not gone unnoticed and the UN Committee for the Elimination of Discrimination Against Women has commented critically:

The Committee is concerned that the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 unduly restricts women’s access to legal aid because it removes access to legal aid for litigation concerning, among others, divorce, property disputes, housing and immigration matters. While noting that legal aid remains available for some private family law issues, the Committee is concerned that the Act conditions legal aid upon proof of, among others, abuse suffered by victims of violence.⁸⁰⁴

Entitlement to legal aid for family matters under LASPO was initially dependent on having one or more specified forms of evidence of domestic violence having occurred within the previous 2 years.⁸⁰⁵ Following a concerted campaign which provided evidence that 43% of women did not have the prescribed forms of evidence to access family law legal aid,⁸⁰⁶ some changes were made slightly relaxing the evidence requirements. However, following an application for judicial review, the regulation imposing the 24-month time limit was held invalid by the Court of Appeal because it frustrated, in part, the purpose of the Act.⁸⁰⁷ The evidential time limit was subsequently amended to 60 months⁸⁰⁸ and the government has now removed the time limit altogether.⁸⁰⁹

800 Bach Commission 2017, p. 31.

801 Cm 9486.

802 Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, para. 12.

803 Bach Commission 2017, p. 31.

804 DAW/C/GBR/CO/7, p. 4, para. 22.

805 The Civil Legal Aid (Procedure) Regulations 2012, Regulation 33.

806 Rights of Women 2014.

807 *R (on the application of Rights for Women) v. The Lord Chancellor*, 2016, para. 45.

808 Civil Legal Aid (Procedure) (Amendment) Regulations 2016.

809 The Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2017, in force 8 January 2018.

Despite this relaxation of the evidential rules, the general principle remains that legal aid will not be available for most private family law matters, such as disputes between parents over the arrangements for children, unless there has been domestic violence. Given that the case in the European Court of Human Rights which established a right to civil legal aid in some cases was a private law family case where there had been domestic violence,⁸¹⁰ it is unsurprising that the UK government did not remove these cases from the scope of civil legal aid in England & Wales, despite the dramatic scale of cuts undertaken overall.

Clearly aware of the risk of censure from international bodies following the reforms, the UK government kept open the possibility of obtaining legal aid in out-of-scope exceptional cases; one of a number of similar provisions dealing with special circumstance in the jurisdictions under consideration. These will now be considered in more detail.

5.5 Exceptional cases

It has been seen above that a common formulation of scope restrictions is to provide that certain categories are not funded unless there are special reasons for granting legal aid. This provides a legal aid safety net if the matter type is not deemed a priority but the applicant or the particular factors of that case mean that a fair hearing cannot be achieved without legal assistance. In the Republic of Ireland and Scotland there are no general saving provisions; the few case types excluded from civil legal aid scope cannot be funded whatever the other circumstances, other than in relation to defamation in Scotland as described below. However, in all the other jurisdictions there are provisions for exceptions to be made to the usual exclusions.

In Finland, for example, even within the excluded categories of taxation and the registration of documents, legal aid can be granted if there are especially weighty reasons.⁸¹¹ There remains an absolute bar on cases concerning membership of municipalities or other public bodies, but it can be assumed that this is a very small number of potential cases. In Sweden the list of absolutely excluded cases is longer, but divorce and child support matters, tax and customs issues and low value cases can be granted legal aid if there are special circumstances.⁸¹²

Unlike in Finland and Sweden, the Icelandic system provides that any type of case may be given legal aid if there are special reasons. A similar result is seen in Denmark, where legal aid is in any event available for almost any type of matter, with exclusions only for business matters or minor defamation. Nonetheless there is a specific statutory provision that the Minister of Justice

810 *Airey v. Ireland*, 1979.

811 Rättshjälpslag, 2002, 6 §.

812 *Ibidem*, 11 §.

may upon application grant a party free legal aid in any case when special reasons speak for it.⁸¹³ This especially applies in cases which have fundamental importance or general public importance or which have significant importance for the applicant's social or business situation.⁸¹⁴

As has been seen, in Norway any cases not listed as priority case types can only be granted legal aid in exceptional cases, which in most instances requires a similarity to the listed categories. The Circular issued by the Ministry of Justice and Public Security provides that the same approach is to be taken to exceptional cases in both free legal advice and free legal representation cases.⁸¹⁵ The Legal Aid Act is to be understood as narrowing the availability of legal aid in unlisted case types; the general rule is that legal aid will only be granted in listed types of case. The exception applies where the matter "seen from an objective point of view is especially pressing for the applicant."⁸¹⁶ This does not mean that the applicant herself considers the problem particularly pressing, but that the matter would generally be considered to affect people personally to a particularly strong degree.⁸¹⁷ Similarity with the listed case types is to be given weight, according to both the Act⁸¹⁸ and the Circular,⁸¹⁹ and this is in practice the main factor in deciding whether legal aid will be granted for non-priority cases. The Circular goes on to provide examples, stating for example that child welfare cases falling outside the list will normally be considered as of great personal importance for the individual but that employment cases will generally not. The latter stance is interesting; private sector dismissals are included in the priority list but public sector employment cases rely on inclusion as similar cases where the matter is particularly pressing. Given that the European Court of Human Rights has confirmed, as seen below, that there is an assumption that Article 6 applies also to public sector employees, the diversion of approach is hard to justify. It is noteworthy, also, that the exception does not appear to cover cases where the unusual need for legal assistance arises out of the characteristics of the individual rather than the case type.

Northern Ireland and England & Wales share a very precise approach to exceptional cases of any case category, explicitly aimed at preventing breaches of international human rights law. In Northern Ireland, outside the usual rules on matter types and merits, legal aid may be granted under what is known as 'exceptional case funding'; apart from where there is a wider public interest in designated types of inquest, such funding will only be granted if failure to provide legal aid would be a breach of the individual's rights under the

813 Retsplejeloven, 2017, § 329.

814 If free legal aid is rejected, the rejection may be appealed to the Danish Board of Appeal Permission within 4 weeks after the applicant having received the rejection.

815 SRF-1/2017, para. 7.5.1.

816 Rettsshjelploven, 1980, § 11(3) and § 16(3).

817 SRF-1/2017, para. 7.5.1.

818 Rettsshjelploven, 1980, § 11(3) and § 16(3).

819 SRF-1/2017, para. 6.5.1 and 7.5.1.

European Convention or enforceable EU rights or if the risk of such a breach makes funding appropriate.⁸²⁰

Similarly, in England & Wales, section 10 of LASPO allows the Director of Legal Aid Casework to make an ‘exceptional case determination’ and grant legal aid in a case for which it would otherwise be unavailable, if the failure to provide legal aid would amount to a substantial risk of breach of the rights within the European Convention on Human Rights or enforceable EU rights.⁸²¹ Legal aid must be granted where failure to do so will be a breach of such rights, and may be granted where there is a risk of such a breach. From the first years of operation of LASPO, it was apparent that the exceptional case criteria were being very strictly applied. The House of Commons Justice Committee findings bear repeating at some length:

The exceptional cases funding scheme was designed to ensure that the legal aid reforms did not put the Government in breach of its duty to protect individuals’ European Convention or European Union rights. During the passage of the Bill the scheme was described as a ‘safety net’ to compensate for the Government’s narrowing of legal aid. It was also presumably intended to further the Government’s objective of ‘targeting legal aid to those who need it most.’

During the passage of the Bill through Parliament, the [Ministry of Justice] estimated that 5,000–7,000 applications for exceptional cases funding would be made annually, of which around 3,700 (74%–53%) would be granted. The latest figures from the Legal Aid Agency, however, show that only 151 (7.2%) of the 2,090 applications for exceptional case funding made between April 2013 and September 2014 were granted [...]

We heard of a number of cases where, on the facts available to us, it appears surprising that exceptional case funding was not granted. Details of cases refused exceptional cases funding include an illiterate woman with learning, hearing and speech difficulties facing an application which would determine her contact with her children; parents with learning difficulties who wished to contest their child’s adoption but were £35 a month over the eligible financial limit; a woman with “modest learning difficulties” who the judge in the case told us was unable to deal with representations from the lawyer on the other side as a result of which she “now faces possibly not seeing her child again”; and a destitute blind man with such profound learning difficulties he lacked litigation capacity. In July 2014, at the beginning of our

820 The entry into force of the rules was convoluted: s. 12A(3) Legal Aid and Coroner’s Court Act (NI) 2014 substituted Article 12 in the Access to Justice Order with a new Article 12A. However, Article 12 of the Order was still uncommenced in the Access to Justice Order and was subsequently brought into operation on 1 April 2015 by The Access to Justice (2003 Order) (Commencement No. 7, Transitional Provisions and Savings) Order (Northern Ireland) 2015, at which point that part of the 2014 Act became effective.

821 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.10.

inquiry, the number of grants of exceptional funding for cases not involving inquests was sixteen. Julie Bishop of the Law Centres Federation, observed to us “Sixteen cases is not a safety net”.

The number of exceptional cases funding applications granted has been far below the Ministry of Justice’s estimate. We have heard details of cases where the refusal of exceptional cases funding to vulnerable litigants is surprising on the facts before us. We conclude therefore that the low number of grants together with the details of cases refused exceptional cases funding means the scheme is not acting as a safety net.⁸²²

The difficulty appears to have been the guidance issued by the Ministry rather than s.10 itself. The guidance at that time stated, in relation to exceptional case funding applications:

It would not [...] be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. Rather, section 10(3)(b) should be used in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section 10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case. This may be so, for example, where the case law is uncertain (owing, for example, to conflicting judgments).⁸²³

This interpretation was challenged by way of several applications for judicial review by campaigning organisations. The Court of Appeal agreed with the applicants and held that “the Guidance is not compatible with article 6(1) of the Convention and article 47 of the Charter. It impermissibly sends a clear signal to caseworkers and the Director that the refusal of legal aid will amount to a breach only in rare and extreme cases”.⁸²⁴ The guidance was subsequently amended and now offers three questions to be considered by caseworkers in assessing applications for exceptional funding:

- 1 Does the case involve the determination of civil rights or obligations?
2. If yes, will withholding of legal aid mean the applicant will be unable to present his or her case effectively, or lead to an obvious unfairness in the proceedings?
3. If yes, what are the minimum services required to meet the legal obligation to provide legal aid?⁸²⁵

It has been suggested that the “focus remains on only granting exceptional legal aid where it is absolutely necessary to do so, and then only to the minimum extent possible”.⁸²⁶ However, applications and grants have increased, with recent

822 House of Commons Justice Committee 2015, para. 30-33.

823 As quoted in the *Gudanaviciene* judgment; the original guidance is no longer in publication.

824 *Gudanaviciene, et al. v. The Director of Legal Aid Casework and the Lord Chancellor*, 2014, para. 181.

825 Lord Chancellor’s guidance - exceptional case funding (non-inquests), p. 3.

826 Ling and Pugh 2017, para. 4.28.

figures showing an application rate of over 2,500 per year and a grant rate of over 50%.⁸²⁷

In Scotland, where defamation is excluded from scope, such cases can nonetheless be funded if the case has a “degree of exceptionality [...] the same, or approximately the same, as in the facts found in cases where the Court of Session, the Supreme Court or the European Court of Human Rights has given an indication that the absence of public funding for representation violates one or more of the Convention rights as defined in the Human Rights Act 1998”⁸²⁸.

5.6 Coverage in individual cases and appeals

The scope of civil legal aid systems overall varies by jurisdiction, as has been seen. In addition, the scope of one particular civil legal aid certificate may differ from another, although the possibility of limitations on certificates is used more in some jurisdictions than others. There are two clear approaches; to issue all certificates to cover certain steps and/or amount of costs, or to issue certificates which implicitly cover all the steps in proceedings unless specifically limited when issued. As will be seen, the first approach is usual in the UK and Republic of Ireland; the second is typical of the Nordic countries.

A legal aid certificate in the Republic of Ireland must specify “the steps which the applicant is authorised to take, whether and to what extent the services of counsel may be engaged, whether, and to what extent, the fees or expenses of any expert or any witness may be paid, or such other matters as are deemed appropriate by the Board.”⁸²⁹ In other words, the Irish system issues certificates which are always expressly restricted, albeit potentially to the whole of a case. An appeal against a judgement of a trial court to the relevant appellate court is not usually authorised by a legal aid certificate but where a decision is appealed to another judge of the same court it will be covered unless explicitly excluded. Where it is not covered by the original certificate, legal aid for an appeal can only be obtained through a fresh application for legal aid.⁸³⁰ The initial certificate will not cover enforcement action relating to the proceedings unless an amendment is obtained to this effect.⁸³¹

In Northern Ireland, a civil legal aid certificate can be limited to a period of time, a particular set of proceedings or to part only of the proceedings⁸³² and it is quite common for a certificate to be limited to obtaining a barrister’s opinion on the case, at which point an application can be made to extend the certificate if the opinion is favourable. Civil legal aid certificates cannot cover

827 UK government legal aid statistics for April 2017 to March 2018 show a total of 2628 applications and a grant rate of 54%. Ministry of Justice, *Legal Aid Statistics quarterly, England and Wales, January to March 2018*.

828 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, para. 4.116.

829 Civil Legal Aid Regulations 1996, Regulation 8(3).

830 Legal Aid Board Circular on Legal Services 2017, p. 3-12.

831 *Ibidem*, p. 3-13.

832 Access to Justice (Northern Ireland) Order 2003 s. 14(4).

both a case at first instance and appeal proceedings relating to the same case;⁸³³ a new certificate must be sought if a party wishes to appeal the decision of the court of first instance. All Scottish legal aid certificates are subject to a costs limitation.⁸³⁴ Appeal proceedings are generally considered as free-standing matters for the purposes of legal aid and an application must be made for a fresh certificate. However, a first-instance legal aid certificate may be extended to cover an appeal which relates only to an interim matter.⁸³⁵

Civil legal aid certificates in England & Wales must specify a financial limit and may impose other conditions or limitations which must also be stated on the certificate.⁸³⁶ As a general rule they do contain limitations, typical restrictions being that work is limited to obtaining a barrister's opinion on the merits of the case, or to a particular preliminary hearing.⁸³⁷ Interim appeals⁸³⁸ and initial advice on appealing a final order are covered by the existing certificate, but pursuing an appeal by taking a barrister's opinion or any other steps would require amendment of the certificate.⁸³⁹

Denmark stands as a good illustration of the alternative approach in the Nordic countries. There, "free legal aid comprises the entire case with the instance in question, including the procedure that is necessary in order to obtain a new hearing of the case before the same court and the enforcement of the decision".⁸⁴⁰ If the legally aided party is wholly or partly successful at first instance but the other party appeals to a higher court, legal aid for the appeal will also be included in the original certificate.⁸⁴¹ However, if the legally aided party loses the case at first instance and wishes to appeal, a new application for legal aid is required. Legal aid certificates may be limited, but not by restricting the extent to which the proceedings will be covered; rather, there may be a limit on the type of benefit conferred. Legislation provides that a grant of legal aid confers: exemption from court fees; payment of lawyers' fees and other costs of the case; and exemption from paying costs to the other side if the assisted person loses in the proceedings.⁸⁴² However, a grant of legal aid may be limited to just some of these benefits.⁸⁴³

In Norway, the situation is similar; the entire first instance case is always covered by a legal aid certificate and this also extends to defending the case upon appeal where the appeal is brought by the other party and the assisted person was wholly or partly successful in the lower court.⁸⁴⁴ Other appeals are not in scope.

833 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 15(8).

834 Scottish Legal Aid Board Civil Legal Assistance Handbook, para. 6A.1.

835 *Ibidem*, para. 4.91.

836 The Civil Legal Aid (Procedure) Regulations 2012, Regulations 15 and 35.

837 Ling and Pugh 2017, para. 5.127.

838 Civil Finance Electronic Handbook, p. 16.

839 *Ibidem*, p. 152.

840 Retsplejeloven, 2017, § 331(3).

841 *Ibidem*, § 331(4).

842 *Ibidem*, § 331(1).

843 *Ibidem*, § 331(2).

844 Rettshjelploven, 1980, § 22.

A Finnish legal aid certificate covers work on the case at all levels of the court hierarchy; thus, appeals are covered by the same certificate.⁸⁴⁵ However, legal aid is limited to 80 hours' lawyer time in most cases and if work on the appeal cannot be completed within this limit, an application must be made for a time extension of up to 30 hours at a time. This will be granted if there are special reasons, taking into account the person's need for access to justice and the nature and extent of the matter.⁸⁴⁶ As it is not possible in Sweden to limit legal aid to only one judicial instance, appeals are included as long as the time limit (100 hours in Sweden) is kept to or extensions obtained, as in Finland. Legal aid continues until a case is concluded, which presupposes that the last court decision has come into effect (i.e. that the time limit for appeals has passed and no appeal has been lodged).⁸⁴⁷ Although legal aid does not cover enforcement following a successful case, legislation provides that a person in receipt of legal aid will not be required to pay the fees usually required by the enforcement agency.⁸⁴⁸

Iceland is dissimilar to the other Nordic countries and aligned with the UK and Republic of Ireland as regards coverage for appeals: a legal aid certificate does not extend beyond the court decision at first instance and a fresh application must be made for legal aid for an appeal.⁸⁴⁹ Whilst there is a statutory possibility of legal aid being limited to a certain amount of money or to a specialist's report,⁸⁵⁰ this is not usual.

5.7 Time scope: emergency legal aid and retrospectivity

All civil legal aid schemes are based on an application process, the administration of which is not instantaneous. Circumstances therefore sometimes arise in which a client provides instructions so late that there is no time to wait for the legal aid application to be processed before steps must be taken by the lawyer to protect the client's position. In the Nordic countries, this problem is addressed through retroactivity of legal aid but this is not a facet of the UK and Irish schemes; instead, they provide amended, faster processing mechanisms in such cases.

In an urgent civil situation in Northern Ireland, an applicant can request an emergency certificate.⁸⁵¹ Such a certificate may be granted if it is in the interests of justice,⁸⁵² but only where the Legal Services Agency finds it likely that the applicant will be found to be eligible for legal aid both financially and

845 Rättshjälpslag, 2002, 13 §, para. 1.

846 *Ibidem*, 5 §, para. 2.

847 Renfors and Arvill 2012, p. 25.

848 Rättshjälpslag, 1996, 19 §.

849 Regulation 45/2008, Article 5(2)(b).

850 Lög um meðferð einkamála, 1991, Article 127(1).

851 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 17.

852 *Ibidem*, Regulation 17(3)(b).

on the merits of the case.⁸⁵³ An emergency legal aid certificate operates in the same way as a full certificate⁸⁵⁴ with two important exceptions: it is temporary, lasting only a limited period as specified on the certificate within which the emergency steps are able to be taken; and if the full certificate is refused or if an offer of legal aid is made which the applicant refuses, all the fees and costs incurred under the emergency certificate must be repaid to the Legal Services Agency.⁸⁵⁵ Ordinary legal aid certificates are not retrospective; only work carried out after the issue of the certificate will be paid for by the Agency.⁸⁵⁶ However, the Director when issuing an emergency certificate has the discretion to specify that it has effect from an ‘appropriate’ date,⁸⁵⁷ which appears to open the possibility of a retrospective emergency certificate.

Scotland also provides a scheme for emergency certificates which requires the solicitor to take steps to satisfy themselves that the client is likely to be eligible financially. In situations of ‘special urgency’, emergency work can be carried out to protect the client’s position without seeking advance authority from the Board.⁸⁵⁸ A list is provided of urgent steps which may be taken “actually, necessarily and reasonably [...], due regard being had to economy” in order to protect the client’s position; in other situations approval must be sought before commencing work. If a client is subsequently found to be financially ineligible, they will be required to pay a contribution set by the Board towards the costs incurred.⁸⁵⁹

A very similar emergency procedure is available in the Republic of Ireland, but due to the introduction of a very fast electronic process for assessing full applications and carrying out means assessments, the emergency procedure is largely obsolete.⁸⁶⁰ However, if an emergency certificate were issued in the Republic of Ireland, the same provision would apply that if it subsequently transpires that the client is not financially eligible, all costs paid out must be refunded by the client.⁸⁶¹

In England & Wales, the contract issued to providers gives delegated power to the solicitor to grant legal aid in emergencies in most cases (the exceptions include judicial review cases and those falling under the ‘exceptional cases’ category discussed above).⁸⁶² This takes the place of emergency legal aid, as utilised in Scotland and Northern Ireland, although an emergency certificate procedure remains in place to deal with the areas which fall outside the devolved powers. If the full financial assessment subsequently carried out by

853 *Ibidem*, Regulation 17(3)(a).

854 *Ibidem*, Regulation 17(7).

855 *Ibidem*, Regulation 28.

856 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015, Regulation 14.

857 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 17(5).

858 The Civil Legal Aid (Scotland) Regulations 2002, Regulation 18.

859 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, para. 6.3.

860 Legal Aid Board Circular on Legal Services 2017, p. 3-7.

861 Civil Legal Aid Regulations, 1996, Regulation 10.

862 Standard Civil Contract Specification 2013, para. 5.2 – 5.3.

the Legal Aid Agency shows that the solicitor was wrong in assessing the client as financially eligible the certificate will be revoked⁸⁶³ and the client will have to repay any costs already incurred.⁸⁶⁴

Turning to the Nordic countries, Finnish legal aid can be granted retrospectively,⁸⁶⁵ although as a general rule an application should be made as soon as possible and in any event before the case is concluded.⁸⁶⁶ In Sweden, work carried out before the date of the application for legal aid can be paid for under the legal aid bill but only to the extent that it was urgent or small-scale.⁸⁶⁷ In Norway, an application for legal aid can even be made after the case has been concluded,⁸⁶⁸ although as a general rule legal aid should be sought before assistance is given.⁸⁶⁹

It is not possible to wait until the conclusion of the case to apply for legal aid in Denmark. Whilst legal aid in that jurisdiction explicitly includes work reasonably carried out in order to prepare the case before the grant of legal aid was made,⁸⁷⁰ the legal costs to be paid are fixed by the court at the conclusion of proceedings⁸⁷¹ and it is at this point that it must be clear whether the costs are to be paid privately or by legal aid. Thus, it is possible to apply at a late stage in the proceedings as long as sufficient time is allowed for the application to be processed before the end of the case.⁸⁷² Applications can however take some months to be assessed and so some care is needed to ensure that the paperwork is in order before the costs decision by the court

5.8 Analysis

5.8.1 International requirements

Scope restrictions, then, are a very usual method of limiting the extent and expense of legal aid. It is far from clear, however, that such restrictions comply with the international obligations of states.

The relevant international human rights provisions applying to civil legal aid have been set out in Chapter 4 above. It was seen that if a set of legal proceedings is not classified by the international treaty bodies as criminal, there will still be protection (albeit weaker) if the matter amounts to “the

863 The Civil Legal Aid (Procedure) Regulations 2012, Regulation 52.

864 The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, Regulation 47.

865 Rättshjälpslag, 2002, 13 §, para. 1.

866 Oikeusavun käsikirja 2013, section 1.4.

867 Rättshjälpslag, 1996, 27 §, para. 3. The Supreme Court has confirmed that this rule will be strictly applied; where the reason for the delay in application was that the applicant was awaiting the outcome of a claim for legal expenses insurance, the lawyer could only be paid under legal aid for 6 hours' work, as there was no particular urgency: Högsta Domstolens avgörande Ö 5072-14, 2015.

868 Rättshjelploven, 1980, § 6.

869 SRF-1/2017, para. 2.7.

870 Retsplejeloven, 2017, § 331(3).

871 *Ibidem*, § 334(4).

872 Mavrogenis 2012, pp. 51 and 186.

determination of [an applicant's] rights and obligations in a suit at law"⁸⁷³ or "the determination of his civil rights and obligations".⁸⁷⁴ There have been a number of cases before the treaty bodies which explore the line between criminal and civil proceedings, and also consider which proceedings might not fall within either category.

Chapter 3 above addressed the first of these issues and it was seen that, even if national law defines a set of proceedings as civil, the nature of the proceedings and the severity of the potential penalty may lead to the action being categorised as criminal with respect to the international rules which apply. An example which led to categorisation of a matter as civil is *Aerts v. Belgium*,⁸⁷⁵ where proceedings concerning incarceration in a mental hospital were held not to amount to criminal charges but "the outcome [...] was decisive for civil rights, within the meaning of Article 6 § 1 [because] the right to liberty, which was [...] at stake, is a civil right."⁸⁷⁶

In some situations, national law defines certain proceedings as falling outside both criminal and civil categories. Unsurprisingly, the European Court of Human Rights has not been prepared to find the domestic categorisation decisive. In *Stran Greek Refineries*⁸⁷⁷ the Court had an opportunity to consider the meaning of this part of Article 6. It held that:

the concept of 'civil rights and obligations' is not to be interpreted solely by reference to the respondent State's domestic law. Article 6 para. 1 applies irrespective of the status of the parties, of the nature of the legislation which governs the manner in which the dispute is to be determined and of the character of the authority which has jurisdiction in the matter; it is enough that the outcome of the proceedings should be decisive for private rights and obligations.⁸⁷⁸

It was concluded in the matter before the Court that:

the applicants' right under the arbitration award was 'pecuniary' in nature, as had been their claim for damages allowed by the arbitration court. Their right to recover the sums awarded by the arbitration court was therefore a 'civil right' within the meaning of Article 6, whatever the nature, under Greek law, of the contract between the applicants and the Greek State.⁸⁷⁹

The European Court of Human Rights has however conceded that some categories of case fall outside the protection of Article 6 altogether, being classified as neither criminal nor decisive of civil rights or obligations. This is the

873 ICCPR Art. 14(1).

874 ECHR Art. 6(1).

875 *Aerts v. Belgium*, 1998.

876 *Ibidem*, para. 59.

877 *Stran Greek Refineries and Stratis Andreadis v. Greece*, 1994.

878 *Ibidem*, para. 38.

879 *Ibidem*, para. 40.

case with certain immigration matters as: “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1.”⁸⁸⁰ Similarly, “tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer”⁸⁸¹

One line of caselaw⁸⁸² suggested for some time that employment disputes concerning civil servants were not covered by Article 6. However, the Grand Chamber of the Court in *Vilho Eskelinen & ors. v. Finland* limited the exclusion significantly:

There can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified.⁸⁸³

Within the constraints set out concerning the meaning of ‘civil rights and obligations’, Article 6 applies. It has been seen in this chapter that states often limit the availability of civil legal aid by removing some categories of case from scope and the European Court of Human Rights has had the opportunity to consider the acceptability of such a mechanism in two cases concerning defamation proceedings in the UK. The decisions of the court indicate that it is not acceptable that a whole area of civil law is excluded from the remit of a legal aid scheme.

In the UK, defamation proceedings were previously completely excluded from eligibility from legal aid, leading to several challenges before the European Court of Human Rights. In *McVicar v. UK*,⁸⁸⁴ the Court first set out the general principles:

880 *Maaouia v. France*, 2000, para. 40.

881 *Ferrazzini v. Italy*, 2001, para. 29.

882 See e.g. *X v. UK*, 1980.

883 *Vilho Eskelinen & ors. v. Finland*, 2007, para. 62.

884 *McVicar v. UK*, 2002.

Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to a court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case. [...] The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.⁸⁸⁵

In that case, neither the fact that the defamation proceedings were held before a High Court judge and jury, or the fact that the burden of proof was on the applicant were decisive and the absence of legal aid had not resulted in a breach of Article 6(1).⁸⁸⁶

McVicar left open the issue of whether legal aid could ever be required in defamation proceedings and the question was returned to in *Steel & Morris v. UK*.⁸⁸⁷ That case concerned defamation proceedings brought against Ms. Steel and Mr. Morris by McDonalds in a case which involved 40,000 pages of documentary evidence, 130 oral witnesses and a trial lasting 313 days. The judgments of the trial court and the Court of Appeal together ran to over 1,100 pages. The legal and factual complexity of the issues was considerable.

It was acknowledged by the European Court of Human Rights, following *McVicar*, that “the general nature of a defamation action, brought to protect an individual’s reputation, is to be distinguished, for example, from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family”. However, the Court noted that in this case “the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention [and that] the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant”.⁸⁸⁸ The Court considered the extent to which the applicants were able to bring an effective defence despite the absence of legal aid and held that “in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel”.⁸⁸⁹ Considering that the issue would have been the same if legal aid had in theory been available for defamation actions but refused to the applicants for another reason, the Court held:

885 *Ibidem*, para. 47 and 48.

886 *Ibidem*, paras 52 and 53.

887 *Steel and Morris v. the United Kingdom*, 2005.

888 *Ibidem*, para. 9.

889 *Ibidem*, para. 15.

In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of Article 6 § 1 of the Convention.⁸⁹⁰

It is submitted that *Steel & Morris* establishes the principle that the blanket exclusion of a category of cases from eligibility for legal aid is not acceptable; if the complexity of the case, the importance of the issue at stake and the personal circumstances of the applicant are such that legal aid is required in the interests of a fair hearing, it must be provided.⁸⁹¹ In the late 1990s and early 2000s, the UK government settled cases which would have tested the situation with regard to the absence of a civil legal aid scheme in Guernsey,⁸⁹² and the absence of legal aid for Privy Council appeals against detention pending deportation in Gibraltar.⁸⁹³ Kiraly and Squires have suggested that, for EU states, the EU Directive on Legal Aid also prohibits legal restrictions concerning the subject matter of cases which will be covered by legal aid.⁸⁹⁴

Some jurisdictions, in addition to the shared international requirements, have a domestic constitutional obligation to provide legal aid in at least some civil cases. It can be seen from the introductory chapter to this thesis that none of the constitutional provisions are sufficiently specific to affect the scope of a civil legal aid scheme, although they may necessitate the existence of such a scheme.

As has been seen above, jurisdictions often provide that exceptional cases of any subject category may be eligible for legal aid funding. This is sometimes expressly done to meet the requirements of Article 6. However, it is a continuing theme of the jurisprudence of the European Court of Human Rights that rights must be afforded in practice, not just in theory, and the presence of an exceptional cases scheme will not protect a state against a finding of non-compliance with Article 6 if there are in practice still cases where an individual is refused legal aid and thus denied access to court or a fair hearing. This raises questions in particular about the exceptional cases scheme in England & Wales which has garnered much criticism as outlined above.

5.8.2 Variation in scope between advice and representation

As has been seen, the scope of legal aid in a jurisdiction often diverges between advice and representation. Unlike in criminal cases (see above, Chapter 3), in civil matters there is no specific indication from the international human rights bodies as to the stage of proceedings at which legal aid must be granted. However, it has been established that the state must provide legal assistance

890 *Ibidem*, para. 18.

891 See also McBride 1998, p. 262.

892 *Faulkner v. UK*, 1999; a civil legal aid scheme has since been established in Guernsey.

893 *Duyonov & ors. v. UK*, 2001.

894 Kiraly and Squires 2011, p. 35. Denmark is not party to this Directive.

early enough to ensure that a subsequent hearing is fair.⁸⁹⁵

Iceland is a special case within the jurisdictions under consideration because it does not provide legal aid for advice at all; there is thus no advice work in scope, whilst the scope for representation, as set out above, is relatively generous. Denmark also has stricter scope requirements for advice than those for representation, as advice cannot be obtained for commercial, debt or most administrative matters whilst representation is in principle available for all case types. In all the other jurisdictions under consideration, advice is available for a greater range of case types than representation, or there is no difference in scope for advice and representation.

In England & Wales, the scope is the same for advice and for representation, as both are included within 'civil legal services' and subject to the operation of LASPO Schedule 1.⁸⁹⁶ However, the included category definitions may refer to the stage a case has reached, which in practice excludes early advice in some cases whilst including the representation and incidental advice at the stage when proceedings are imminent (see below).

The Republic of Ireland, Northern Ireland and Norway have different lists of exclusions for advice and for representation. In Norway, on balance, the overlapping priority lists for advice and for representation probably result in slightly more generous scope for advice. Likewise in the Republic of Ireland the advice scheme is slightly more generous as some conveyancing advice is in scope.

In Sweden, Scotland and Finland, advice is available for all questions of law but at the level of representation there are some scope restrictions. The restrictions are very minor in Finland thus creating a scheme which is more generous than but comparable to that in the Republic of Ireland, with very similar scope for advice and for representation. In Sweden and Scotland a significant list of matters is out of scope for representation, including (in Scotland) defamation, some debt matters, simple divorce and small claims and (in Sweden) marriage contracts and wills, some debt, property and probate matters and first-instance disputes on property upon relationship breakdown. These two schemes therefore have much more generous scope for advice than for representation.

It can thus be seen that advice services are not always available for the same types of cases as representation work. There can be a range of reasons for such differential scope. Advice may be useful in legal questions which do not relate to a dispute, for example if a co-habiting couple want to know how their legal position will change if they marry, or if a consumer has been asked to sign a credit agreement but wants help understanding its terms. Advice without a view to representation may also be pertinent in a situation where the possible dispute resolution process is extra-judicial, for example in written

895 *Campbell & Fell v. UK*, 1984, para. 107.

896 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.8 and 9.

administrative procedures. In such instances, legal help with representation will be irrelevant and lack of availability of such assistance will not be problematic. Thus, some cases can without ill effect be in scope for advice but out of scope for representation. Equally, though, for these cases to be in scope for representation would not add any pressure to the legal aid system as there would be no take-up.

Aside from specific situations where only advice is relevant, the variation in scope between advice and representation may reflect government priorities on legal aid spending, and tactical decisions on cost effectiveness.

The Law Society of England and Wales, commenting on the impact of the scope restrictions in the Legal Aid, Sentencing and Punishment of Offenders Act has made a strong case for increasing scope at advice level, calling for the government to “bring early advice for housing benefit, and rent arrears and mortgage problems arrears back into scope of the legal aid scheme”.⁸⁹⁷ They point out that removing advice at the early stages of disputes can be a false economy:

Legal aid is still available to defend possession proceedings but only at the point where loss of the home is imminent and the landlord is seeking an order for possession. Legal aid is not available to deal with issues such as rent and mortgage arrears that may ultimately result in possession proceedings. Some disputes could be resolved more quickly and cheaply if legal aid were available for early advice rather than having to wait for possession proceedings to be issued.⁸⁹⁸

The economic logic of this argument is compelling, but unlikely to prompt a change in policy. Indeed, the government in its proposals for the Act had anticipated the point but was not minded to act accordingly:

We recognise that there are arguments that withdrawal of legal aid for any issue could lead, by a chain of events, to serious consequences. But our consultation proposals for the future scope of legal aid focus on cases where, in the case at hand, there could be very serious direct consequences for the client. We consider that this is the appropriate way to target resources and do not propose to devote limited public funds to less important cases on the basis that they could, indirectly, lead to more serious consequences for the litigant.⁸⁹⁹

This statement illustrates the opposing policy view; that citizens may be able to resolve lesser problems themselves or obtain help from family and friends or community groups and thus legal aid funding should be focused on intractable legal problems which require intensive professional legal input. This would be an explanation for the situation in Denmark, for example.

⁸⁹⁷ Law Society of England and Wales 2017, p. 28.

⁸⁹⁸ *Ibidem*, p. 27.

⁸⁹⁹ CP12/10, para. 4.20.

In the relatively rare situations where legal aid is available for representation but not for advice, the main effect is on the timing of help. In such circumstances the boundary between advice and representation is unlikely to be clear-cut as in order to be able to represent a client in a case the lawyer will have to take instructions and must also advise on the case. Common sense indicates that this will be so, and there may well be professional duties on the lawyer to ensure that they give the client all the information they need to make informed decisions about their case, which will of course include advising them (not simply going ahead with representation without discussing the case and likely outcomes with the client).⁹⁰⁰

5.8.3 Hidden scope restrictions: exclusion of tribunals and courts

As seen above, restrictions to the scope of legal aid take two main forms; restrictions by subject or restrictions by judicial venues covered. In particular, the systems of Scotland, Northern Ireland and the Republic of Ireland exclude many tribunals which hear appeals relating to administrative decisions on matters including social security, care standards, immigration and asylum, and war pensions. Outside the administrative sphere, tribunals in these jurisdictions also deal with most employment cases at first instance and appeal. Excluding a tribunal from the scope of legal aid indirectly removes the corresponding subject area from scope. It is thus important not to overlook venue restrictions in a consideration of scope.

In addition to cases before the regular courts, Northern Ireland allows representation to be legally aided before the Mental Health Review Tribunal, Lands Tribunal for Northern Ireland, First-Tier Tribunal (certain immigration and nationality matters only), and the Upper Tribunal on appeal from the First-Tier Tribunal in the same group of cases.⁹⁰¹ This means legal aid is not available for representation before the First-Tier or Upper Tribunal in any other type of case, thus excluding social security and child support, care standards and war pension matters, *inter alia*. There is no legal aid available for representation before any of the other tribunals such as the Industrial Tribunal, Fair Employment Tribunal, Pensions Appeal Tribunal, Criminal Injuries Compensation Appeal Tribunal or Special Educational Needs and Disability Tribunal. Advice is, however, available for matters which fall under the remit of these tribunals; as a result, a solicitor may under legal aid help a client prepare for an appeal but not arrange for her to be represented at the hearing. Theoretically this should not present a problem, as tribunals are intended to be informal and accessible to the public, but as will be seen in Chapter 8, the extent to which this is still true can be questioned.

900 See e.g. in England & Wales the Solicitors Regulation Authority Code of Conduct Chapter 1.

901 Access to Justice (Northern Ireland) Order 2003, Schedule 2, para. 2.

Similarly, Scotland includes matters relevant to all tribunals within legally aided advice, as all areas of Scots law are in scope at this level. ABWOR can cover cases before the Employment Tribunal, Immigration and Asylum Tribunal, Mental Health Tribunal, Upper Tribunal for appeals against administrative decisions, and appeals to the first-tier or Upper Tribunal against decisions of the Pensions Regulator. Some tribunals are also in scope for representation, notably the Lands Tribunal for Scotland, Employment Appeal Tribunal and Upper Tribunal for Scotland. However, some tribunals are not covered beyond advice, including the Social Security and Child Support Tribunal, and many cases before the First-tier Tribunal for Scotland (with jurisdiction over some housing, property and tax issues). In these tribunals, as a result, applicants will not be able to obtain assistance at court paid for by the state.

In the Republic of Ireland, the only tribunal covered by legal aid at the level of representation is the Refugee Appeals Tribunal. Most other tribunals have been replaced by specialist courts or other boards, which are not in scope for representation. Thus, whilst advice may be obtained on employment law matters, representation is not available before the Labour Court (or, for that matter, the Workplace Relations Commission which decides labour disputes at first instance). In social security disputes, advice can be sought but representation is not available before the Social Welfare Appeals Office. A further appeal on a point of law can be brought to the High Court and a social security case may therefore be within scope at this stage.

England & Wales has taken a cautious three-stage approach: specifying the precise actions which are to be included within the scope of civil legal aid; excluding some case types which may overlap with the included categories; and finally, excluding all advocacy unless it is in specified courts and tribunals. As is the case for much of the legislation, the provisions are extremely detailed, resulting in long lists of precise situations. For example, advocacy is in scope “in proceedings in the First-tier Tribunal under (a) section 40A of the British Nationality Act 1981, or (b) regulation 26 of the Immigration (European Economic Area) Regulations 2006, but only to the extent that the proceedings concern contravention of the Equality Act 2010”.⁹⁰² The meticulous nature of the categorisation has the effect of specifying scope by reference to each and every possible action, once all three stages of the scope test are applied. This is qualitatively different to the use of venues as a selection tool for deciding scope over a broad range of cases; the English & Welsh approach uses the forum as one of the identification markers to ensure that the particular case is correctly allocated as in or out of scope.

In the Nordic countries, public funding for administrative cases is also limited, but generally through different mechanisms. In Denmark, though, exclusion at the advice stage of cases before an administrative board of appeal or private complaints board means that most administrative cases are out of

902 Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 3, para. 12.

scope. This technique of excluding by forum is similar to the approach seen in Scotland and Northern Ireland, and also to Iceland, where legal aid only applies to court cases, and consideration is given to whether the individual has tried to resolve the matter through one of the many administrative committees available for resolution of administrative disputes.⁹⁰³

In Finland, administrative courts generally decide cases on the papers and thus legal aid for representation is a moot issue in many situations, although hypothetically in scope. In cases such as child protection, compulsory mental health treatment, asylum and residence permit cases there may more often be hearings, which would be covered by legal aid. In Sweden, whilst administrative matters are theoretically in scope, decisions are generally made on the papers as in Finland, and the non-binding guidance issued suggests that they will generally not qualify under the criteria that there should be a 'need' for legal representation.⁹⁰⁴ This is said to be due to the nature of such cases and the duty of the Administrative Courts to ensure the cases have been fully investigated and properly prepared by the authorities,⁹⁰⁵ which also applies in Finland.⁹⁰⁶ In the words of the relevant online handbook, "in the General Administrative Court legal aid is currently rare".⁹⁰⁷ Decided cases in the collection published by the National Courts Administration include a decision that where negotiations with social services about the care of a child were ongoing, there was no need for a legal representative.⁹⁰⁸ However, detailed guidance is given on the types of cases before the Administrative Court which have been accepted as needing representation, for example defending a high value claim for repayment to the National Insurance office.⁹⁰⁹ Legal aid has also been granted in a complex case where repayment was sought of an alleged overpayment of a large sum of social security benefit.⁹¹⁰

Norway does not explicitly limit the courts or tribunals before which representation can be funded. However, the specificity of the matters which are in scope includes, in several cases, reference to the legislation under which the case must fall, which implicitly indicates the use of certain courts.

903 Regulation 45/2008, Article 5(2)(b).

904 Domstolsverkets handböcker, Rättshjälp, Chapter 7.2.1.

905 The result being that most individuals are unrepresented before the Administrative Court, which anecdotally may in fact be problematic for the proper presentation of their case.

906 See further details in section 8.3.3.2 below.

907 Kanslihandbok allmän förvaltningsdomstol, para. 4.2.1.

908 Rättshjälpsnämnden 69-1999.

909 Domstolsverkets handböcker, Rättshjälp, Chapter 7.4, referring case Rättshjälpsnämnden 33-2009.

910 Rättshjälpsnämnden 405-1998.

5.8.4 Scope restrictions in family cases and extra-judicial resolution mechanisms

As will be seen in Chapter 8 below, many jurisdictions have structures in place to encourage the resolution of family cases without the need for court involvement. The scope of legal aid in family matters might be expected to harmonise with the extent to which legal proceedings are the norm for resolving family difficulties. However, this is not always the case. It is the Nordic countries, particularly Sweden and Denmark, but to a lesser extent Norway and Finland, which rely on non-court dispute resolution processes after relationship breakdown, yet in all these jurisdictions legal aid is available for advice and representation for family matters to some extent. In Denmark and Finland, all family matters can be the subject of legally aided advice and representation, despite the existence of extra-judicial dispute mechanisms for family cases in these jurisdictions.

Norway requires couples to undergo mediation before commencing court proceedings and provides an administrative alternative to court resolution of disputes if the parties choose this route. Legal aid is also available for financial settlements on divorce and issues relating to children such as parental responsibility, residence of children and access disputes.

In Sweden, there is good coordination between legal aid and family dispute resolution procedures. Legal aid is not available for the division of property after relationship breakdown, as this is not a matter for the courts; rather, a 'division of property official' makes an initial assessment. Appeals to court against this division may qualify for legal aid. Divorce and child support matters are only in scope for legal aid if there are special circumstances which, as seen above, are relatively broadly interpreted in family cases. Thus, legal aid is likely to be available for disputes which cannot be resolved by the division of property official.

Harmonisation is much less in evidence in England & Wales, where there is a significant mismatch between the availability of legal aid and the usual modes of dispute resolution. The government dramatically reduced the availability of legal aid for family law matters with the introduction of LASPO. Public law matters, where the state is attempting child protection measures, are still in scope as are private law cases where domestic violence is a factor, but all other private law family cases are no longer covered for legal aid at the level of advice or representation. Advice connected with mediation is still in scope, in line with the government's stated aim to encourage resolution of family matters outside court, in particular through the use of mediation.⁹¹¹ Unfortunately, this policy appears to have been unsuccessful, as reported by the Law Society:

911 CP12/10, para. 4.69.

The government predicted the number of family mediations would increase as families tried to resolve their problems outside of court. They predicted an increase of 9,000 mediation assessments and 10,000 mediation cases for the year 2013-14. There was actually a decrease of 17,246 or 56% in mediation assessments in the year after the reforms. In addition, the number of mediation cases starting fell by 5,177 cases, or 38% in the same period.

We believe that this has a simple explanation: the government failed to take account of the fact that solicitors providing early advice were a significant source of referrals to mediation, and that removing access to early advice from a solicitor would, therefore, adversely affect uptake of mediation.

We believe that without early advice from a solicitor, many people do not know that the option of mediation exists, or how to access it.⁹¹²

The outcome has therefore been that those with family law disputes in England & Wales continue to seek resolutions through court proceedings, but without legal aid, causing an increase in litigants in person and damaging access to justice and the prospects of a fair hearing.

5.9 Rationales for scope limitation

It has been seen that there are a number of mechanisms used for reducing the scope of legal aid, which may or may not comply with the international obligations of a state and may or may not appear logical in light of the other justice arrangements in a jurisdiction. Whatever the method used, the decision on which actual case types are to be covered by legal aid is a reflection of the policy principles underlying that legal aid scheme. Each jurisdiction decides which cases it thinks are worth prioritising over others and therefore which to fund when there is a limit to how many cases can be afforded. Approaches differ between jurisdictions, but some common factors and patterns can be identified which appear to have varying force in different legal aid schemes.

The UK government set out their policy on criteria relevant to scope in the consultation document which preceded LASPO. This indicates many, but not all, of the patterns which can be seen in the selection of cases for funding in all the jurisdictions under comparison:

The need to reduce public spending, and provide access to public funding for those who need it most, has required some very difficult choices to be made about where publicly funded legal assistance is no longer affordable. In making these proposals, we have applied the factors we set out [above] to determine whether funding is justified:

912 Law Society of England and Wales 2017, p. 20.

- the objective importance of the issue, taking into account the matters at stake;
- the litigant's ability to present their own case;
- the availability of alternative sources of funding; and
- the availability of other routes to resolution, and the advice and assistance available to individuals to help them achieve a resolution, including the extent to which the individual could be expected to work at resolving the issue themselves.⁹¹³

The last three points all go to the issue of whether the client needs legal aid or whether they can manage without, either because of the availability of other help or because no help is needed. Clear and explicit motivations for choices on scope thus include coverage of areas of particular importance to the client and exclusion on the basis that legal assistance is not needed. However it is suggested that other possible rationales can also be detected from the commonly excluded case categories and the express justifications given by other governments for their policy on scope. These include removal from scope on grounds of public policy and refusal to pay for matters which arise through the fault or choice of the individual.

Maybe the most common starting point for exclusion from scope is to identify cases which the individual should be able to manage without formal legal assistance. This is the basis of the current legal aid scheme in Sweden, where the principle is expressed as a primary consideration in the legislation.⁹¹⁴ The effect on scope is explained thus:

Legal assistance should in principle be available in any legal matter, whether dealt with by a court, administrative authority or relating to legal advice unconnected with a public procedure. With this point of departure, legal aid has a very wide field of application. Certain restrictions have therefore been made in order to concentrate society's resources on the areas where the need is greatest.⁹¹⁵

The common exclusion of small claims cases and matters concerning straightforward documentation also point to this motivation, as does the non-inclusion of representation before tribunals in the UK.

In Finland, the issue of what an individual can be expected to achieve unrepresented was also considered in the preparation of legal aid legislation, but the conclusion reached was that, whilst parties themselves can manage simple legal matters, court processes have developed in such a way that the responsibility for collating and presenting evidence lies with the parties, and qualified legal assistance is needed.⁹¹⁶ As has been seen, very few types of matter are excluded from legal aid in Finland, as a consequence.

913 CP12/10, para. 4.146.

914 Rättshjälpslag, 1996, 7 §.

915 Domstolsverkets handböcker, Rättshjälp, Chapter 10.

916 RP 82/2001 p. 43.

A related issue is that some problems exist on the periphery of what can be considered 'legal'. Debt and social security issues are typical examples of problems which can be treated as legal or non-legal issues. Unsurprisingly, governments are often keen to classify these issues as non-legal to avoid spending on legal aid, whilst lawyers practising in the fields, and other parties,⁹¹⁷ point to complex legislation, difficult to navigate administration and the potential for difficult appeals to argue that legally experienced advisers are needed.

In Scotland, the dividing line between legal and not legal is very significant because all matters of Scots law are in scope for legally aided advice. However, not all matters on which a client asks advice of a lawyer are necessarily legal questions and a lawyer must take care only to provide legally aided advice and assistance on truly legal issues. The Scottish Legal Aid Board online handbook for civil legal aid lists the types of matters which will be accepted as legal and about which a solicitor can therefore definitely give advice under civil Advice and Assistance,⁹¹⁸ but "the fact that your client's problem is not specifically shown on the list of approved subject matters does not necessarily mean that you cannot give them advice and assistance".⁹¹⁹ The handbook provides a shortcut so that lawyers do not need to consider whether a subject is legal if it is on the pre-approved list; if it is not, the lawyer takes the risk that the Legal Aid Board will not approve the claim for payment if they do not agree with the lawyer's assessment that the matter was legal. In an interesting example of cooperation between the legal professional body and the legal aid authority, suggestions for additional approved categories can be made directly to the Scottish Legal Aid Board or to the Law Society of Scotland, who have consulted with the Board on the list.⁹²⁰

Even within systems where not all legal matters are within scope, the question of whether a matter is legal can be an important justification for policy on scope. This was a common theme in the preparatory work for LASPO:

The Government is of the view that very significant sums are currently spent on providing legal advice for issues where individuals are in fact looking for practical advice rather than the specific professional expertise offered by a lawyer. We have explored whether there are alternative forms of advice or assistance available to help individuals to resolve their issues, instead of seeking expensive legal advice, which may not be needed. For example, several voluntary sector organisations offer advice on welfare benefits, housing and other benefits. Where there are alternative forms of advice and assistance in a particular area of law and there is no reason to believe that these will cease to be available, we consider that it is proper to

917 Bach Commission 2017, p. 29.

918 Scottish Legal Aid Board Civil Legal Assistance Handbook, para. 1.18.

919 *Ibidem*, para. 1.17.

920 *Ibidem*, para. 1.15.

take them into account in deciding how high a priority should be accorded to the provision of publicly funded legal advice and representation in that area of law.⁹²¹

This is an interesting paragraph because it ultimately categorises the subjects under discussion as ‘areas of law’ but still concludes that legal advice is not needed. It can also be seen that the fact that advice might be available from other sources was seen as highly relevant. This can again be related to the question of whether there is a need for legal aid. Jurisdictions in which legal expenses insurance play an important role, such as Sweden, use the same concept to refuse legal aid for any case where the individual has insurance; legal aid is not needed if the case can be funded another way.

Reference is made in several jurisdictions to the importance of the matter for the client, which is also an element of merits testing in individual cases, as will be seen in Chapter 6. Significance to the client was seen in the listed criteria in England & Wales, and also featured in two recent reviews of Access to Justice in Northern Ireland. The first, reporting in 2011, considered the scope of civil legal aid from a wide-ranging perspective. Practical difficulties for clients and courts, policy on appropriate methods of dispute resolution and the significance of the subject matter for the individual were all considered relevant. In respect of private law family proceedings, for example, the review concluded:

There is a strong public policy argument in favour of helping ensure that, once [relationship] breakdown has occurred, it is managed in a way that minimises conflict and produces sustainable solutions benefiting both parties and, more importantly, any children. We believe that, so long as the current legal framework applies, this is most likely to be achieved through the availability of legal advice, negotiation between solicitors and, if needed, mediation or collaborative intervention, with recourse to court if that is the only way of securing a resolution. This increases the likelihood of domestic violence or child protection issues being identified at an early stage. Also, from our own observations in court, it was apparent to us that with highly congested lists, the judges’ ability to manage the business and encourage agreed solutions was greatly enhanced where the parties were legally represented. However, while we recommend that private family law should remain within scope for the financially eligible, legal aid needs to be structured in a way that facilitates resolution but does not involve the taxpayer in funding parties to use the courts as a means of perpetuating and exacerbating disputes.⁹²²

Within a different subject area, the review concluded that most money claims should be removed from scope, but this proposal had not yet been implemented at the time that the second Access to Justice review reported. By this point, in

921 CP12/10, para. 4.26.

922 Access to Justice Review Northern Ireland, 2011, para. 5.80.

2015, the need to save money had become more urgent, the proposals with regard to scope were hardening and it was recommended that the “scope of civil legal aid should in future be defined by what remains in scope, not what is excluded”,⁹²³ i.e. an approach similar to that in Norway and in England & Wales. Further, “the categories of non family cases retained within scope should reflect priorities based on their constitutional significance, the importance of the proceedings to the client or the need to protect children or vulnerable adults”.⁹²⁴ There was also an interesting suggestion of a possible change in approach to the identification of areas in scope:

Historically, there has always been a tendency for legal aid and justice policy to consider priorities according to the nature of the case or type of procedure involved. Increasingly, justice issues are being considered according to the needs of particular clients or client groups.⁹²⁵

This possibility, of defining qualifying groups of clients rather than subjects, has been considered and rejected by the Norwegian government.⁹²⁶ The emphasis there is slightly different as it is the overall purpose of the legal aid system which is called upon to assist in choosing subject areas to be in scope. When considering possible changes to the legal aid scheme (which in the end were not implemented), the government commented in 2009 that they were sympathetic to calls for advice under legal aid to be extended to cover all case types. However, with regard to assistance beyond advice it was felt that universal coverage would unacceptably increase costs and that this would “neither be a proper use of public resources nor in accordance with the principle that legal aid should be concentrated on matters of great importance for the welfare of the individual”.⁹²⁷ In developing a new scheme, however, consideration could be given to expanding the areas within scope, and “particular consideration should be given to the principle that the legal aid scheme should be a social support scheme, and to the role of the legal aid scheme in the fight against poverty”.⁹²⁸

Some commonly excluded areas of law cannot be explained according to these theories of importance to the individual and need for legal assistance only available through legal aid. In particular the categories of business and land disputes and bankruptcy are ones where the consequences for an individual are likely to be considerable, the law may be complex and there is unlikely to be free assistance available from other sources. Whilst at first it might be thought that individuals with these problems (or at least the first) should be able to pay privately for legal assistance, this is not necessarily the case. In any

923 Stutt 2015, p. 17.

924 *Ibidem*.

925 *Ibidem*, p. 246, para. 26.18.

926 St.meld. nr. 26 (2008-2009), para. 9.3.3.8.

927 *Ibidem*, para. 9.3.1.

928 *Ibidem*.

event, the financial eligibility criteria for legal aid will ensure that only those of sufficiently low means will qualify for assistance. Whilst it is possible to see a connection with the Norwegian focus on legal aid as a social welfare scheme, the suspicion regarding the other jurisdictions excluding these and similar matters is that there are felt to be public policy reasons against spending money on legal aid for such cases. It could well be unpopular with the public to spend taxpayers' money on these case types. The Icelandic exclusion of business disputes caused by the actions or inaction of the legal aid applicant themselves may be an example of such an approach.

It might be possible to make a case for limiting legal aid to cases where the individual has no choice but to be involved in legal proceedings. The European Court of Human Rights in *Steel & Morris v. UK* found, as seen above, that it was relevant that the parties did not choose to bring proceedings, but had to engage in proceedings brought against them in defence of their right to freedom of expression.⁹²⁹ This theory is supported by the UK government statement that "in many matters, we would expect individuals to work to resolve their own problems, rather than resorting to litigation at a significant cost to the taxpayer".⁹³⁰ According to such logic, defending proceedings would be covered, as would taking proceedings which were essential, such as proceedings to gain contact with children or to force a landlord to make essential repairs to a rented home. This would explain the exclusion of conveyancing (there is no obligation to buy or sell a house) and the writing of wills (which is not mandated). However, it is far from a complete explanation and would not, for example, explain a bar on probate work, which must be carried out by someone after a death. Furthermore, the social and financial value of such a choice is questionable; if the individual is forced to take action unassisted in order to put his everyday affairs in order, he may make mistakes which could lead to an absolute need for more expensive legal proceedings later. Much work which is currently excluded would doubtless need to be included if this were the guiding principle, suggesting that although this approach may have some influence on choices of scope, it is not an overriding theme.

Indications can also be found that there is a moral element in some decisions on scope. These are most explicit in the proposals leading to LASPO. *Inter alia*, the UK government argued:

We have also considered the extent to which the individual's personal choices have played a part in the issue arising and the extent to which they might be expected to resolve it themselves. The Government recognises that there are many types of dispute where individuals may need to rely on legal aid to assist them in matters where external factors beyond their control have affected their lives. For example, an individual who has been detained because of their mental health may wish to challenge matters relating to their detention.

929 *Steel and Morris v. the United Kingdom*, 2005.

930 CP12/10, para. 4.3.

However, there is a range of other cases which can very often result from a litigant's own decisions in their personal life, for example, immigration cases resulting from decisions about living, studying or working in the United Kingdom. Where the issue is one which arises from the litigant's own personal choices, we are less likely to consider that these cases concern issues of the highest importance.⁹³¹

The element of moral judgment discernible in the arguments should have no place in the selection of cases, according to international human rights obligations described above. In addition, the arguments are inconsistent as many of the areas removed from scope such as the social welfare law categories cannot be argued to have arisen due to the individual's choices, unless the need to rely on the state for an income and for other support is seen as a failure rather than as misfortune. It is also surprising to conflate the issue of individual choice with the importance of an issue; having a family is for most a choice, but resulting legal difficulties are generally agreed to be of very high importance.

5.10 Conclusions

As has been discussed at various points in this thesis already, 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".⁹³² 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 cost of legal aid by restricting scope. It has been seen that there are various methods for achieving this, 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 jurisdiction 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.

The political motivation behind the choice of subjects to be excluded from scope is not always clearly explained or justified, although some indications have been presented in this chapter. To be in line with the spirit of international human rights obligations, rationales should focus on the need for the individual to have assistance in order for the hearing to be fair, as confirmed in *McVicar*

931 *Ibidem*, para. 4.18 and 4.19.

932 Stutt 2015, p. 10.

v. UK.⁹³³ Even backed by appropriate reasoning, though, absolute exclusion of any category (other than tax or some aspects of immigration status) is not compliant with Article 6 unless a functioning system for exceptional cases is in place, as it may be characteristics of the individual, rather than the case type, which makes assistance necessary. The suggestion in Northern Ireland that identifying groups who are likely to need help rather than subjects with which it will be needed may provide better targeting in accordance with the approach of the European Court of Human Rights. This could be a good thing for proper access to justice and might improve the likelihood of a fair hearing in all civil matters rather than just limited types selected by government.

Case study 3:		
John in Wales, Jan in Sweden and Jonas in Denmark were all wrongly accused of misconduct at work and summarily dismissed a month ago, possibly unlawfully. The financial problems caused by the loss of work have led them into debt and the landlord is now threatening possession proceedings if the rent is not paid soon. The stress has caused arguments at home and the wives of all three men have moved out, taking the children with them and so far refusing contact. There is a need for help in a classic 'bundle' of problems: employment, social security, debt, housing and family.		
Wales – John	Sweden – Jan	Denmark – Jonas
As his home is at risk, John will be able to obtain some publicly funded assistance with his debt problems, by contacting the government Civil Legal Advice telephone helpline. ⁹³⁴ He is unlikely to be able to obtain further assistance with debt given his circumstances as a non-homeowner. If his landlord actually takes possession proceedings, these are then in-scope housing proceedings but earlier attempts to resolve or negotiate would not be funded. John's social security issues are out of scope unless, having appealed to a tribunal without advice or assistance, he appeals further to the Upper Tribunal. No legally aided advice or representation will be available for his employment case or for his family problems.	Jan can obtain legal advice of up to 2 hours on all of his matters from a lawyer, but he will have to pay for this. Up to half the fee will be paid by legal aid if he is financially eligible, but at least half will be expected from him unless the lawyer waives this part of the fee. If the problems continue and he needs representation, debt restructuring and the division of the property if he and his wife divorce will not be eligible for legal aid. His employment, social security and housing matters, and family disputes regarding the children will be in scope. If he is unhappy with the decision of the division of property official, legal aid to appeal to court will also be within scope.	Advice under legal aid is available to Jonas on his employment, housing and family matters, if he can find a lawyer prepared to act or has access to a private legal aid institution. His social security should be dealt with by the local authority and thus is not included in scope for advice unless he wishes to make a complaint; his debt problems are also out of scope for legally aided advice. If he cannot resolve his problems and they escalate to legal proceedings, all the aspects will be in scope, except any debt matters which are dealt with as small claims. Whether he is actually granted legal aid will of course depend on satisfying the merits and means tests.

933 *McVicar v. UK*, 2002.

934 See Chapter 4.

6. Chapter 6: Merits criteria for grants of civil legal aid

6.1 Introduction⁹³⁵

The previous chapter examined the restriction of civil legal aid to certain types of case, varying according to jurisdiction. Even within eligible case types, there is very often an additional prerequisite for an administrative decision to grant legal aid, in the form of a merits test. These also vary considerably in the jurisdictions under consideration, both in type and extent. As will be seen, Finland and Norway apply modest requirements regarding the merits of cases eligible for legal aid funding; at the other end of the scale, England & Wales applies an extensive and complex set of overlapping tests.

After a consideration of the overall extent of merits testing in each jurisdiction, the various types of test applied will be considered in turn: *probabilis causa litigandi*; reasonableness of being involved in proceedings or of the state funding such proceedings; comparison with a reasonable privately paying individual; prospects of success; proportionality of cost and benefit; the need for representation; the significance of the matter for the individual making the application for legal aid and a few lesser-used additional tests.

Whilst merits tests are almost universal, legitimate questions can be asked about the acceptability of such tests. Practical problems arise from the element of prediction involved in many merits tests and there are also valid concerns as to the extent merits testing may affect the realisation of the right to a fair hearing. These and other implications will be considered alongside an examination of the relevant jurisprudence of the European Court of Human Rights.

935 This chapter is based in part on the author's article Barlow 2017c.

6.2 Merits tests for civil legal aid

6.2.1 Extent of use

Within our group of jurisdictions, Finland places least reliance on merits assessment in deciding applications for civil legal aid. As has been seen in previous chapters, the Finnish legal aid scheme has considerable breadth of purpose, being intended to provide expert assistance to those who cannot otherwise afford the help needed in a legal matter.⁹³⁶ Legal aid is assessed by lawyers at the Legal Aid Offices and in in-scope matters will generally be provided to financially eligible persons regardless of the merits of their case. The only caveat is that assistance will not be provided if: the matter is of minor importance to the applicant; it would be manifestly pointless in proportion to the benefit that would ensue to the applicant; pleading the case would constitute an abuse of process; or the matter is based on an assigned right and there is reason to believe that the purpose of the assignment was to receive legal aid.⁹³⁷ Unlike in other jurisdictions, no additional guidance is provided by the Ministry of Justice and no secondary legislation contains any merits tests. However, the handbook described in earlier chapters, designed to assist consistency of application of the law, suggests an agreed interpretation, arising from practice, of the relevant paragraphs.⁹³⁸

The Norwegian approach to merits in civil legal aid cases is also minimal, in comparison with the other jurisdictions. However, the explanation of purpose in the Norwegian Legal Aid Act, unlike that in Finland, includes an element of merits assessment; legal aid is available “to meet a need for legal aid that is of great importance to [applicants’] persons and their welfare”.⁹³⁹ The test of ‘great importance’ is not an assessment which is left to the decision-maker in each case (the County Governor or court, see Chapter 4 above); rather, the legislation itself clarifies which types of cases are to be deemed important enough. The majority of merits testing is thus delivered through the subject limitations described above in Chapter 5, and there is no additional merits testing in non-means tested priority cases (for which legal aid decisions are made by the courts). In other cases some merits testing is required as part of the administrative decision by the County Governor as legal aid can only be granted in non-priority cases where the matter “seen from an objective point of view is especially pressing for the applicant”,⁹⁴⁰ and in means-tested priority or non-priority representation (rather than advice) cases there is an additional test that it must not be unreasonable for assistance to be paid for from public funds.⁹⁴¹ The Ministry of Justice Circular clarifies that the statutory explanation

936 Rättshjälpslag, 2002, 1 §, para. 1.

937 *Ibidem*, 7 §.

938 Oikeusavun käsikirja 2013, section 2.2.2.

939 Rettshjelploven, 1980, § 1.

940 *Ibidem*, § 11(3) (advice) and § 16(3) (representation).

941 *Ibidem*, § 16(5).

of purpose provision is to be used as an interpretative guide in the application of the Act.⁹⁴²

The legal aid scheme in Iceland is, as seen in earlier chapters, established by the Act on Civil Procedure.⁹⁴³ This provides that legal aid shall be granted if the applicant has sufficient reason to initiate proceedings or defend himself in civil proceedings in court in Iceland and either: the applicant's financial situation is such that he could not afford to defend his interests and the case is of such a nature that it is considered appropriate that legal aid in the case would be financed by public funds; or the outcome of the case would have great general significance or matter greatly to the employment, social status or other personal status of the applicant.⁹⁴⁴ In the latter category, the economic resources of the legal aid applicant are not relevant. Under statutory powers contained in the Act, the Minister has issued a Regulation⁹⁴⁵ which provides further structure to the decision-making process. The Regulation augments the statute by adding some scope restrictions, as described in Chapter 5 above, and also substantially expands the merits test.

Under the Regulation, the Icelandic Legal Aid Committee in deciding an application is to have regard to: whether the nature of the case is such that it is acceptable for it to be paid for by public funds; whether it is clear enough that the case is necessary and at the appropriate point to be brought before the courts; whether the case seems to be likely to succeed at court; and whether there is a sufficiently similar case already going through the courts, the outcome of which should be awaited before granting legal aid in the current case.⁹⁴⁶ The first element, that it is acceptable for the case to be publicly funded, includes elements of scope discussed in the preceding chapter, but also excludes cases where the dispute concerns insignificant interests and the costs are disproportionate to the likely benefit. Furthermore, the application will be refused if there are serious evidential problems arising from the gross negligence of the applicant. The factors are to be looked at overall, i.e. it is not necessary for all the conditions to be met, if the Committee decides that overall the criteria are satisfied. No guidance is issued on the interpretation of the Act and Regulation.

The primary merits criteria governing legal aid for civil representation in Sweden are that the applicant has a need for a legal representative which cannot be met in another way⁹⁴⁷ and that it is reasonable for the state to pay the legal costs, having regard to the type, importance, value and other circumstances of the case.⁹⁴⁸ Certain types of case are only eligible for a grant of legal aid if there

942 SRF-1/2017, para 2.1.

943 Lög um meðferð einkamála, 1991, Chapter 20.

944 *Ibidem*, Article 126.

945 Regulation 45/2008.

946 *Ibidem*, Regulation 5.

947 Rättshjälpslag, 1996, 7 §.

948 *Ibidem*, 8 §.

are special reasons, as described in the preceding chapter.⁹⁴⁹ In addition, legal aid will not be granted if the matter can wait until the outcome of a similar case currently going through the courts or if the claim relates to rights which have been transferred to the legal aid applicant where the transfer appears to have been for the purpose of obtaining eligibility for legal aid.⁹⁵⁰ These criteria apply equally to all decisions whether being taken by the courts or by the Legal Aid Authority.

In Denmark, three categories of civil case are set out, each with their own merits criteria. Firstly, there are certain categories of case for which legal aid will be granted or refused by the court dealing with the substantive matter.⁹⁵¹ Legal aid for these cannot be granted if “it is obvious that the applicant will not succeed in the case”.⁹⁵² In all other cases, legal aid applications are to be decided by the Minister of Justice (in practice the Legal Aid Office within the Department of Civil Affairs) and legal aid will be granted if “the applicant is deemed to have reasonable grounds to litigate”.⁹⁵³ There is additionally a possibility of legal aid for exceptional cases where there are special reasons.⁹⁵⁴

Scotland applies a merits test which is expressed relatively simply in the primary legislation. In order for an application for civil legal aid to be successful, the Scottish Legal Aid Board must be satisfied that the applicant has *probabilis causa litigandi* and that it is reasonable in the particular circumstances of the case that they should receive legal aid.⁹⁵⁵ The primary legislation itself does not provide a definition of either *probabilis causa litigandi* or ‘reasonable’ and there are no pieces of secondary legislation setting out further detail on the meanings of the terms or how they should be applied. However, the Scottish Legal Aid Board publishes guidance on their interpretation of the terms in the online handbook for practitioners. An Independent Strategic Review commissioned by the government recommended in 2018 that the merits test should be subject to Ministerial approval, codified and regularly updated;⁹⁵⁶ for the present, however, the interpretation which provides the detail for the test is set by the decision-maker, the Scottish Legal Aid Board, itself.

The civil legal aid scheme in Northern Ireland applies a similar, but slightly extended, merits test to that in Scotland. The statutory provision states that legal aid may be granted where there are “reasonable grounds for taking, defending or being a party to the proceedings”.⁹⁵⁷ Furthermore, legal aid may be

949 *Ibidem*, 11 §. Examples include divorce and ancillary matters and child maintenance.

950 *Ibidem*, 10 §

951 Retsplejeloven, 2017, § 327(1), (2),(3) and (5).

952 *Ibidem*, § 327(4).

953 *Ibidem*, § 328.

954 *Ibidem*, § 329.

955 Legal Aid (Scotland) Act 1986, section 14.

956 Evans 2018, p. 51.

957 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 37(1)(b) (Lower Court representation) and 43(1)(a) (Higher Court representation).

refused if it would be unreasonable to grant a certificate⁹⁵⁸ or, in Lower Court proceedings, if “only a trivial advantage would be gained”⁹⁵⁹ or if the matter is so simple that a lawyer would not ordinarily be employed.⁹⁶⁰ The test is administered by the Northern Ireland Legal Services Agency, applying binding guidance issued by the Department of Justice.

In civil cases in the Republic of Ireland, the Legal Aid Act sets out three tests which must be satisfied for legal aid or legal advice to be granted: an overarching principle test, a means test and a merits test. At either advice or representation level the overarching principle test states that legal aid can only be granted if a ‘reasonable privately paying individual’ test is satisfied.⁹⁶¹ In respect of representation it must be shown in addition, *inter alia*, that the applicant has as a matter of law reasonable grounds for being a party to the proceedings; that the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned,⁹⁶² and that having regard to all the circumstances of the case⁹⁶³ (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant legal aid.⁹⁶⁴

The merits test for civil legal aid in England & Wales deserves special mention for its complexity. Unlike the other systems, with a relatively straightforward test contained in primary and secondary legislation, potentially expanded upon in official guidance, the English & Welsh criteria contained in secondary legislation are extremely complicated and multifaceted. The relevant legislation is the Civil Legal Aid (Merits Criteria) Regulations 2013, as amended by eight further sets of regulations.⁹⁶⁵ Binding guidance on applying the tests is issued by the Lord Chancellor.⁹⁶⁶ The test is applied by caseworkers at the Legal Aid Agency when making administrative decisions on applications for legal aid.

958 *Ibidem*, Regulation 37(2)(a) and 43(2)(a).

959 *Ibidem*, Regulation 37(2)(b).

960 *Ibidem*.

961 Civil Legal Aid Act 1995, s. 24.

962 Other than in proceedings concerning the welfare of a child or sex offenders register order cases, see section 28(3).

963 Other than in proceedings concerning the welfare of a child or sex offenders register order cases, see section 28(3).

964 Civil Legal Aid Act 1995, s.28.

965 Most significantly the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 and the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016.

966 Lord Chancellor’s Guidance, 2018.

The Regulations are structured as follows. First, various tests are set out and defined, including a ‘reasonable private paying individual’ test,⁹⁶⁷ a proportionality test⁹⁶⁸ and a ‘prospects of success’ test.⁹⁶⁹ The Regulations go on to state that to be eligible for civil legal aid an applicant must fulfil the ‘general merits criteria’ as adapted later in the Regulations to that type of case, and also a personal conduct test which provides that legal aid will not be granted unless it is reasonable to do so in the light of the conduct of the applicant in this and previous applications or cases.⁹⁷⁰ An additional test is given for high cost cases,⁹⁷¹ that it must be reasonable to fund the case in the light of present and likely future demands upon the legal aid fund.⁹⁷²

Next, the ‘general merits criteria’ are set out for the various levels of legal aid which are available: Legal Help, Help at Court and so on (see Chapter 4, above). With regard to Legal Representation, which is the type of assistance available for court proceedings, there are standard criteria for Legal Representation⁹⁷³ and additional criteria for the two sub-categories: Investigative Representation⁹⁷⁴ and Full Representation.⁹⁷⁵

Finally, the Regulations go through some (but not all) of the types of cases for which legal aid is available and provide ‘specific merits criteria’ for each. These set out which parts of the general merits criteria apply, usually also adding additional tests, for example the proportionality test or ‘reasonable private paying individual’ test. These two tests do not appear as part of any of the standard criteria but are imported as part of some of the specific case-type tests. Within some categories, such as public law and family law, subject-specific ‘standard’ criteria are set by adaptation of the general merits criteria and then these subject-specific standard criteria are in turn adapted for each type of case within that field. In some instances, separate provisions are set out for Investigative and Full Representation. If an application is made in a type of case which is eligible for legal aid but is not listed separately in the Regulations, the general merits criteria for that level of help will apply, in addition to the personal conduct test.

The merits test at the level of advice and assistance is considerably simpler. At this level there is a requirement that it be reasonable to provide such help having regard to any other sources of funding available to the client, and that there is likely to be sufficient benefit to the client to justify the cost of providing legal help.⁹⁷⁶

967 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 7.

968 *Ibidem*, Regulation 8.

969 *Ibidem*, Regulation 5.

970 *Ibidem*, Regulation 11(6). No assistance with interpreting this requirement is given in the Regulations.

971 Cases which are likely to cost at least £250,000 and do not involve life or liberty or public law Children Act issues.

972 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulations 11(7) and (8).

973 *Ibidem*, Regulation 39.

974 *Ibidem*, Regulation 40.

975 *Ibidem*, Regulations 41-44.

976 *Ibidem*, Regulation 32.

6.2.2 Case types exempted from merits tests

Merits tests are not always consistently applied across all case types. It has been seen, for example, that the Norwegian legal aid system depends very largely on scope restrictions for the selection of cases for funding. Within this system, a whole group of case types, non-means tested priority cases, are not subject to merits testing at all. In England & Wales only a very small group of cases is exempted from merits testing. These are listed in regulation and consist of: assessment of suitability for mediation; EU and international agreements concerning maintenance and Hague Convention child abduction cases.⁹⁷⁷ In Iceland, there are also some types of case which are exempt from merits testing, notably child protection and adoption cases.

In other jurisdictions, parts of the merits tests are deemed satisfied in certain types of case, such as in Denmark, where some cases are deemed to have reasonable grounds to litigate. However, these cases are still subject to the merits test and the presumption may be overridden by other factors.

6.2.3 Types of merits test

6.2.3.1 *Probabilis causa litigandi*

Several of the jurisdictions make it explicit that legal aid will only be granted where the applicant has *probabilis causa litigandi*, otherwise known as probable cause. The phrase refers to substantial grounds for commencing or defending litigation and the intention is to ensure that legal aid is not granted to persons who have no legal cause of action or legal defence (as the case may be). These are the types of cases (or defences) that would be at risk of being struck out by courts without full hearings as they cannot in law amount to an action, or legally count as a defence.

The test is explicit in three of the considered jurisdictions, as seen above. In Iceland, all legal aid applicants must show “sufficient reason to initiate or defend proceedings”; in the Republic of Ireland, in order for legal aid to be granted for representation it must be shown that the applicant has as a matter of law reasonable grounds for being a party to the proceedings; and before granting legal aid the Scottish Legal Aid Board must be satisfied that the applicant has *probabilis causa litigandi*. According to the Scottish Legal Aid Board, “probable cause is quite a low threshold. It means ‘a plausible case’. It covers, for example, jurisdiction, title to sue and the legal basis for the action.”⁹⁷⁸

Whilst the issue is not set out in terms in the other jurisdictions, this should not be taken to suggest that cases without probable cause would be funded elsewhere, as the same effect is obtained through other means. In Finland, for example, legal aid cannot be granted if pleading the case would constitute

977 *Ibidem*, Regulation 11(9).

978 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part 2, para 1.22.

an abuse of process⁹⁷⁹ and in Northern Ireland, the requirement that there must be “reasonable grounds for taking, defending or being a party to the proceedings”⁹⁸⁰ would exclude cases without probable cause as well as those where the factual, rather than legal, basis was insufficient.

All the systems which apply a prospects of success test will by default exclude cases which show no reasonable cause, as these by definition have no chance of succeeding. Thus for example applications for legal aid decided by the Danish courts cannot be granted if “it is obvious that the applicant will not succeed in the case”,⁹⁸¹ which will be the case if there is no probable cause. The Swedish and English & Welsh prospects of success tests are also relevant in this regard.

In Norway, case types are very restricted as has been seen in Chapter 5 above, and in non-means tested priority case types there is no rule equivalent to a need for probable cause. As these case types are in the main public law non-money cases such as objection to an order for compulsory medical treatment or public guardianship matters,⁹⁸² there would presumably be little incentive for a person to bring a claim vexatiously; most people will be responding to claims made against them by the state and it may be felt as a matter of policy that everyone should be able to make their case with the help of a lawyer even if the legal basis of the defence is weak. In all other cases there is a provision that legal aid will not be granted if it is unreasonable for assistance to be paid for from public funds,⁹⁸³ which could be used to bar cases without probable cause.

6.2.3.2 Reasonableness

6.2.3.2.1 Reasonable grounds to pursue a case

Reasonableness appears in three ways in the merits tests for civil legal aid in the jurisdictions under consideration. Some jurisdictions apply a requirement that it must be reasonable for the applicant to be involved in the proceedings; others award legal aid only if it is reasonable for the public purse to fund the case. In addition to these two tests, a further use of reasonableness as a marker addresses the question of costs and asks whether a reasonable person would pay privately for representation in the case if they had the financial means to do so.

As summarised above, in Denmark, some applications for civil legal aid are decided by the courts, in accordance with a test relating to prospects of success, which will be discussed further below. In all other cases, legal aid applications are decided by the Legal Aid Office within the Department of Civil Affairs and legal aid will be granted if “the applicant is deemed to have

979 Rättshjälpslag, 2002, 7 §.

980 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 37(1)(b).

981 Retsplejeloven, 2017, § 327(4).

982 *Ibidem*, § 16(1).

983 Rettshjelploven, 1980, § 16(5).

reasonable grounds to litigate”.⁹⁸⁴ The Act itself provides guidance on some of the factors which should be taken into account when assessing reasonable grounds to litigate. The non-exclusive list comprises: the significance of the case for the applicant; the prospects of the applicant being successful in its action; the size of the subject matter; the amount of the expected costs and the possibility of having the case settled by an administrative committee or a private complaints board or approved appeals committee.⁹⁸⁵ This list introduces a wide variety of factors under the umbrella of ‘reasonableness’, many of which are present as independent tests in the merits requirements in other jurisdictions. The significance of the matter for the client, prospects of success and issues concerning the cost of the case, likely benefit and the relationship between them will all be considered below as discrete tests. There is however a qualitative difference in the Danish test, which utilises these tests only as possible ways of indicating whether it is reasonable for the individual to be involved in litigation. The overriding test remains reasonableness.

Some types of case (essentially housing repossession, employment and personal injury) are to be deemed as involving reasonable grounds to litigate unless the prospects of success, size of the subject matter or costs, or availability of one of the other settlement options clearly speak against it.⁹⁸⁶ The case is assumed to be sufficiently significant for the applicant for it to be reasonable for him to litigate and the other factors are only relevant if they evidently contradict this assumption.

In the Republic of Ireland, as outlined earlier in this chapter, a number of merits tests co-exist, and these are different for advice and for representation, although the overarching ‘reasonable privately paying person test’ applies to both levels of assistance. In respect of representation, one element of the merits assessment is that the applicant must have, as a matter of law, reasonable grounds for being a party to the proceedings.⁹⁸⁷ Furthermore, the proceedings under consideration must be the best means of achieving the desired result,⁹⁸⁸ a test which is also, it is suggested, related to the issue of whether it is reasonable to take the proceedings proposed. The reasonableness of the applicant in being involved in the litigation is also pertinent in the Republic of Ireland, in some requirements relating to the conduct of the individual. Even if all the other criteria are fulfilled, the Legal Aid Board may still refuse legal aid if the applicant has behaved unreasonably with respect to legal aid in a previous matter⁹⁸⁹ or is behaving in such a way that costs are likely to be unnecessarily high in the current case.⁹⁹⁰ This last requirement is closely mirrored in the ‘personal conduct test’ applicable to all civil legal aid applications in England &

984 Retsplejeloven, 2017, § 328.

985 *Ibidem*, § 328(2).

986 *Ibidem*, § 328(3).

987 Civil Legal Aid Act 1995, s. 28(2)(b).

988 *Ibidem*, s. 28(2)(d).

989 *Ibidem*, s. 28(4)(b).

990 *Ibidem*, s. 29(6).

Wales. This provides that legal aid can only be provided where it is reasonable to provide services in the light of the conduct of the applicant in previous or current legal aid applications or grants or in civil legal proceedings in general.⁹⁹¹

6.2.3.2.2 Reasonable for the state to fund the case

There is a different approach to reasonableness in some civil legal aid merits tests; the test addressed in the previous section looked at reasonableness from the perspective of the potential litigant whereas this test considers the perspective of the public purse.

As outlined above, the merits test for civil legal aid in Scotland is relatively simple: the applicant must have probable cause and it must be reasonable in the particular circumstances of the case that they should receive legal aid.⁹⁹² In place of further statutory regulation, the Scottish Legal Aid Board issues an online manual for solicitors, which is not legally binding but indicates the approach which will be taken by the Board when assessing applications. The manual indicates the types of case in which it might or might not be considered reasonable for a client to be funded, and the evidence which should be provided to establish reasonableness in the various types of matter for which legal aid might be sought. The manual states that:

The reasonableness test provides us with a very wide discretion. It is impossible to give an exhaustive list of circumstances in which questions of reasonableness may apply. We have identified certain situations where it may not be reasonable to grant legal aid and in addition, we have provided information on certain factors that may be taken into account in deciding whether or not it is reasonable to grant legal aid. There are, however, many factors that we need to take into account in assessing whether an application is reasonable so we cannot provide a definitive list of those factors.⁹⁹³

The general guidance applicable to all case types indicates that factors to be considered include: the nature and timing of the legal application; whether other resolution methods are appropriate; the balance between the likely cost and the likely benefit; whether a reasonable offer of settlement has been made and the strength of the available evidence. The courts have confirmed that the Board should carry out a “balancing exercise, involving the cost of the litigation, the possible benefit to be gained and the Board’s views as to the prospects of success”, and that it is for the Board to decide the weight to be attached to the various factors.⁹⁹⁴

991 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 11(6).

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

993 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part 4, para 3.3.

994 *McTear v. Scottish Legal Aid Board*, 1995.

The Swedish merits test for civil legal aid is that the applicant has a need for a legal representative which cannot be met in another way⁹⁹⁵ and that it is reasonable for the state to pay the legal costs, having regard to the type, importance, value and other circumstances of the case.⁹⁹⁶ A similarity with the structure of the Danish test can be seen; in both jurisdictions the overall test is reasonableness but statutory provisions list elements to be considered in assessing reasonableness, thus limiting the discretion of the decision-maker. However, the Danish test applies the test of reasonableness to the grounds to litigate, rather than to the payment by the state of the legal costs.

The non-binding Swedish online handbook provides assistance with the interpretation of the reasonableness requirement, the starting point being the nature of the case including prospects of success.⁹⁹⁷ The assessment will be more generous towards a respondent in proceedings than to the individual seeking to bring the claim.⁹⁹⁸ A matter which has already been decided by a court and in which no relevant new circumstances exist may be refused on the grounds that funding is not reasonable,⁹⁹⁹ even where the original court decision is not being honoured by the opponent.¹⁰⁰⁰ However, a wider public interest can make funding reasonable in cases which otherwise would not be eligible.¹⁰⁰¹ As elsewhere in the handbook, specific examples are given of decided cases in which legal aid has and has not been authorised. It appears that to some extent a common usage approach is taken to the term 'reasonable'; legal aid has for example been refused for a dispute over a leisure boat¹⁰⁰² and for a claim for compensation for negligent advice from a stockbroker.¹⁰⁰³ Interestingly, in Sweden the reasonableness test replaced the earlier probable cause test, as it was felt that the latter was not sufficient to ensure that a thorough assessment of legal aid applications was carried out and that resources were directed where they were most needed.¹⁰⁰⁴ In Scotland, as has been seen, the reasonableness requirement is in addition to the requirement of probable cause.

In the Republic of Ireland, when awarding civil legal aid for representation, the Legal Aid Board must be satisfied, *inter alia*, that having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant legal aid.¹⁰⁰⁵ In cases concerning the welfare of a child (broadly interpreted) and sex offenders register order cases the criterion does not apply.¹⁰⁰⁶

995 Rättshjälpslag, 1996, 7 §.

996 *Ibidem*, 8 §.

997 Domstolsverkets handböcker, Rättshjälp, Chapter 8, para. 8.2.

998 *Ibidem*.

999 *Ibidem*.

1000 Rättshjälpsnämnden 677-1998.

1001 Domstolsverkets handböcker, Rättshjälp, Chapter 8, para. 8.2.

1002 Rättshjälpsnämnden 58-1999.

1003 Domstolsverkets handböcker, Rättshjälp, Chapter 8, para. 8.2, referring case RN 58/1999.

1004 *Ibidem*, para 8.1.

1005 Civil Legal Aid Act 1995, s.28.

1006 *Ibidem*, s. 28(3).

The reasonableness test in Northern Ireland is expressed in the negative; legal aid may be refused if it would be unreasonable to grant a certificate.¹⁰⁰⁷ The applicable, binding guidance focuses on prospects of success and the cost-benefit analysis, both of which will be considered further below, as the main elements in deciding whether it is unreasonable to grant legal aid.

The test is also a negative one in certain cases in Norway. For cases concerning representation at court, of listed types which are means-tested or exceptional cases, there is a single merits test which is that legal aid will not be granted if it is unreasonable for assistance to be paid for from public funds.¹⁰⁰⁸ Guidance in the Circular on the interpretation of this requirement states that the provision is to be considered as an exception to the main principle of subject-based eligibility and as such should be applied with caution. It is a safety valve to enable the authorities to refuse legal aid where it is clear that it should not be granted.¹⁰⁰⁹ Examples of circumstances which can be taken into account include the value of the claim (legal aid should not be issued for trifling matters); the responsibility of the applicant for the circumstances leading to the dispute and previous (especially repeated) litigation in the same matter. Cases between close relatives or neighbours are unlikely to be given legal aid as it is considered reasonable that they should solve their disputes out of court.

In the 2009 review of legal aid, the Ministry of Justice proposed that the reasonableness test should be extended to cover legal advice (but not the first interview) and that more detailed guidance on its application should be given. The latter would include a consideration of reasonable proportionality between how important the matter is and the likely costs; the possibility of resolving the dispute through other means; the prospects of success; whether the change sought to an existing court order is significant (where relevant); and whether the claim has arisen through the fault of the applicant.¹⁰¹⁰ It was acknowledged that the extension of discretionary assessment would involve additional administrative expenses but suggested that the benefits of a better targeted legal aid system outweighed this problem.¹⁰¹¹ This recommendation, however, along with the rest of the 2009 proposals, has not been implemented.

An interesting twist to the reasonableness test is found in England & Wales, where legal aid must be refused for high cost cases¹⁰¹² if the decision-maker is not “satisfied that, having had regard to the present and likely future demands for the provision of civil legal services under Part 1 of the Act, it is reasonable to provide the individual or legal person with civil legal services in all the circumstances of the case including, but not limited to, the particular

1007 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 37(2)(a).

1008 Rettshjelploven, 1980, § 16(5).

1009 SRF-1/2017, Section 7.6..

1010 St.meld. nr. 26 (2008-2009), para. 10.3.

1011 *Ibidem*.

1012 Predicted costs over £250,000, with the exception of cases relating to the life or liberty of the individual or his family and public law children cases.

circumstances of the individual or legal person”.¹⁰¹³ This explicit permission to consider future demands on the legal aid fund appears to permit budgetary pressures to affect individual case decisions, potentially without any policy consideration at a governmental or parliamentary level.

6.2.3.2.3 The reasonable privately paying individual

In an explicit attempt to mirror the behaviour of privately-paying clients, several jurisdictions in the cohort apply a ‘reasonable privately paying individual’ test as part of the merits assessment for civil legal aid.

In the Republic of Ireland, such a test is the main element of the merits assessment for civil legal aid. The ‘general criteria for the grant of legal aid and advice’ is that a ‘reasonably prudent person’ would be likely to pay privately for the services if his means were such that the cost would represent a financial obstacle (but not undue hardship) to him, and that a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.¹⁰¹⁴ In considering how a reasonably prudent person might behave, consideration will be given to “the average member of society – not a well off person”.¹⁰¹⁵ The second element of the test, uniquely within the jurisdictions under consideration, requires consideration of whether a legal professional would be likely to recommend taking action if the potential litigant was relying on her own resources. In practice, this part of the test is rarely relied upon, although it can in theory be used to refuse legal aid to those who wish to take a case which objectively would be unreasonable, but which they feel strongly about. There is clearly an overlap with the requirement, in the first test, to use a reasonably prudent person as the benchmark, but with the addition of an element of professional understanding; the outcome of the combined test in representation cases approximates a decision made by an averaged well-off reasonable person acting on legal advice.

The professional adviser test includes elements of other merits test and “is important because we do not have a limitless budget and cannot fund persons to take cases of little value and/or prospects of success”.¹⁰¹⁶ There is a free-standing prospects of success test for representation cases but not for advice cases in the Republic of Ireland, so the professional adviser test is needed if the Legal Aid Board is to be able to consider prospects of success in advice cases. However, the Circular suggests that “in practice it would be extremely rare that an application [for legal advice] would be refused on the merits criteria”;¹⁰¹⁷ “if the applicant is found financially eligible, then legal advice is usually granted”.¹⁰¹⁸

1013 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 11(8). Note that legal persons may only obtain legal aid in exceptional circumstances.

1014 Civil Legal Aid Act 1995, s. 24.

1015 Legal Aid Board Circular on Legal Services 2017, Part 2, p. 2-1.

1016 *Ibidem*.

1017 *Ibidem*.

1018 *Ibidem*, p. 2-3.

According to the wording of the statute, in the Republic of Ireland, all the elements of the merits test must be fulfilled. Thus, for a grant of legal aid for representation, other criteria such as reasonableness to grant legal aid, reasonable grounds for proceeding with the case and the prospects of success test must also be met. However, the guidance given in the Circular indicates that compliance with the overarching ‘reasonable privately paying individual’ test may lead to a grant even if the other criteria are not met,¹⁰¹⁹ departing somewhat from a strict reading of the statutory provisions.

In England & Wales, the reasonable privately paying individual test is not one of the standard criteria for civil legal aid, but forms part of the subject-specific merits test in some cases. In particular, the test applies to some private law family cases and to cases not of significant wider public interest which are not primarily money claims. The test as set out in regulation states:

For the purposes of these Regulations, the reasonable private paying individual test is met if the Director is satisfied that the potential benefit to be gained from the provision of civil legal services justifies the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case.¹⁰²⁰

As can be seen, the question to be considered also demands consideration of some of the other aspects of merits testing, within the ‘reasonable privately paying individual’ test. The prospects of success, in particular, must be considered here as well as independently in the important test discussed below. In applying the test, a combination of subjective and objective approaches is required:

This test is applied objectively according to whether a reasonable person would be prepared to risk his or her own money and bear the risk of having to pay the costs of the other side. [...] The fact that the individual may feel very strongly about the case or be determined to go to court [...] is not in itself relevant. The notional individual being considered under this test is, in general, a person with reasonable but not super-abundant means, such that he or she could afford to litigate privately but to do so would be something of a sacrifice. However, in assessing the potential benefits to be gained from the proceedings from the applicant’s standpoint it may be important to have regard to the actual circumstances of the applicant. For instance,

1019 *Ibidem*, p. 5-7.

1020 Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 7.

establishing an individual's entitlement to welfare benefits may be justifiable even if the sums involved appear on their face modest in relation to the likely costs required.¹⁰²¹

In Finland, whilst there is no 'reasonable privately paying person' test on the face of the legislation, the requirement that legal aid cannot be granted if the matter is of minor importance to the applicant¹⁰²² incorporates a similar principle. The relevant legislative proposal provides that in applying that criterion, consideration must be given to how much an average person would be willing to risk in legal fees to bring the case.¹⁰²³ The interpretation indicated by the handbook is that the case will be funded only if a reasonably prudent person would bear the costs of taking the case privately, bearing in mind the advantage sought and the means of the applicant.¹⁰²⁴ This approach to interpretation may have also been behind the refusal of legal aid in the asylum case described below in section 6.2.3.4.2 relating to the need for assistance.

6.2.3.3 Prospects of success

Many jurisdictions place considerable importance on an assessment of the prospects of success in decisions on civil legal aid. There is a connection with the tests discussed in preceding sections, based on an assumption that a reasonable person will pay close attention to the chance of winning, in deciding whether to instigate or defend an action. Whilst this may be true in many cases, it does not take account of the extent to which the importance of the matter may increase an individual's willingness to take risks in litigation, nor does it address the need for fair court hearings in all cases, regardless of the respective chances of each party. The jurisdictions under consideration vary significantly in the extent to which they rely on a prospects of success test, and the following descriptions build from the lowest to the highest use of the criterion.

In Finland, as seen above, the legal aid eligibility criteria do not include any measure of likelihood of success and thus legal aid is also available for very weak or even hopeless cases. However, a grant of Finnish legal aid does not protect against inter-parties costs if the case is lost, and it appears that the risk of having to pay the other side's costs acts as a deterrent to clients wanting to pursue cases with low chances of success. The previous rigid requirement in Finland to pay the winning party's costs was found by the United Nations Human Rights Committee to be a breach of the fair trial rights contained in the International Covenant on Civil and Political Rights,¹⁰²⁵ and a subsequent amendment to the Code of Judicial Procedure allows the judge discretion to reduce the payment liability if it would be manifestly unreasonable to make the

1021 Lord Chancellor's Guidance, 2018, paras. 4.2.5 and 4.2.6.

1022 Rättshjälpslag, 2002, 7 §.

1023 RP132/1997 rd, p. 23.

1024 Oikeusavun käsikirja 2013, section 2.2.2.

1025 *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, 1997, para 7.2.

costs order.¹⁰²⁶ This is, however, an exception to the general rule, which appears in practice to act as a deterrent.

Prospects of success are also of minimal relevance in Norway. In cases concerning representation at court, in means-tested priority types and non-priority cases, there is a single additional merits test which is that legal aid will not be granted if it is unreasonable for assistance to be paid for from public funds.¹⁰²⁷ The guidance on the reasonableness test explicitly states that applications must not be decided purely on the question of whether the party is likely to succeed in the action.¹⁰²⁸ Whilst the nature of the disputed interest will be relevant in the overall assessment, its weight will depend on its objective personal importance to the applicant,¹⁰²⁹ rather than the chance of succeeding. The resistance to prospects of success as a determinative factor in civil legal aid in Norway is evidently strong; even when reforms were proposed to tighten the merits test, prospects of success consideration was to be limited to the issue of whether there were any legal requirements which could not be met.¹⁰³⁰ This is a much less demanding test than many of those considered below.

In Sweden, as seen above, the prospects of success is relevant as part of the interpretation of the requirement that it must be reasonable in all the circumstances for the state to pay for legal representation. The online handbook states that the starting point for the assessment of reasonableness should be the nature of the case including prospects of success¹⁰³¹ and it is advised that cases where the chances of success are very low may be refused legal aid. However, unlike the Scottish position, which will be described below, no further detail on the interpretation of this element of the test is given. Instead, as with other elements of the eligibility tests, specific examples are given of decided cases in which legal aid has and has not been authorised, including a proposed case in Iran relating to custody of children where the prospects of success were so small that it was not reasonable for the state to contribute to the costs. As a group, medical negligence cases are said to be of a kind where legal aid may often be refused due to low chances of succeeding. Praxis relating to the previous Legal Aid Act is also referred to as relevant, and provides an explanation that when the court which is dealing with the substantive matter is assessing a legal aid application, it must be careful to comply with the general principle that a court must not form an opinion on a case before hearing all the evidence and arguments. This makes assessment of chances of success sensitive, and only in cases where the case is evidently hopeless or of meaningless value should legal aid be refused on this ground.¹⁰³² The Swedish approach to prospects of success is thus that only cases with some chance of success will be funded; those which

1026 Rättegångsbalk, 1734, Chapter 21, § 8c.

1027 Rettshjelploven, 1981, § 16(5).

1028 SRF-1/2017, para. 7.6.

1029 *Ibidem*, para 7.5.1.

1030 St.meld. nr. 26 (2008-2009), para. 10.3.

1031 Domstolsverkets handböcker, Rättshjälpen, Chapter 8, para 8.2.

1032 *Ibidem*, Chapter 8.3, referring case NJA 1982 s.175, I and II.

are hopeless will be excluded from legal aid regardless of any other factors.

In Denmark, in the categories of case for which legal aid will be assessed by the court, legal aid cannot be granted if “it is obvious that the applicant will not succeed in the case”.¹⁰³³ In other cases, the merits test is that there are reasonable grounds to litigate which, as seen above, is to be interpreted according to a list of statutory criteria including the prospect of the applicant being successful.¹⁰³⁴ The Danish tests on prospects of success thus differ depending on whether it is a court-granted type of legal aid, in which case only matters with some prospect of success can be funded, or of a case type where the Legal Aid Office assesses the application, in which case the prospects of success in general are a relevant factor in the decision.

Beyond the statutory provisions, there is no official guidance on the application of the merits criteria, although decisions in appeal cases can assist in interpretation. The unofficial guidance provided in the interpretative book by the Head of the Legal Aid Office expands on the provision. It is said that the more likely a person is to obtain a favourable outcome, the easier it is to argue that there are reasonable grounds to litigate.¹⁰³⁵ However, the nature of the case and its subject-matter may make the prospects of success less relevant in deciding reasonableness. It is always the overall reasonableness which is to be decided, in the light of the other factors. In considering likelihood of success, the available and permissible evidence, correct selection of the respondent and wider advantages and disadvantages of litigation in the particular case will be relevant.¹⁰³⁶

Similarly, in Iceland, the likelihood of success is one of the elements used to determine whether it is reasonable that the case be funded by the public. Article 5 of the Regulation on Legal Aid and the Legal Aid Committee instructs the committee to consider, *inter alia*, whether the case seems to be likely to succeed at court in deciding whether to grant legal aid. Assessment of chance of success can include consideration of the outcomes of similar cases. ‘Likely to succeed’ is taken to mean more likely to succeed than to fail.

The Republic of Ireland is at the point on the scale which marks the first jurisdiction in which prospects of success is a free-standing merits test which must be satisfied in addition to the other tests. This is the situation in the Republic of Ireland for representation cases. The other merits criteria include that the applicant has reasonable grounds for being a party to the proceedings and also that it is reasonable to fund the case, but unlike in Sweden, Denmark and Iceland the prospects of success test is not subsumed within consideration of reasonableness but is separate and must be satisfied independently. The Circular gives an indication of how the test is applied in practice. When submitting an application for civil legal aid, the solicitor must provide their

1033 Retsplejeloven, 2017, § 327(4).

1034 *Ibidem*, § 328(2).

1035 Mavrogenis 2012, para. 6.5.

1036 *Ibidem*.

analysis of the case including “on the basis of the facts established at the time of the application what prospects of success the applicant has in the proceedings, in the solicitor’s professional judgement”,¹⁰³⁷ potentially with reference to counsel’s opinion. The analysis must be followed by a recommendation to grant or refuse legal aid, and the importance of prospects of success is emphasised:

It is not acceptable to make a positive recommendation having conducted an analysis and the conclusion made pointing towards a negative recommendation/refusal. In particular, you should not make a positive recommendation knowing that the applicant’s prospects of success are poor. In these cases, you must recommend a refusal.¹⁰³⁸

Nonetheless, if the recommendation is to refuse, the solicitor “must be able to back up this opinion. In this case the Statement of Facts must state the facts grounding the negative opinion and that this opinion must be supported by reference to the law and the relevant provisions of the Act and Regulations”,¹⁰³⁹ Thus the decision must be made carefully and professionally, with legal reasoning, as to whether the claimant is ‘reasonably likely to succeed’ in the case. This recommendation will then be considered by the decision-maker as one of the elements of the merits verdict. The decision must be made independently and it is explicitly stated in the Circular that “it is not enough to simply ‘rubber stamp’ the recommendation made [...] by the solicitor”.¹⁰⁴⁰ The outcome of this system is thus that civil legal aid will only be granted if there are reasonable chances of success as assessed by the Legal Aid Board. Prospects of success are emphasised as an important element of the solicitor’s recommendation to the Board and may well be the deciding factor. However, it seems that the test of ‘reasonable prospects’ may be applied in such a way that it equates to ‘not poor prospects’ which, in comparison to some of the other systems, is relatively forgiving.

The position of the prospects of success test in Northern Ireland is interesting because the criterion does not appear in statute or regulation but nonetheless forms an important part of the selection of cases for legal aid. As has been seen above, the merits test in this jurisdiction is that there must be “reasonable grounds for taking, defending or being a party to the proceedings”,¹⁰⁴¹ it must not be unreasonable to grant a certificate,¹⁰⁴² there must be more than a trivial advantage to be gained¹⁰⁴³ and the matter should not be so simple that a lawyer would not ordinarily be employed.¹⁰⁴⁴ However, binding guidance on the assessment of applications for legal aid includes directions on the application

1037 Legal Aid Board Circular on Legal Services 2017, p. 3-9.

1038 *Ibidem*, 3-10.

1039 *Ibidem*.

1040 *Ibidem*, p. 5-2.

1041 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 37(1)(b).

1042 *Ibidem*, Regulation 37(2)(a).

1043 *Ibidem*, Regulation 37(2)(b).

1044 *Ibidem*.

of a prospects of success test.¹⁰⁴⁵ The guidance is not explicit on the point, but it can be assumed that the test is intended to contribute to the question of whether it would be unreasonable to grant legal aid.

Echoing the approach in the Republic of Ireland, prospects of success is said to be “an objective legal test as to how likely the case would be to succeed before the judge or other tribunal”.¹⁰⁴⁶ It is accepted that “estimating prospects of success can never be an exact science, particularly at the early stages of litigation. Therefore, it is a matter for the legal representative to use their judgement and experience”.¹⁰⁴⁷ The lawyer acting for the client must, in the application, estimate the chances of success as falling within one of six categories: Very Good (80% chance or more of obtaining a successful outcome); Good (60%–80% chance); Moderate (50%–60% chance); Borderline (where the prospects of success are not poor, but, because there are difficult disputes of fact, law or expert evidence, it is not possible to say the prospects of success are better than 50%); Poor (prospects are clearly less than 50%); and Unclear (the case cannot be put into any of the above categories because further investigation is needed).¹⁰⁴⁸ Most types of case will only be funded if the prospects of success are at least 50% and funding is likely to be refused where the prospects of success are poor,¹⁰⁴⁹ although cases of wider public importance or overwhelming importance to the client or which are of a priority case type may be funded if the prospects of success are borderline.¹⁰⁵⁰

It is noteworthy that the Northern Irish guidance recognises the difficulty of predicting prospects of success to a greater degree than the other legal aid schemes considered here. When defining the meaning of the Unclear category it is acknowledged that “the prospects of success could be said to be ‘unclear’ in almost every case as only limited information is available at the outset of a case and the prospects of success may only become clear shortly before trial”.¹⁰⁵¹ Despite this, it is still necessary for a prediction which differentiates within narrow bands of likelihood to be given by the conducting lawyer, at the time of the legal aid application. Civil legal aid in Northern Ireland will only be awarded if the prospects of success are 50% or higher, in most types of cases; the chance of winning the case is a decisive factor.

Similarly, in Scotland, prospects of success is “an important factor in deciding whether it is reasonable to grant civil legal aid”.¹⁰⁵² Lawyers applying for legal aid on behalf of their clients must estimate, with reasons, the chances of the case being successful, both expressed as ‘excellent’, ‘good’, ‘fair’, or ‘poor’

1045 Department of Justice Northern Ireland 2016. The Guidance is issued under powers contained in Article 14 (2A) and (2B) of the Access to Justice (Northern Ireland) Order 2003 and section 3 of the Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014.

1046 Department of Justice Northern Ireland 2016, para 3.2.

1047 *Ibidem*, para 5.2.

1048 *Ibidem*, para 5.1.

1049 *Ibidem*, para 5.3.

1050 *Ibidem*, para 5.4.

1051 *Ibidem*, para 6.2.

1052 Scottish Legal Aid Board Civil Legal Assistance Handbook, Part 4, para 3.23.

and on a scale of 1-10. In non-family cases where the prospects of success are assessed as 'fair' or 'poor' (between 1 and 6 on the ten-point scale), the application is likely to be refused unless there are any other significant factors that would warrant the granting of civil legal aid. In family cases it must be shown that there is "some purpose in the applicant continuing with the proceedings" for legal aid to be granted despite a 'fair' or 'poor' prospects of success assessment. In addition to this general guidance the online handbook further sets out detail of the approach to particular categories of case, which may also involve assessments of prospects of success. For example, "in any application for proceedings before the Supreme Court, we should be satisfied there are not only significant prospects of success, but also that the appeal raises a point of general public importance".¹⁰⁵³ Prospects of success, whilst not mentioned in legislation, is thus considered by the Scottish legal aid administrative authorities to be a central element in deciding whether it is reasonable for the applicant to receive legal aid, and must usually be above 60% (on the assumption that the ten-point scale can be equated to percentages).

Very similar legislative rules in Scotland, Northern Ireland and Sweden have thus been applied very differently, with a much more cautious approach to denying legal aid because of poor prospects of success in Sweden. It can be argued that this approach, which protects against the risk that the party with the weaker case will often be unrepresented, improves the chances of a fair hearing across a broad range of cases. The Scottish and Northern Irish technique of inserting a strict prospects of success test in the guidance moves these jurisdictions towards a commercial risk assessment approach, as discussed below.

In the introduction to this chapter, the complexity of the merits test in England & Wales was outlined. The structure of the test means that it is not possible to give a definitive overall answer as to the applicable prospects of success test; different criteria apply to different types of cases according to a detailed classification. It is clear, though, that the test holds a central place in the assessment of civil legal aid applications. A detailed 'prospects of success' test as set out in the regulations¹⁰⁵⁴ lists factors to which regard can and cannot be given when determining prospects of success, and then defines bands as follows: 'very good' prospects of success are those where the likelihood of success is 80% or more; 'good' means 60-80%; 'moderate' 50-60%; 'marginal' 45-50% and 'poor' under 45%. Further categories of 'unclear' and 'borderline' are described, respectively, as cases where there are investigations which could enable a reliable estimate of prospects of success to be made, and cases where this is not the case but disputes of law or fact make it impossible to judge the prospects. The bands are similar to, but slightly more numerous than, the Northern Irish bands. The applicable level is applied to each type of case using these categories. In general,

¹⁰⁵³ *Ibidem*, Part 4, para 4.92.

¹⁰⁵⁴ The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 5, as amended by the Civil Legal Aid (Merits Criteria)(Amendment)(No. 2) Regulations 2015, Regulation 2, and the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016, Regulation 2.

for applications for ‘full representation’, the prospects of success must be very good, good or moderate; or marginal or borderline, if the case is of significant wider public interest or is of overwhelming importance to the individual.¹⁰⁵⁵

The complexity described above makes it impossible here to expound on the applicable prospects of success test for each case type. In June 2016 the Legal Aid Agency confirmed that the test applies to most civil cases and issued clarification following a court decision¹⁰⁵⁶ that: “The Court of Appeal found that it is lawful for the prospects of success test to have a 50% threshold, and this does not breach a client’s rights. As a result, we are now no longer funding any applications for civil legal aid that are subject to a prospects of success test where the prospects are assessed as poor or borderline.”¹⁰⁵⁷ Despite this announcement, regulations¹⁰⁵⁸ were introduced in 2016 which allowed for the granting of legal aid in borderline and marginal cases in the areas of domestic violence,¹⁰⁵⁹ child protection,¹⁰⁶⁰ private law children matters and certain cases relating to EU and international agreements. In other cases, legal aid for representation will only be granted in borderline or marginal cases where the case is of significant wider public interest or, for family cases, overwhelming importance for the client or the case relates to a potential breach of the European Convention on Human Rights.¹⁰⁶¹ The merits test for civil legal aid in England & Wales thus includes as a determining factor that prospects of success must be above half for most types of case, and involves consideration of prospects of success as an element in deciding whether legal aid should be granted also in cases with a higher chance than this.

The percentage prospects of success test is a core element of the subject-specific merits tests in England & Wales and requires, it is submitted, a very difficult assessment indeed. To estimate prospects of success in this detail might almost be said to require levels of clairvoyance, given the various unpredictable factors which can affect outcomes in court cases. Furthermore, to define one category as indicating only a 5% range of likelihoods of success seems at best highly ambitious, and in light of the discussion on percentage predictions below, arguably meaningless. All these assessments are being made by civil servants who do not necessarily have any legal training.

Prospects of success features in civil merits testing in England & Wales not only as a free-standing test but also as an element of the proportionality test, which reads: “For the purposes of these Regulations, the proportionality test is met if the Director is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of

1055 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 43.

1056 *Director of legal aid casework and Lord Chancellor v. IS*, 2016.

1057 Legal Aid Agency *Civil news: change in approach to assessing civil merits*, June 2016.

1058 The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016.

1059 *Ibidem*, Regulation 2(10).

1060 *Ibidem*, Regulation 2(9).

1061 *Ibidem*, Regulation 2(11).

success and all the other circumstances of the case.”¹⁰⁶² In addition, as shown above, the reasonable private paying individual test requires a consideration of the likely prospects of success.¹⁰⁶³

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.

6.2.3.4 Other tests

6.2.3.4.1 Proportionality between cost and benefit

One of the common elements of a merits test is a consideration of the relationship between the expected cost of the case and the degree of benefit sought. In everyday language, the test seeks to ascertain whether bringing the case is worth it or not. If limited to a purely financial comparison this is inapplicable to cases

1062 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 8.

1063 *Ibidem*, Regulation 7.

where the benefit sought cannot be expressed in financial terms. Some cases are clearly non-financial, such as those concerning arrangements for children, and some combine financial and non-financial elements, such as litigation to determine whether a family can remain in their home or must move. In response to this difficulty, some jurisdictions do not require a strict comparison between two sums of money, but include the costs and benefit as part of a wider consideration of whether it is reasonable to bring a case. Other jurisdictions use a strict cost-benefit comparison but only for certain types of case. A further difference between jurisdictions is that some include the consideration of cost and benefit in the legislation, whether primary or secondary, whilst others introduce it as part of the guidance on interpretation of broader statutory tests.

Jurisdictions using a comparison of cost and benefit as part of an overall reasonableness assessment include Scotland, Northern Ireland, Denmark, Sweden and the Republic of Ireland.

In Denmark, as seen above, legislation sets out the test of reasonableness and indicates some factors to be considered in the assessment, including the size of the subject matter and the amount of the expected costs.¹⁰⁶⁴ There is no express requirement to balance these two elements directly against each other; both are just statutory elements of the reasonableness test. Similarly, in Sweden, there is a statutory reasonableness test and a statutory list of relevant factors, which includes a consideration of the value of the case in determining whether it is reasonable for the state to pay the legal costs.¹⁰⁶⁵

The statutory civil merits test in the Republic of Ireland includes an explicit cost benefit analysis in most representation cases, but not in proceedings concerning the welfare of a child or sex offenders register order cases. In all other applications for legal aid for representation, the decision-maker must be satisfied that, having regard to all the circumstances of the case, including the probable cost to the Board, measured against the likely benefit to the applicant, it is reasonable to grant legal aid.¹⁰⁶⁶

In Scotland and Northern Ireland it is governmental guidance which introduces a cost benefits test into the assessment of the statutory reasonableness test. When determining whether it is reasonable in the particular circumstances of the case to grant legal aid in Scotland,¹⁰⁶⁷ the general guidance indicates that the Board will give consideration to the balance between the likely cost and the likely benefit, amongst other factors.¹⁰⁶⁸ The Department of Justice guidance in Northern Ireland introduces a complex cost-benefit test which is not present in the legislation. The guidance, presumably addressing the statutory tests that it must not be unreasonable to grant a certificate and that there must be more

1064 Retsplejeloven, 2017, § 328(2).

1065 Rättshjälpslag, 1996, 8 §.

1066 Civil Legal Aid Act 1995, s.28(2)(e).

1067 Legal Aid (Scotland) Act 1986, s. 14.

1068 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part 4, para 3.3.

than a trivial advantage to be gained,¹⁰⁶⁹ sets out a multi-layered cost benefit consideration which must be applied by the Legal Services Agency. In order to be able to assess cost benefit correctly, each case must be categorised as one of the following:

- (a) Quantifiable claims – in these cases it is likely that funding will only be granted for cases which satisfy specific damages to costs ratios which vary according to the prospects of success.
- (b) Unquantifiable claims – in these cases the test is whether the benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances.
- (c) Public interest cases – in these cases the test is a general one that the likely benefits of the proceedings must justify the likely costs.¹⁰⁷⁰

Where the ratios apply, these are as follows: if the prospects of success are very good (80% or more) the likely damages must exceed likely costs; if the prospects of success are good (60%–80%), the likely damages must exceed likely costs by a ratio of 2:1; if the prospects of success are moderate (50%–60%), the likely damages must exceed likely costs by a ratio of 3:1.¹⁰⁷¹

This is a complex and sensitive test, which differentiates between various types of case as to the appropriate regard to be given to the relationship between cost and benefit. It is impossible to know whether this reflects how a decision-maker would in any event act if simply asked to consider reasonableness, having regard to cost and benefit. The detailed approach to the direction of decisions is in keeping with the general approach in Northern Ireland and England & Wales overall.

In addition to these examples of the cost benefit test as part of a reasonableness test, the former is also a free-standing statutory element of merits testing in Iceland and England & Wales. In Iceland, the regulations provide that it will not as a general rule be acceptable to grant legal aid in a dispute which concerns ‘insignificant interests’ where the costs of bringing the matter to court are disproportionate to the likely benefit.¹⁰⁷²

The binding Lord Chancellor’s Guidance alerts practitioners in England & Wales to the “three separate cost benefit criteria for full representation that might be applied depending on the type of case concerned”.¹⁰⁷³ The first of these applies to cases which are primarily seeking money damages but where there is not a significant wider public interest. This test combines prospects of success and the ratio of the likely cost of the case and its likely benefit in a manner similar to that in Northern Ireland:

1069 The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 37(2).

1070 Department of Justice Northern Ireland 2016, para. 7.2.

1071 *Ibidem*, para. 7.5.

1072 Regulation 45/2008, Regulation 5(1)(c).

1073 Lord Chancellor’s Guidance, 2018, para. 4.2.1.

if the prospects of success of the case are very good, the Director must be satisfied that the likely damages exceed likely costs;

if the prospects of success of the case are good, the Director must be satisfied that the likely damages exceed likely costs by a ratio of two to one; or

if the prospects of success of the case are moderate, the Director must be satisfied that the likely damages exceed likely costs by a ratio of four to one.¹⁰⁷⁴

Secondly, the reasonable private paying individual test, as set out above, inserts a cost-benefit assessment to a number of cases. Lastly, the proportionality test applies to cases under the general merits criteria with significant wider public interest and is the test usually applied to cases under the specific merits criteria.¹⁰⁷⁵ This test requires that “the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case”.¹⁰⁷⁶

The much simpler merits test for legal aid for advice and assistance also includes a cost benefit analysis. At this level there must be likely to be sufficient benefit to the client to justify the cost of providing legal help.¹⁰⁷⁷ The test “recognises that, at these levels of service, even in a matter with poor prospects of success, it may well be considered worthwhile for an individual to pay for initial advice, including the advice that the case is not worth pursuing further. The more legal help is provided, however, the more that the benefits deriving from the costs incurred will need to be taken into account”.¹⁰⁷⁸

In Finland, legal aid will not be granted in a case where it would be “obviously inappropriate in comparison to the benefit the applicant receives”.¹⁰⁷⁹ This test does not appear to be very significant in practice and is not expanded upon in the handbook, other than to confirm that legal aid can be refused on this ground even if the applicant considers the claim to be worthwhile.¹⁰⁸⁰

6.2.3.4.2 A need for representation

The question of whether an individual needs assistance in the form of legal services in order to deal with a problem is one which is fundamental to the provision of legal aid, from many perspectives. Whether someone needs legal aid in order to ensure a fair hearing is the primary concern of the human rights treaty bodies in considering international obligations to provide legal aid. As has been seen in the preceding chapter, scope restrictions are often determined

1074 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 42.

1075 Lord Chancellor’s Guidance, 2018, para. 4.2.1.

1076 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 8.

1077 *Ibidem*, Regulation 32.

1078 Lord Chancellor’s Guidance, 2018, para. 4.2.14.

1079 Rättshjälpslag, 2002, 7 §, para. 2.

1080 Oikeusavun käsikirja 2013, section 2.2.2.

by the perceived lack of need for legal assistance in certain types of case. In addition, the question of need for assistance or representation is relevant in a discussion of merits criteria as some jurisdictions apply an individual check in each application that the applicant is in need of the assistance sought.

The primary civil representation merits criteria set out in Swedish statute is that the applicant has a need for a legal representative which cannot be met in another way.¹⁰⁸¹ Guidance in the online Legal Aid Handbook explains that the starting point for the assessment is the consideration of whether, without help, the applicant will be able to safeguard their interests in the case; the difficulty of the case is to be weighed against the applicant's own abilities.¹⁰⁸² However, all the personal circumstances of the applicant are relevant, including their family situation, as "those who are ill, inexperienced or alone have in general greater difficulty than others in enforcing their rights".¹⁰⁸³

As has been seen in previous chapters, both the Finnish and Norwegian legal aid schemes include the concept of need in their statutory statements of purpose for legal aid and in both systems the criteria could be used in assessing individual legal aid applications. However, the Norwegian system pre-determines need through scope limitations; need is assessed on a general level through statute and, as a result, does not play a large part in individual decisions on legal aid. The Finnish system aims for a much higher level of coverage than the Norwegian and incorporates very little general needs assessment through scope restriction, but in making administrative decisions on individual cases it is possible to use the fact that the applicant is able to protect their interests and rights themselves to decide that a legal aid attorney will not be required and refuse legal aid. In making this decision, particular attention must be paid *inter alia* to the severity of the case, legal complexity, evidence requirements and age and personal characteristics of the applicant as well as to the objective interest of the applicant in the case.¹⁰⁸⁴ A recent court case has indicated that this provision may at times be used quite flexibly to avoid funding cases which in other jurisdictions might fail a reasonableness test. The case in question concerned an asylum seeker who had previously received legal aid for several unsuccessful applications for residence and who had returned to Finland despite a ban on entering the entire Schengen area. The Legal Aid Act 1 §, para. 1 on need and 7 §, para. 1 which bars funding for cases of minor importance to the client, were together used to uphold the refusal of legal aid.¹⁰⁸⁵

One of the standard criteria for civil representation in England & Wales is that "there is a need for representation in all the circumstances of the case including: the nature and complexity of the issues; the existence of other proceedings; and

1081 Rättshjälpslag, 1996, 7 §.

1082 Domstolsverkets handböcker, Rättshjälp, Chapter 7, para. 7.1.

1083 *Ibidem*, Chapter 7, para. 7.2.

1084 Oikeusavun käsikirja 2013, section 2.2.

1085 HAO 17/0811/3.

the interests of other parties to the proceedings”.¹⁰⁸⁶ As with many of the merits tests in this jurisdiction, there is overlap with other tests in the application of the rule; according to the Lord Chancellor’s Guidance, this is a “test of whether legal representation as a form of service is appropriate in all the circumstances of the proceedings, having regard again to whether a reasonable client paying privately would wish to fund representation”. For example, the “straightforward nature of some proceedings, such as an undefended divorce, may make representation unnecessary”.¹⁰⁸⁷

If a merits test of need for representation is applied in such a way that legal aid is always granted if there is a need for legal assistance in order to obtain access to court and a fair hearing, the international human rights requirements would, by definition, be satisfied (see below).

6.2.3.4.3 Significance of the matter for the client

A factor which is used in merits assessment to a larger degree than a specific ‘need’ test in the jurisdictions under consideration is the issue of how important the issue is for the client. This goes not to the question of whether an individual is able to achieve a fair hearing or access to justice without legal assistance, but how important it is that a fair process is achieved. This is a distinction without basis in the international human rights treaties, which apply to all determinations of qualifying civil rights and obligations, not only those which are particularly important to the individual.

There is an overlap between the question of scope restrictions and the significance of the matter for the client, particularly around cases of minimal value. A case with very low value may be excluded from scope as in Sweden or excluded because of the low significance for the client, as in Finland.¹⁰⁸⁸ In this latter jurisdiction, as indicated by the statutory wording, the test is to be applied subjectively, i.e. by considering whether for that individual the matter is particularly important despite its objectively low value.¹⁰⁸⁹ However, there is also a provision that legal aid should be refused if a grant would be clearly meaningless in relation to the benefit to be gained, which according to the suggested interpretation should include cases where “the benefit to the applicant is objectively estimated to be so low, that legal aid would not be appropriate”, even if the applicant considers the claim important.¹⁰⁹⁰ This is seemingly not the same as a cost-benefit test, as the rule makes no reference to the cost of the case. Beyond the exclusion of low value matters from scope in Sweden, the type, importance and value of the case are factors which must be

1086 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 39(e).

1087 Lord Chancellor’s Guidance, 2018, para. 7.23.

1088 Rättshjälpslag, 2002, 7 §.

1089 Oikeusavun käsikirja 2013, section 2.2.2.

1090 *Ibidem*.

taken into account when deciding whether it is reasonable for the state to pay the legal costs.¹⁰⁹¹

In Norway, all cases must fulfil the stated purpose of the Act and the Circular points out that this means cases of negligible value would not usually be considered to qualify. Furthermore, in non-priority cases legal aid will only be granted if the matter “seen from an objective point of view is especially pressing for the applicant”.¹⁰⁹² This does not mean that the applicant herself considers the problem particularly pressing, but that the matter is generally considered to affect people personally to a particularly strong degree,¹⁰⁹³ directly contradicting the Finnish approach. Similarity with the listed case types is to be given weight, according to both the Act and the Circular, and the latter also points out that here, too, reference should be made to the purpose of the Act such that *de minimis* cases would not usually qualify. Similar approaches are taken in Scotland and Northern Ireland. In the latter jurisdiction there must be more than a trivial advantage to be gained if legal aid is to be granted.¹⁰⁹⁴ In Scotland, “as a general proposition, litigation that would have little or no material benefit to the applicant or is brought simply to satisfy vague demands for justice or principle would not be reasonable”.¹⁰⁹⁵

The significance of the case for the applicant is of more consequence for the civil legal aid merits assessment in Denmark, where it is one of the statutory factors to be considered overall when assessing reasonable grounds to litigate.¹⁰⁹⁶ In addition, if a case falls outside the usual rules there will still be a possibility of legal aid for exceptional cases where there are special reasons, stated as particularly including cases of fundamental importance, general public interest or significant importance for the applicant’s social or business situation.¹⁰⁹⁷

The Act on Civil Procedure in Iceland provides that legal aid should be provided in two different ways according to the level of importance of the case to the individual. If the applicant is within the financial eligibility limits, legal aid is available if the case is “of such a nature that it is considered appropriate” for public funds to finance the case.¹⁰⁹⁸ The introduction of the concept of the ‘nature’ of the case suggests that the importance of the matter for the client could be relevant. In addition, however, if “the outcome of the case would have great general significance or matter greatly to the employment, social status or other personal status of the applicant”, legal aid can be granted regardless of means.¹⁰⁹⁹ It should be noted that this second route to legal aid eligibility has

1091 Rättshjälpslag, 1996, 8 §.

1092 Rettskjelploven, 1980, § 11(3) (advice) and § 16(3) (representation).

1093 SRF-1/2017, para 6.5.1; Ot.prp. nr. 91 (2003-2004), s.54.

1094 Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 37(2)(b).

1095 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part 4 para 3.22.

1096 Retsplejeloven, 2017, § 328(2).

1097 *Ibidem*, § 329.

1098 Lög um meðferð einkamála, 1991, Chapter 20, Article 126.

1099 *Ibidem*.

been politically contentious and has been revoked and then reinstated according to the political nature of successive governments. There is a current proposal to, again, revoke this section of the Act, which may be brought into force imminently. The objections are based on the argument that it is not appropriate to provide non-means tested legal aid; legal aid should support only those of low means.¹¹⁰⁰ Interestingly, this view takes a social law approach to legal aid, viewing it as a benefit which should only be given to those who can be shown financially to need it, whilst reducing the availability of legal aid to enforce other social rights by removing the absolute right to legal aid in cases of great significance to, inter alia, the social status of the individual.

6.2.3.4.4 Compliance with international obligations

Some jurisdictions, notably those which have experienced negative decisions from the European Court of Human Rights in respect of their legal aid coverage,¹¹⁰¹ specifically provide that legal aid must be granted if there is otherwise a risk of breaching international obligations. In the Republic of Ireland the catching provision is within the merits assessment, which contains the proviso that: “notwithstanding the outcome of these merits tests, legal aid must be granted if it is necessary in order for Ireland to comply with its international obligations.”¹¹⁰²

Chapter 5 above on the scope of civil legal aid includes a consideration of the exceptional case rules in Northern Ireland¹¹⁰³ and England & Wales,¹¹⁰⁴ which can be used to obtain funding for cases which would otherwise not be eligible, if legal aid is necessary to avoid a breach of the European Convention on Human Rights or enforceable EU rights. In both jurisdictions, an exceptional case determination overrides both scope restrictions and merits assessment; thus, if a case is in scope but would otherwise be refused on the merits, a potential breach of international requirements will equate to satisfaction of the merits criteria and legal aid will be granted.

The other jurisdictions appear content to allow their main merits tests to catch cases which might lead to difficulties with international obligations if legal aid were refused.

6.2.3.4.5 Properly prepared case

A further criterion is applied as part of the merits assessment in some of the jurisdictions: whether preparatory stages of the case have been properly conducted. This is particularly emphasised in Iceland, where civil legal aid decisions must include consideration of whether the case is clearly necessary and whether it is appropriate to bring the matter before the court, bearing in

1100 Antonsdóttir 2018, p. 136.

1101 E.g. *Steel and Morris v. the United Kingdom*, 2005 and *Airey v. Ireland*, 1979.

1102 Civil Legal Aid Act 1995, s. 28(5)

1103 Access to Justice (Northern Ireland) Order 2003 s. 12A(3)

1104 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.10.

mind: whether the circumstances and arguments are sufficiently clear that the case is ready to be handled by the courts; whether the individuals concerned have attempted to resolve the matter outside the court system; and whether all documents have been acquired and a court case is necessary at this point in time.¹¹⁰⁵ Additionally, if there is a sufficiently similar case already before the courts, which will be likely to set a precedent, it is permitted to refuse legal aid until that other case has been decided.¹¹⁰⁶

A related approach is taken in Scotland, according to the guidance; in deciding on the reasonableness of granting legal aid, the Legal Aid Board will include a consideration of the availability of evidence in the proceedings¹¹⁰⁷ and whether sufficient attempts have been made to resolve the dispute prior to litigating.¹¹⁰⁸ Likewise, in England & Wales, the applicant must have “exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution”¹¹⁰⁹ before legal aid will be granted.

6.3 The acceptability and implications of a merits test

6.3.1 The European Court of Human Rights: access to court, fair hearing and equality of arms

Article 6 of the ECHR provides an entitlement to a ‘fair hearing’ in the determination of civil rights and liabilities. At least two distinctive approaches by the European Court of Human Rights (the Court) to this provision can be seen.

The first and most common approach has been to address an aspect of the right to a fair hearing which is only implied by the Convention; the right of access to court. As early as 1975 the Court confirmed that “the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1”.¹¹¹⁰ This principle has been approved consistently and frequently since.¹¹¹¹ It is plain that there is good reason to ensure that the Convention is interpreted this way; without a right of access to court, a state could sidestep the obligation to provide a fair hearing by refusing any hearing at all. The problem has been described by the Court thus: “it would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention

enforcement bodies, remove from the jurisdiction of the courts a whole range

1105 Regulation 45/2008, Regulation 5.

1106 *Ibidem*.

1107 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part 4, para. 3.15.

1108 *Ibidem*, Part 4, para. 3.5.

1109 The Civil Legal Aid (Merits Criteria) Regulations 2013, 104/2013, Regulation 39(d).

1110 *Golder v. UK*, 1975, at para 36. Confirmed, inter alia, in *Roche v. UK*, 2005.

1111 E.g. *Roche v. UK*, 2005.

of civil claims”¹¹¹²

The development of a right of access to court, though, leads to a further difficulty in practical application. Each jurisdiction has laws defining the circumstances and situations in which a civil case may be brought, thus curtailing the right of access to court. The acceptability of such laws was, inevitably, confirmed by the Court, which has noted that “Article 6 does not itself guarantee any particular content of substantive law of the Contracting Parties”¹¹¹³ and thus that “the right of access to the courts is not absolute but may be subject to limitations”¹¹¹⁴

However, in order to ensure that a state could not go full circle and avoid fair trial by setting excessive demands for civil proceedings:

the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired [... and a limitation ...] will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved¹¹¹⁵

The formulation of a right of access to court in civil cases, as carved out by the Court under Article 6, has thus annexed the jurisprudence on limitations familiar under Articles 8 to 11. As Article 6 fair trial rights are not capable of limitation according to the text of the treaty, this is notable and potentially problematic. The effect is to divide Article 6 in civil cases into two types of rights: rights involved in getting a civil case before the courts, which are capable of limitation; and the right to a fair hearing once a case is at court, which is not capable of limitation. Legal aid has usually been discussed within the former category, with the result that restrictions to civil legal aid have been readily accepted by the Court. Thus, under the implied right of access to court, “it may ... be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings”,¹¹¹⁶ although such limitations must “not [be] arbitrary or disproportionate, or [impinge] on the essence of the right”¹¹¹⁷

Given this willingness to limit access to court, it is not surprising that in situations where there is no legal bar to appearing unrepresented, limitations to legal aid in civil cases have been very readily accepted by the ECHR treaty bodies. As argued by the European Commission on Human Rights:

1112 *A v. UK*, 2002.

1113 *Roche v. UK*, 2005.

1114 *Ashingdane v. UK*, 1985, para. 57.

1115 *Ibidem*. This principle has been applied in many cases since, e.g. *Levages Prestations Services v. France*, 1996; *Tabor v. Poland*, 2006; *Laskowska v. Poland*, 2007 and *Dachnevic v. Lithuania*, 2012.

1116 *Tabor v. Poland*, 2006, para. 40.

1117 *Laskowska v. Poland*, 2007, para. 62.

Article 6 (1) does not require that legal aid be provided in every case, irrespective of the nature of the claim and supporting evidence. Where an individual is refused legal aid in a particular case because his proposed civil claim is either not sufficiently well grounded or is regarded as frivolous or vexatious the burden would then fall on him to secure his ‘access to court’ in some other way such as, for example, bringing the action himself or seeking assistance from some other source [...] such a situation would not normally constitute a denial of access to court¹¹¹⁸

The praxis has settled on a reliable formula for summarising the Court’s position on legal aid and access to court, typified the case of *Laskowska v. Poland*.¹¹¹⁹ In this civil, family maintenance case, the Court stated that the right of access to court could be subject to legitimate restrictions on condition that such limitation “pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.¹¹²⁰ This is strikingly similar to the test applied by the General Court of the European Union when applying Article 47 of the Charter in *GREP v. Freistaat Bayern*; the pertinent question was “whether the conditions for grant of such aid constitute a restriction of the right of access to courts and tribunals which infringes the very essence of that right, whether they pursue a legitimate aim and whether there is a reasonable degree of proportionality between the means used and the aim pursued”.¹¹²¹ It is submitted that this line of reasoning and indeed the line of cases emphasising the right of access to court ignores the need for this right to be meaningful, as confirmed in the *Airey* case:

The Government contend that the application [sic] does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer.

The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

1118 *X v. UK*, 1980, para. 16.

1119 *Laskowska v. Poland*, 2007.

1120 *Ibidem*, para. 52

1121 *GREP v. Freistaat Bayern*, 2012.

[...] litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position can effectively present his or her own case.¹¹²²

This judgment epitomises the second line of reasoning, which is a focus on fair hearing. The Court refers to several concepts: access to court, effective access and fair hearing. The emphasis, however, is on ensuring that the individual can satisfactorily present her case either without assistance or, if that is not possible, with assistance paid for by the state. Access to court must be effective. The approach has been followed in some later cases where the Court has found the relevant question to be “whether, in all the circumstances, the lack of legal aid operated to deprive the applicant of a fair trial and breached his right to present an effective defence”.¹¹²³ The ‘access to court’ approach ignores this fundamental aspect of the right to a fair hearing by concentrating on access to court rather than what happens at court. Applied to legal aid, this may cause a significant problem when considering outcomes for individuals.

One further significant theme can be found in Article 6 cases concerning legal aid; that of ‘equality of arms’. This concept is well-established in other types of cases under Article 6 and the principle has been described thus: “the requirement of ‘equality of arms’ [...] implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.¹¹²⁴

Whilst the concept has not been often discussed in decisions concerning legal aid, despite its evident relevance, there are some notable exceptions, in particular the *Steel and Morris* decision discussed above in Chapter 5. As a preliminary pointer, the Court stated that “it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary”.¹¹²⁵ However, in that case “the disparity between the respective levels of legal assistance enjoyed by the applicants and [the other party] was of such a degree that it could not have failed [...] to have given rise to unfairness, despite the best efforts of the judges”.¹¹²⁶ Accordingly, the Court found a violation of

1122 *Airey v. Ireland*, 1979, para. 24.

1123 *McVicar v. UK*, 2002, para. 51.

1124 *Inter alia Dombo Beheer v. The Netherlands*, 1993, para. 33.

1125 *Steel and Morris v. UK*, 2005, para. 62. See also *Laskowska v. Poland*, 2007, para. 54.

1126 *Steel and Morris v. UK*, 2005, para. 69.

Article 6 on the grounds that “the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms”.¹¹²⁷

Equality of arms is an element of the right to fair hearing which, it is submitted, should be explored more fully when considering the limits which may be placed upon legal aid. Arguably, on a strict interpretation of the Convention, legal aid is required in any case where representation is necessary for a hearing to be fair, taking into account the need for equality of arms. The text of Article 6 does not allow limitations and thus a fair hearing must in theory be allowed in respect of any matter which in domestic law qualifies as ‘civil rights and obligations’.

Shipman, in reviewing the praxis of the European Court of Human Rights post-*Steel and Morris*, summarises:

Refusal to fund publicly civil litigation may lead to a violation of Art. 6(1) in three situations. First, if the applicant has been unable consequently to pursue a case in the courts, this may constitute a breach of the right of access to a court. Secondly, applicants may conduct their own case but the court may find that there is a denial of the opportunity to present an effective case. Thirdly, the lack of provision may lead to inequality of arms, such that there is a substantial disadvantage vis-à-vis the adversary.¹¹²⁸

Unfortunately, the three situations are not consistently given equal attention by the European Court of Human Rights, and the two main approaches of access to court and fairness of hearing produce consequences for the administration of legal aid which are not mutually compatible. As has been seen, access to court is a weak basis for arguing the need for civil legal aid: in most cases it is possible to bring or defend proceedings without representation and therefore legal aid is not required for the realisation of the right of access to court. The imposition of even quite harsh eligibility tests on merits, including prospects of success, would therefore be acceptable. A concentration on fairness of hearing produces a different result as the implication is that both sides in a civil dispute should be able to present their side of the dispute effectively. This would logically appear to be the case whatever the value of the case, cost of providing legal assistance or the strength of the respective positions of the parties. However, the ‘need for representation’ merits test is clearly directly relevant and if properly applied as a free-standing qualification for legal aid should ensure fair hearing in any in-scope case.

It is interesting at this juncture to note that the approach of the European Court of Human Rights largely overlooks the social law perspective which is, as will be seen in the conclusions chapter, a strong focus in some national justifications for legal aid. This may be inevitable as the European Convention on Human Rights has a civil and political rights focus, and it is in the context of the

1127 *Ibidem* para. 72.

1128 Shipman 2006, p. 8.

civil right to a fair trial that legal aid is considered by the Court. Nonetheless, the status of the Convention as the human rights treaty with the strongest enforcement mechanism means that its approach is disproportionately important compared to the statements of international bodies dealing with social, economic and cultural rights. The Global Study on Legal Aid of UNODC and UNDP, for example, emphasises the “linkages between access to justice, poverty and inequality, accountability and the rule of law, and ensuring equitable development”,¹¹²⁹ but is not accompanied by an enforcement mechanism which would exert real pressure on states to ensure legal aid on this basis. The equality of arms line of reasoning from the European Court of Human Rights comes closest to acknowledging the wider societal importance of legal aid, but this is the approach which is least emphasised in the Court’s praxis, as seen above.

6.3.2 Application of European Court of Human Rights praxis to merits tests

It has long been clear from the praxis of the international human rights treaty bodies that they will not object to selection of cases for legal aid based not only on the nature of the case, but also on its strength. As early as 1980, the (then) European Commission on Human Rights confirmed that “Article 6 (1) does not require that legal aid be provided in every case, irrespective of the nature of the claim and supporting evidence”.¹¹³⁰

In *Laskowska*, the need to control expenditure was found to be a legitimate aim in limiting access to legal aid.¹¹³¹ This is particularly pertinent in view of current fiscal policies resulting in reduced public spending across many jurisdictions. However, the manner in which cases are selected for funding must “be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to a court”,¹¹³² thus leaving legal aid schemes open to challenge even if limitations are made for budgetary reasons. Considering the various types of merits test discussed above in turn, the *Laskowska* decision can be used to assess whether the European Court is likely to accept these limitations on legal aid.

Probabilis causa litigandi is a basic threshold test, which is not likely to conflict with Article 6; if any merits limitations are acceptable, which they are according to praxis, this test must be tolerated.

All the various reasonableness criteria are also likely to be accepted. Reasonableness is a core concept in the jurisprudence of the European Court of Human Rights, and if a claimant was acting unreasonably in pursuing a case, or if it would be unreasonable for the state to fund the case, it is difficult to imagine that the Court would intervene. A note of caution should be sounded,

1129 UNODC/UNDP, 2016, p. 5.

1130 *X v. UK*, 1980, para. 16.

1131 *Laskowska v. Poland*, 2007, para. 52.

1132 *Ibidem*.

however, by way of a reminder that the Court will ultimately consider whether overall the right to a (fair) tribunal was impaired in the particular case, and thus absolute merits criteria which do not allow for the balancing of other factors may be found wanting. Given the generous interpretation of Article 6 by the Court, it is also likely that the reasonable privately paying individual test would be found acceptable although, as argued below, theoretical objections can be made.

The prospects of success test has caused some difficulties at the European Court of Human Rights, where in the context of justice systems which require legal representation at appeal concern has been expressed that legal aid authorities should not, in assessing an application, pre-judge a case. There is here a clear difference between situations in which legal representation is necessary, under domestic law, in order to bring a claim before a particular court and those where it is possible to appear unrepresented. Where it is only possible to make a court application through a legal representative, such as before the Courts of Cassation in France and Belgium, refusal of legal aid to a person who may be unable to afford to pay a lawyer has the effect of absolutely preventing that person accessing the court. The application of a prospects of success test in such circumstances is particularly problematic, as the legal aid decision has the effect of a leave to appeal decision. As the Court pointed out in one such case:

It was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of [the] right to a tribunal.¹¹³³

However, in *Del Sol*¹¹³⁴ the Court was willing to accept a similar provision in France, seemingly because of the judicial nature of the body making the legal aid decision. There, the possibility of refusing legal aid on the ground of lack of arguable ground of appeal on points of law was “undoubtedly intended to meet the legitimate concern that public money should only be made available to applicants for legal aid whose appeals to the Court of Cassation have a reasonable prospect of success”.¹¹³⁵ Nonetheless, poor chances of success will not be an acceptable ground for refusing legal aid if other factors make representation necessary for a fair hearing.¹¹³⁶

This problem rarely arises in the jurisdictions under consideration but there are some circumstances in which legal representation is obligatory. In Finland, it is necessary to have representation in Supreme Court cases concerning

1133 *Aerts v. Belgium*, 1998, para. 60.

1134 *Del Sol v. France*, 2002.

1135 *Ibidem*, para. 23

1136 *Ibidem*.

procedural errors¹¹³⁷ and in Norway, the Supreme Court can require a party to obtain representation if they are unable to properly present the case unaided.¹¹³⁸ However, the primary importance of this line of decisions is that it indicates that even when access to court will be prohibited without representation, the Court is prepared to countenance the refusal of legal aid to an indigent party and thus deny such access. Even more so in cases where access to court can theoretically be achieved by an individual acting unrepresented, then, selection according to prospects of success is likely to be acceptable as a general principle.

As was seen above, in the *Laskowska* case the European Court of Human Rights held that the selection process within a legal aid system must not be 'arbitrary or disproportionate'¹¹³⁹ and thus the familiar European Court of Human Rights test of proportionality is relevant. Precisely how this can apply to a legal aid system is not clear, however. It is suggested that proportionality between cost and benefit might fall within this general approval. Nonetheless, as will be argued below, this criterion may fall foul of the need for a fair trial, which is in the Convention not limited to cases of larger value.

The questions of need for representation and the significance of the matter for the client were core in the *Airey* case discussed above. In that case the need for representation was denied by the government and the Court decided against them on this point, thus demonstrating that a state's view of whether representation is necessary is not conclusive. A legal aid scheme which allows for a grant where representation is 'needed' will only be acceptable on the international level if it is found to be effective in identifying cases where there is such a need. The requirement that a case must be properly prepared before legal aid is granted may also fall under this conceptual heading; an individual does not yet need help with litigation if they are not yet ready to litigate. However, this comes with an important caveat that there may be a duty to provide state-funded advice to enable a person to prepare the case for an application for assistance with representation, as acknowledged in the Guidance on the sufficient benefit test for advice and assistance in England & Wales described above.

Compliance with international obligations is clearly a merits test specifically designed to ensure that Article 6, amongst other provisions, is complied with, and if properly applied will by definition not breach the Article.

1137 Lag om ändring av 15 och 31 kap. i rättegångsbalken, 2011, 1 §.

1138 LOV-1915-08-13-6, § 3-2.

1139 *Laskowska v. Poland*, 2007, para. 52.

6.3.3 Problems with the prospects of success criteria

6.3.3.1 Percentage likelihoods of success¹¹⁴⁰

As seen above, some jurisdictions (in this study Northern Ireland and England & Wales) explicitly use percentages when judging prospects of success for the purpose of civil legal aid eligibility. This introduces scientific language into the exercise, lending an aura of reliability and objectivity but it is far from clear that the terminology is properly understood or that the logical conclusion of adopting percentages has been fully considered.

It is useful to consider the meaning of the mathematical language which has been adopted. 'Percent' literally means 'in every hundred'; thus, if a case has a 60% chance of success this means that if it were possible to find 100 identical cases and follow their progress, 60 of them would win. Statistics works best on large numbers and we would not expect the figures to work out exactly with only 100 cases and much less so with a sample of ten, but if we could amass 10,000 cases then we would expect to find 6,000 of them winning. It seems unlikely that this mathematical meaning is what is in the minds of the practitioners making the legal aid applications; many may not even understand the statistical implication. Lawyers in general are likely to be much more comfortable with phrasing such as 'reasonably likely to succeed' (Republic of Ireland) or 'likely to succeed at court' (Iceland) than with the true meaning of the language of percentages in this context. However, if the ranges of percentage prospects of success are small, only a genuinely mathematical meaning can make sense. It is very difficult to explain the difference between 50% and 60% likely to succeed unless the statistical definition is used; both are roughly equal chances of success or failure, both might be thought reasonably likely to succeed. Given the discussion below about accuracy of predictions, it seems highly unlikely that there is in fact a 10% difference in how many cases actually succeed, depending on whether they are predicted to have a 50% or 60% chance of success, but this is what is being asserted through the application of such a test.

The logical conclusion of the use of statistical language raises a further concern. Taking an assumption that a given system of legal aid requires there to be a 50% chance of success before an individual will be funded, it is clear that a person with a 40% chance of success would not be assisted. However, statistically speaking, 40% of such persons would be successful in their cases if they proceeded. These people are faced with the choice of not proceeding with their litigation, in which case many claims which would succeed are not brought, or going ahead unrepresented under potentially unfair conditions. Even if it is felt that limiting access to court to those with strong cases is acceptable, restricting fair hearing to those with strong cases seems counter-intuitive; those with very strong cases are less in need of legal assistance than those with borderline cases, as expert legal argumentation is less likely to make the difference between success and failure.

1140 Barlow 2017c.

A final concern arising from percentage prospects of success is that, statistically, the chances of the two possible outcomes must add up to 100%; i.e. if one party has a 60% chance of success, mathematically the chance of the other party winning must be 40% (unless the circumstances are such that it is possible for both to succeed, see below). Several of the jurisdictions prefer to fund only cases with at least a 50% chance of success, but unless the chances are exactly 50% for each party, only one of the parties will meet this requirement. If both parties are indigent, this raises the likelihood that in most cases only one party will be legally aided and thus represented. The risk of an unfair hearing is thus increased through the use of percentage prospects of success tests, in many cases.

If the use of percentages is a genuine exercise in funding cases with a statistically reliable outcome, these issues need to be addressed; if not, the cloaking of subjective judgment in scientific language is inappropriate.

6.3.3.2 Accuracy of prediction¹¹⁴¹

The use of prospects of success tests presupposes that it is possible to predict outcomes of legal cases. In the case of the Northern Irish and English & Welsh tests, there is an assumption that very detailed and precise prediction, expressed as a percentage likelihood, is possible, and in Scotland a similar assessment is required, although expressed as a scale of 1-10 rather than a percentage. The issue of predictability of the outcome of litigation has received considerable attention in the field of conditional fee arrangements.¹¹⁴² In that context, Higham concluded that “lawyers can predict the prospects of success in litigation in a way which is useful and valid. What they cannot do is a sum in objective probability”.¹¹⁴³ One study of lawyers’ predictive ability in the context of legal aid decisions in England suggested that in fact lawyers are bad at forecasting likelihood of success.¹¹⁴⁴ Predictions were approximately double the actual success rates across the range: of cases predicted as having above an 80% chance of success only 47% succeeded; of those predicted as having a 60-80% chance of success only 34% were successful and of those predicted as 50-60% likely to succeed, 30% were in the event successful. The accuracy of prediction varied substantially depending on the type of case, with lawyers’ forecasts being much more successful in inheritance and probate cases than in business disputes, for example.¹¹⁴⁵

Some intriguing research is beginning to explore whether Artificial Intelligence can be used to accurately predict the outcome of cases. A recent study found that computer models were able to predict the outcome of cases at the European Court of Human Rights with an accuracy significantly

1141 *Ibidem*.

1142 Higham 2003, p. 20.

1143 *Ibidem*, p. 30.

1144 Goriely, Das Gupta *et. al.* 2001.

1145 This study took place before the scope limitations of LASPO.

higher than that found in the predictions of lawyers in the legal aid study.¹¹⁴⁶ Analysis of the text of European Court of Human Rights decisions enabled a 79% accurate prediction of whether a violation of the convention would be found, with the factual background in the 'Circumstances' section of the judgment proving the most important part of the text in predicting outcome. The researchers openly accept the limits of the findings, and there is at present no suggestion that Artificial Intelligence can predict the outcome of a first-instance case at the early stage that an application for legal aid would usually be made. Experience suggests that the determinative element in many cases is the finding of facts by the judge, which can be difficult to predict particularly if it is dependent on how believable the parties are as witnesses. The Artificial Intelligence research did not address this issue as factual disputes very rarely occur at the European Court of Human Rights and, in any event, the computer predictions were made on the basis of the descriptions of the facts as set out by the judges in their decisions. However, given the distinct possibility that lawyers are very bad at predicting outcomes, the future possibilities of Artificial Intelligence may be relevant if prospects of success continues to be a central element of merits testing.

Given the centrality of lawyer predictions to the grant of legal aid in UK jurisdictions, the fact that the reliability of such judgments is unknown is alarming. It is not acceptable that decisions which have significant impact on individuals' lives and on the realisation of fair trial rights are made on such an apparently unreliable basis and more research is urgently needed to consider whether the predictions of prospects of success correlate to actual outcomes over a larger sample. If they do not, selection on this basis is at worst arbitrary and at best a subjective assessment of how optimistic the particular lawyer feels at that moment.

A less fundamental, but nonetheless important, issue is the need for clarification of whether the prediction is of the chance of success with representation, or the chance of success without. Representation may make a material difference to prospects of success and in the schemes which have been described above it is unclear whether the advantages of representation are to be assumed when making the forecast. As the first indication of chance of succeeding is almost always given by a lawyer representing the applicant, it can perhaps be assumed that they will estimate the chances if they are permitted to continue assisting the client. However, this important issue is not addressed in the legal aid systems studied.

6.3.3.3 Defining success

A prospects of success test must be based on an assumption that it is always possible to identify a concrete outcome in a legal case which can be defined as 'success' and that all other possible outcomes are 'failure'. This would be easier

1146 Aletras *et. al.* 2016.

if there were only two possible, opposite outcomes. Whilst in criminal cases this can be argued, in civil cases it is often not the case and defining ‘success’ is very nuanced. In a housing repossession case, the landlord may seek immediate possession and the tenant may argue that there are not grounds for forcing him to leave at all. If possession is awarded but with a delay of three months, enabling the tenant to find alternative accommodation for his family, it could be argued that each side was successful, although neither was granted all they wanted. Likewise, in a contractual dispute if the claimant seeks 20,000 € and receives 10,000 €, who was successful is debatable.

Northern Ireland has given considerable attention to this issue. The Guidance dedicates a whole chapter to the question of what is meant by ‘a successful outcome’¹¹⁴⁷ and advises that in money cases a successful outcome for the claimant is the award of any sum which is more than nominal and for the defendant the case will have been successfully concluded if the case is dismissed or an amount is awarded which is substantially smaller than that claimed. This definition appears appropriate and is likely to mirror the sense of a litigant as to whether they were successful. It does however raise the interesting proposition that both sides may be successful, where a money claim is reduced substantially but not to a purely nominal level.

Some attention has also been paid to the question in the Lord Chancellor’s Guidance in England & Wales:

the question of what an applicant may reasonably consider a successful outcome to proceedings may not directly equate to whether the court finds in the applicant’s favour [...] a reasonable claimant would not view succeeding on liability but failing to beat an [earlier offer] as a successful outcome. Conversely, a defendant might reasonably view a substantial reduction in damages claimed against him or her as constituting success in the proceedings.¹¹⁴⁸

Whilst these attempts to define ‘success’ are useful and realistic, they result in an awareness that success can be somewhat amorphous, adding to the difficulty of precise prediction of the ‘prospects of success’.

6.3.4 Mirroring commercial behaviour

The difficulty of defining success also has a consequence for the attempt made in some systems to mirror in legal aid the behaviour of those who pay for their own representation. The English & Welsh ‘reasonable private paying individual test’ is one explicit application of the approach. As seen above, the applicable test¹¹⁴⁹ requires likely cost, likely gain and the chance of succeeding to be balanced in order to conclude whether a reasonable private paying individual would litigate. Similarly, in the Republic of Ireland a case can only be funded

1147 *Department of Justice Northern Ireland 2016*, Chapter 4.

1148 Lord Chancellor’s Guidance, 2018, para. 4.1.2.

1149 The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulation 7.

if a reasonably prudent person would be likely to take the action at his or her own expense.¹¹⁵⁰

However, it is submitted that an outright bar on funding cases with lower than a certain chance makes it impossible to mirror normal risk-taking behaviour. Firstly, as the reasonable private paying individual rule above accepts, there are three major elements in such a decision: cost, gain sought and risk of losing. This means that a number of different behaviours would be reasonable according to the circumstances. In a case where the costs are likely to be very high, and the benefit sought is modest, the chances of success would need to be very high to justify the risk. However, if the hoped-for gain is significant and the costs modest, it would be reasonable to take the risk even if the chances of success were relatively low. The Irish test limits one of the variables by clarifying the level of cost to be assumed: the cost of the case should be deemed to represent a financial obstacle to the individual but not to impose undue hardship. This leaves the risk of losing and the gain sought as the factors to be balanced, presuming the cost will be difficult but not impossible to meet. Even with this limitation on the exercise, it is submitted that some potential gains will be so considerable that a reasonable person would proceed with a lower than 50% chance of success. Furthermore, a reasonable person may take a risk which appears objectively unreasonable in extreme circumstances. Commercial risk assessment is relevant in commercial cases but not necessarily in the types of case for which legal aid is often sought. A person might well invest a significant sum of money in trying to keep their home, even if the chance of success was less than half. The alternative may be worse than the risk.

6.4 Conclusions

The merits tests in the Nordic countries, the UK and the Republic of Ireland 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. The following chart illustrates which criteria apply in which jurisdiction, as well as whether the test is statutory, contained in binding guidance or recommended. The statutory criteria are further divided into those which are free-standing tests and those elements which are factors to be considered when assessing another criterion.

1150 Civil Legal Aid Act 1995, s. 24.

	Probable cause	Reasonableness			Prospects of success	Proportionality between cost and benefit	Need for representation	Significance for the client	Compliance with international obligations	Properly prepared case
		Reasonable grounds to pursue case	Reasonable for state to fund case	Reasonable privately-paying individual						
Iceland	TPL		TSL		TSL	TSL		TPL		TSL
Norway			TPL					TPL		
Sweden			TPL		RI	(LF)*	TPL	LF		
Finland				RI		TPL	RI	TPL		
Denmark		TPL			TPL/ LF**	(LF)*		LF		
Scotland	TPL		TPL		RI	RI		RI		(RI)***
Northern Ireland		TSL	TSL		BG	BG	TSL**	TSL**	TPL	
England & Wales				TSL	TSL	TSL	TSL		TSL	TSL ***
Republic of Ireland	TPL	TPL	TPL	TPL D	TPL	TPL			TPL	

Fig. 2. Chart showing the use of merits test for civil legal aid

TPL = test in primary legislation

TSL = test in secondary legislation

D = dominant test

LF = legislative factor to be considered when applying one of the tests

BG = binding guidance on interpretation of statutory provisions

RI = recommended interpretation/notification of how the state agency will apply the test

* costs must be considered but there is no explicit comparison between costs and benefit

** depending on type of case

*** only the exhaustion of alternatives to court is considered, not the preparation of this legal case

It can be seen from the table that reasonableness in some form is present within the merits tests in all the jurisdictions. It has also been seen in this Chapter that 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.

According to a strict reading of international human rights obligations, and indeed also a stringent adherence to the rule of law, all hearings of civil (as well as criminal) cases must be fair. For this to be achieved, the parties must benefit from approximate equality of arms, and each party must be able to properly present his or her case. Depending on the complexity of law and procedure in a jurisdiction, it may be that a very large proportion of litigants cannot adequately prepare and present their cases without professional help. Even if this is in theory possible, whenever one party is either represented or significantly better informed or more experienced than the other, representation may be necessary for there to be equality of arms. These arguments apply irrespective of the costs of representation, the value of the case or indeed any other variables; all hearings should be fair, without exception.

Such a strict application of the right to fair hearing would be unacceptably expensive for any modern state. Therefore the principle is not fully applied and restrictions are made; in practice not every hearing is to be made fair at the expense of the state. The examination of the merits tests above suggests that the typical initial response to the dilemma is to consider which cases it would be reasonable to fund, and which it would not. 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. Both these latter approaches attempt to steer the answer to the question of reasonableness by categorising the case types (as seen in Chapter 5) and/or the qualities and circumstances which will be used to determine which cases are, as a matter of policy, reasonable to fund. The various merits tests, however, are not equal in the extent to which they endanger the right to a fair hearing and it is suggested that some, though common, would be best avoided if proper respect is to be given to the rule of law.

The merits tests are more or less effective in upholding Article 6 rights depending which of the theoretical approaches of the European Court of Human Rights described above are followed. Consequently, the choice of merits tests can be used as an indication of which aspects or aspects of fair trial each state is most concerned to protect: access to court, fair hearing or equality of arms.

Exhibiting a very low level of merits assessment, the Finnish system displays a desire to ensure that, if a person is determined to go ahead with a case despite the *inter-partes* costs risk, the hearing will be fair as legal aid will ensure a level of equality of arms if the individual is unable to afford private legal representation. Legal aid will also allow access to court, again with the proviso that the costs risk may be a deterrent.

England & Wales provides a contrasting illustration. Of the jurisdictions we are considering it is clear that the English & Welsh gives the most attention to the prospects of success test. The test is very detailed and applied in a case-specific way with the aim of ensuring that money is spent where it is most needed. However, the result is that all the focus is on the implied access to court element of Article 6; access to court is facilitated but with restrictions which the government believes to be a proportionate response to the legitimate aim of protecting public funds. Fair trial itself is not protected by this approach, as an individual who, despite a refusal of legal aid, goes ahead with a court hearing, is likely to be in a position of inequality of arms and may well not be able to effectively present his or her own case. The dichotomy leads to the result that a person who is refused legal aid is in a better position if she continues to court unrepresented than if she feels unable to continue with proceedings. In the first situation the right to a fair hearing is absolute and no reasonableness factor applies; if the hearing as a whole is unfair, due to the lack of representation and consequent inability of the individual to effectively present her case, there will have been a breach of Article 6. In the second scenario the individual might argue that her access to court has been denied by the failure to grant legal aid. However, this claim may fail if the state can show that it was reasonable in the circumstances to refuse legal aid.¹¹⁵¹

A strict 'prospects of success' test thus can be seen to suggest a concentration on access to court at the expense of fair trial and equality of arms. It has been seen that the jurisdictions under consideration, all high spending on legal aid in European terms, have differing approaches to the use of prospects of success as an element of the civil legal aid eligibility test. The variation is such that they can be positioned along a scale reaching from no use of the criterion (Finland) to considerable reliance on it (England & Wales). It is notable that the Nordic jurisdictions are grouped at the former end of the scale and those of the United Kingdom at the latter end, with the Republic of Ireland between these two groups. The variation of approach within the Nordic jurisdictions is, however, very considerable. It appears that the Nordic countries are putting into practice a deeper commitment to fair trial and equality of arms, arguably in keeping with the welfare state model. The statements of purpose in the Finnish and Norwegian legal aid legislation strengthen this argument. The UK jurisdictions, to the contrary, appear to be attempting to replicate a commercial decision-making and risk-taking outcome with a much lower welfare element to their

1151 See also Shipman 2006, p. 10.

legal aid policy, despite policy statements of, for example, the Scottish government that legal aid has an important role in poverty reduction.¹¹⁵²

It is submitted that prospects of success should not be permitted to be the determinative factor in any application for legal aid. At their worst, such tests apply imprecise terminology ('reasonable likelihood') or badly understood mathematics (percentage chances) to an inexact science (prediction of chance of success) as applied to an undefined concept ('success'). Even if these problems could be solved, the inevitable result is that many cases which would win are not legally aided, interfering with both access to court and fair hearing rights by reducing them to an exercise in commercial risk assessment. It is unfortunate that the European Court of Human Rights has enabled this approach through its focus on access to court rather than fair trial, and by allowing reasonable and proportionate limitations to become a major element in a right which in the Convention text is not capable of such limitation.

Turning to other merits criteria, the test of *probabilis causa litigandi* does not, it is submitted, contradict access to court, fairness of hearing or equality of arms. Where there is no legal argument, in many jurisdictions a case can be dismissed by a judge before the matter proceeds to hearing and legal aid should not be required to be granted in such cases. By its very nature, probable cause should not interfere in any case where there are legal arguments or preparations required; the judge should be able to identify cases where there is as a matter of law no case or defence possible without the need for any complex debate. There is of course a need for the legal aid decision-maker to have the necessary skill to also identify such cases and to allow legal aid for cases where there is a possibility to argue that a valid case exists.

If a legal aid system is focused on equality of arms, but is unable to afford representation for all parties, the reasonable privately paying individual test may be an appropriate way to proceed. In a matter where neither party can afford representation, the test will approximate the situation if they did have financial means; if the case is sufficiently important to justify the cost of representation, this will be provided. If not, the parties can proceed unrepresented, still with equality of arms. If one party is privately represented, the other will be funded only if a privately paying individual would consider this necessary and worthwhile. Whilst this may sometimes lead to an inequality of arms, so long as the test is applied in a realistic manner, such cases should be limited to those where for some reason, although it is worth bringing or defending the proceedings, representation is not sufficiently valuable to be pursued. The success of the test rests on a realistic assessment of how individuals do behave when faced with litigation, and caution is needed to prevent the test becoming a smokescreen behind which governments can hide their views on how they would like people to behave.

1152 Scottish Legal Aid Board Annual Report and Accounts 2015-16, p. 2. See further discussion in section 9.6.2.2.

Proportionality between cost and benefit, both as an element of the privately paying individual test and also as a freestanding test, should be applied with caution if the intention is to realistically replicate individual decision-making. The combination of prospects of success, which have been seen to be unreliable, with precise ratios of cost to benefit, as seen in Northern Ireland and England & Wales, are far too rigid to reflect natural human behaviour.

The 'need for representation' criterion is evidently closely related to the right to fair hearing; this test provides that legal aid will pay for representation where the individual cannot properly present his case unrepresented. It does not necessarily ensure equality of arms, as a case may concern one party who is well able to present their case unassisted and another who requires help. In these circumstances only one needs, and therefore receives, legal aid, resulting in a hearing with one represented and one unrepresented party; inequality of arms. Nonetheless, as the decisions on legal aid will have been designed to ensure that the proceedings were fair, there should be equivalence between the parties, although not overt equality, and the capable unrepresented party should be able to adequately hold her own against the represented party. Access to court should be satisfied as long as the assessment of need occurs early enough in the proceedings to ensure that the potential litigant in need of assistance obtains this help to take the steps leading to the hearing, not just help at a hearing. Not all cases or litigants do require representation and thus some cost limitation will be achieved. For significant impact on expenditure, though, this criterion should be combined with concerted attempts to divert cases away from contentious court procedures, and to make the law itself and legal procedure as simple as possible so that as large a proportion as possible of the population is able to navigate the legal system without professional help.

Significance of the matter for the individual making the application is a selection criterion which equally affects access to court, fair hearing and equality of arms. In cases judged to be of lower importance, none of the rights are protected. The policy perspective which can be inferred from this test is an acceptance that these rights cannot be vouchsafed in all cases but that the selection will be based on helping those for whom the legal cases are particularly important. Norway epitomises this approach, and is a useful example here even though the selection is largely scope-based. In priority cases both sides, whatever the respective strengths of their arguments, will have representation paid for by the state if they are financially eligible, thus ensuring access to court, fairness of hearing and equality of arms. In exceptional cases which are, unusually, covered by virtue of their similarity to priority case types and their pressing nature, the approach can also, on balance, be considered to be one of equality of arms as it is explicit that even cases with poor chances of success must be allowed representation if the other factors point to the necessity for assistance. Outside the priority and exceptional case types, access to court, equality of arms and fairness of hearing are not guaranteed as legal aid

is not available and the financially weaker party may find itself unrepresented against a represented party, whatever the strength of the case or its importance to the individual. The 'significance of the matter for the individual' criterion would overall be more consistent with the Article 6 jurisprudence if applied subjectively rather than objectively, i.e. with attention to the effect on the particular individual applying for legal aid, not the expected impact on people in general.

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.

Case study 4:		
Dmitri, Danil and Denis are all Russian nationals who are openly gay. Having been subject to persecution, they have fled Russia to, respectively, Iceland, England and Norway. Their initial applications for asylum were refused and they now want to appeal.		
Iceland – Dmitri	England – Danil	Norway – Denis
<p>Dmitri can consult a lawyer and apply for legal aid. This should, according to the legislation, be granted if the Committee decides that the case is of such a nature that it is considered appropriate for public funding, or the outcome of the case would matter greatly to the social status or other personal status of the applicant. Consideration will be given to whether the case is properly prepared and likely to succeed at court. Media reports suggest that Dmitri is unlikely to be successful in his application as legal aid for asylum appeals is routinely refused.¹¹⁵³</p>	<p>To obtain legal aid, Danil must not have acted in previous proceedings or under previous legal aid in such a way that it would be unreasonable to grant him legal aid. Then, he must show that:¹¹⁵⁴</p> <p>he has no other funding possibilities; there is a need for representation in all the circumstances including the nature and complexity of the proceedings; if the case is not of significant wider public interest, the reasonable private paying individual test is met; if the case is of significant wider public interest, the proportionality test is met; the prospects of success are very good, good or moderate, or borderline or unclear if there is significant wider public interest, overwhelming importance to the individual or the substance of the case relates to a breach of Convention rights (which in this case is very possible).</p>	<p>Asylum appeals are non-means tested priority cases and therefore Denis will automatically be entitled to legal assistance paid for by the state.</p>

1153 Iceland Review, ‘Lack of Lawyers for Asylum Seekers’, November 24, 2016.

1154 The criteria are to be found in The Civil Legal Aid (Merits Criteria) Regulations 2013, Regulations 11, 39 and 60. Additional criteria apply but only those which may have a bearing on the facts of this case have been listed.

7. Chapter 7: Reach and content of legal aid

7.1 Introduction

The previous four chapters have set out in some detail the procedural and material content of administrative decisions on applications for legal aid and public defence assistance in the Nordic countries, the jurisdictions of the UK and the Republic of Ireland. From the perspective of this thesis, these decisions form the core subject which will be compared and analysed in Chapter 9. Before undertaking this final analysis, it will be useful to give some perspective as to the meaning of the decisions in practice. Chapter 8, following, will consider the macro context of legal aid; its cost and position within the justice systems of the jurisdictions concerned. This chapter, though, will take a micro approach and examine the possibility and consequences of a grant of legal aid or a public attorney in any particular case. For an individual, it is not the total spend within their jurisdiction or the level of demand overall which is important, but rather their own ability to obtain assistance when needed. Whether a person is able to obtain legal aid and what help this affords them are what matters at the point of crisis.

For access to justice to be increased through legal aid on an individual level, the person concerned must both be entitled to help and have access to it. Eligibility factors relating to the nature of the case have been considered in previous chapters; here the focus is on factors relating to the client, namely financial eligibility and residence or nationality requirements. Access also requires that legal professionals are able, willing and physically present to carry out the necessary advice and/or representation work and supplier availability will also be considered in this chapter.

In addition to the reach (who has access to legal aid), the content of legal aid (what it provides for those to whom it is granted) will be considered. Both these elements are relevant to an administrative law comparison, as a system which covers a small proportion of the population will be subject to fewer pressures than one which covers most of the population. Similarly, if a grant of legal aid confers only modest benefits, each decision will be of less consequence than in a system which is generous with lawyer assistance. The advantages conferred by legal aid which will be considered here are the provision of an amount of

lawyer time and, potentially, protection against the risk of paying the legal costs of the opponent. The amount paid to the lawyer is also relevant as it may affect the amount of time spent on the case as well as the lawyer's willingness to undertake the work at all.

The elements under consideration in this chapter are very complex and a detailed examination of the situation is not possible here. This, and the following, chapter aim to give a brief overview to enable the analysis in Chapter 9 to be more meaningful. It is not intended to provide a comprehensive guide to eligibility criteria and the provision available under legal aid in the nine jurisdictions.

7.2 The reach of legal aid

7.2.1 Financial eligibility

7.2.1.1 Criminal matters

Financial eligibility tests vary significantly between jurisdictions, and there is often also a difference between the eligibility rules for criminal and civil cases within a jurisdiction. In general, where there is such a difference, the test is more generous for criminal cases. Under international provisions relating to legal aid, the financial eligibility limits are a matter for the state, but it is for the treaty bodies to assess in an individual case whether the applicant had 'sufficient means to pay' if this is disputed.¹¹⁵⁵

In criminal matters, as discussed in Chapter 3 above, the Nordic countries are uniform in operating systems whereby public defence counsel are provided free of charge to all, regardless of means, and no payment will be required for this service unless the assisted individual is convicted. Upon conviction, however, repayment of some kind is imposed.

The jurisdictions in the UK and the Republic of Ireland do not have public defender schemes and take a variety of approaches to financial eligibility for criminal legal aid. In the Republic of Ireland there is no specified financial eligibility test for criminal legal aid; the court must decide whether "the means of the person charged before it with an offence are insufficient to enable him to obtain [private] legal aid".¹¹⁵⁶ In assessing financial eligibility, a judge may require an applicant to provide a written statement of means¹¹⁵⁷ and, if the judge is not convinced by the truth of the statement, he or she may call the defendant to the witness stand to verify it. The provision of false statements of means is a criminal offence liable to a fine and/or up to six months' imprisonment.¹¹⁵⁸ In practice, the assessment is carried out with consideration of the likely cost of the defence, as well as the means of the defendant:

1155 *Croissant v. Germany*, 1992. See also Ashworth 1996, p. 62 and McBride 1998, p. 259.

1156 Criminal Justice (Legal Aid) Act 1962, s.2(1)(a).

1157 *Ibidem*, s.9.

1158 *Ibidem*, s.11.

The capacity of an accused to pay for their own representation is contingent on such factors as the anticipated length of the trial, the complexity of the trial, the seriousness of the charges preferred and the actual means of the accused, all of which are intermeshed, thus making the introduction of [financial] guidelines impractical as the matter is indeterminable.¹¹⁵⁹

Following this reasoning, the 2002 review of criminal legal aid concluded that the system should not be significantly changed,¹¹⁶⁰ although there are some anecdotal concerns about consistency of decision-making in this area. If a legal aid certificate is granted, there is no contribution scheme and the assistance will therefore be entirely free to all defendants who are found to have insufficient means to pay privately for representation.

A very similar means test is applied to criminal legal aid in Northern Ireland. Eligibility is not dependent on any fixed income levels; rather, the court can grant legal aid if the defendant's means are 'insufficient' to enable him to obtain legal assistance privately.¹¹⁶¹ When a defendant is in receipt of social security benefits, it is usual to conclude that he cannot afford to pay a representative privately. Where this is not the case, the rule allows flexibility to the judge to take account of the likely cost of representation (which will alter with the seriousness of the charge) as well as the means of the applicant, in deciding whether he has sufficient means to pay for a defence lawyer. There is, however, provision in the Justice Act (Northern Ireland) 2011 allowing regulations to introduce a fixed means test. The first of two recent Access to Justice reports recommends that this be done¹¹⁶² and also suggests that responsibility for the financial assessment should pass to the Legal Services Agency at that point, as "wherever possible decisions with expenditure implications should be taken by the spending body".¹¹⁶³ Advice at the police station is not means tested.

For criminal legal aid in Scotland, other than 'automatic' criminal legal aid (see Chapter 3), the statutory financial eligibility test is that "the expenses of the case cannot be met without undue hardship to [the defendant] or his dependants".¹¹⁶⁴ The assessment includes the income and capital of the applicant and any spouse or partner living with them.¹¹⁶⁵ In interpreting the statutory provision, the Scottish Legal Aid Board has established a detailed test for both income and capital. The income test is based upon the civil financial eligibility test¹¹⁶⁶ whilst the capital upper limit is set to match the capital threshold for Advice and Assistance.¹¹⁶⁷ Despite the similarity with the civil financial

1159 Criminal Legal Aid Review Committee 2002, p. 10.

1160 *Ibidem*.

1161 Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, paras. 28(1), 29(3), 30(3)(a).

1162 Access to Justice Review Northern Ireland, 2011, para. 4.18.

1163 *Ibidem*, p. 6.

1164 Legal Aid (Scotland) Act 1986 s. 23A and 24(1)(a).

1165 Scottish Legal Aid Board *Criminal Legal Assistance Handbook* Part III para. 12.1.

1166 *Ibidem*, para. 12.2.

1167 *Ibidem*, para. 12.5.

eligibility test, there are no provisions for the payment of contributions¹¹⁶⁸ and even if the income or capital are over the upper level, legal aid may be granted if the Board decides that paying her own legal costs would cause the defendant undue hardship.¹¹⁶⁹ It is worth noting that for both criminal and civil legal aid, a recent independent review found that the financial eligibility and contributions system is inconsistent and complicated, and should be simplified.¹¹⁷⁰

Thus, in Scotland, the statutory position is very similar to that in Northern Ireland and the Republic of Ireland but the administrative legal aid authorities have implemented a policy which results in a specific test similar to that in England & Wales. The outcome is that the criminal legal aid schemes administered by courts have loosely defined financial eligibility tests whilst those administered by government agencies use specific, exact tests.

Detailed financial eligibility criteria apply to almost all types of legal aid in England & Wales, including within the criminal sphere. The main exceptions are police station advice, special Children Act proceedings and cases before the Mental Health Tribunal, all of which are completely free from means testing and do not require any contributions or *post facto* payments from the assisted individual. In criminal matters, advice and assistance is subject to a means test which involves assessment of both income and capital. The client will automatically be deemed financially eligible if in receipt of certain social security benefits.¹¹⁷¹ In other cases all capital assets and resources (including the value of a home above a certain limit, and the capital of any partner) and the total weekly income (less certain allowed deductions relating to certain types of income and for dependents)¹¹⁷² must not exceed set limits.¹¹⁷³

The financial eligibility test for representation in criminal proceedings is complex but assisted by an online calculator.¹¹⁷⁴ For representation before the Magistrates' Court, the test applies to income only and no contributions system is in place; in the Crown Court capital is also relevant and a contribution may be payable. As with advice and assistance, recipients of some social security benefits are automatically financially eligible,¹¹⁷⁵ as are children.¹¹⁷⁶

7.2.1.2 Civil matters

In civil cases, all the jurisdictions under consideration apply financial eligibility tests, although some cases may be exempted from means testing. The generosity or otherwise of such tests is difficult to compare; amongst other problems, changing currency exchange rates and different standards of living make it difficult to

1168 Other than in Advice and Assistance.

1169 Scottish Legal Aid Board *Criminal Legal Assistance Handbook* Part III para. 12.2 and 14.

1170 Evans 2018, p. 50.

1171 The Criminal Legal Aid (Financial Resources) Regulations 2013, Regulations 14 and 2.

1172 *Ibidem*, Regulations 11 and 12.

1173 *Ibidem*, Regulation 8.

1174 <https://www.gov.uk/guidance/criminal-legal-aid-means-testing>.

1175 The Criminal Legal Aid (Financial Resources) Regulations 2013, Regulation 23.

1176 *Ibidem*, Regulation 22.

meaningfully analyse the differences. The main variable elements of a system of financial eligibility for civil legal aid in the jurisdictions under consideration are as follows:

- a) whether some cases are exempted from means testing;
- b) whether decision-makers can override the usual financial eligibility rules in some types of cases (i.e. whether there is any element of discretion in applying the tests);
- c) whether there is an upper income limit above which an individual will be ineligible for legal aid;
- d) likewise, but in respect of capital;
- e) whether financial allowances are made for dependents;
- f) whether clients can be asked to make contributions to the costs of their legal aid from their income;
- g) likewise, but relating to capital;
- h) whether the level of contributions varies with the cost of the case;
- i) whether the level of contributions varies depending on the means of the assisted person;
- j) whether persons of particularly low means are exempt from paying contributions (i.e. does anyone receive completely free legal aid?);
- k) whether contributions which would normally be imposed can be waived or reduced in given circumstances;
- l) whether the costs of legal aid are recovered from assets recovered through the assisted proceedings;
- m) whether there is an ongoing duty on the assisted person and/or their lawyer during the life of the case to disclose to the relevant authorities any change in financial circumstances; and
- n) whether legal aid can be withdrawn if the assisted person become financially ineligible during the life of the case.

The pattern of usage of these mechanisms is shown in the table below, in which the questions have been posed so that the more generous systems will answer in the affirmative (shaded light grey) and the less generous position will require a negative answer (shaded dark grey):¹¹⁷⁷

¹¹⁷⁷ Whether varying contributions with means or with costs of case is more or less generous will depend on the level of contributions required. For the purposes of this table it has been assumed that contributions which are calculated as a proportion of the cost of the case are less generous than a fixed level contribution, as variable contributions may become much higher than most fixed rates. Furthermore, it has been assumed that systems where contributions increase with the wealth of the assisted individual are more generous as they tend to require smaller contributions from those of lowest means than is the case in fixed contribution systems.

	Norway	Denmark	Sweden	Finland	Iceland	Ireland	Northern Ireland	Scotland	England & Wales
Any cases non-means tested?	Y	Y	N (but public attorneys)	N	N (but public attorney)	Y (coroner)	Y	N	Y
Decision-maker can override means test	Y	N	N	N (unless live in another EU state)	Y	N	Y some cases	Y (capital)	N
Absence of income limit	N	N	N	N	N	N	N	N	N
Absence of capital limit	N	Y	Y (include capital as income)	Y	Y	N	N	N	N
Allowances for dependents	N	Y	Y	Y	Y	Y	Y	Y	Y
Absence of income contributions	N	Only advice cases	N	N	N*	N	N	N	N
Absence of capital contributions	Y	Y	Y	N	N*	N	N	N	N
Contributions not dependent on cost of case	N	Y (where applic.)	N	N	N*	Y	Y but cannot exceed cost	Y	Y but cannot exceed cost
Contributions vary with means	N	N	Y	Y	Y*	Y	Y	Y	Y
Any completely free legal aid?	Y	Y	N	Y	Y	N	Y	Y	Y
Waiver or reduction of contribution possible?	N	Y by lawyer (advice only)	Under 18s only	Y	Y*	Y but can also increase	Y some cases	N	N
Can the individual keep all the proceeds of a legally aided case?	N	N but rarely enforced	Y but case contribution may be re-calculated on new means	Y	Y	N – can waive rule if hardship	N	N	N
No duty to disclose changes in circumstances?	N	Y	Y	N	Y	N	N with some exceptions	N	N
Legal aid continues regardless of change in means	Usually	Y but may be recalculated after a year	N	N but LAO can continue to represent with 100% contribution	N	N - can continue to represent if agree to repay	N	N	N

Fig. 3. Chart showing use of financial eligibility tests for civil legal aid

* The Icelandic means test, beyond the income limit, is very flexible and elements of all these factors can be applied by the Committee depending on how it uses its discretion.

It can readily be observed that the jurisdictions have very varied approaches. The main common elements are that all have a requirement that the applicant's income must be below a certain amount and that all have a system providing for the payment of contributions from income. In Denmark, however, income contributions only apply to advice cases; contributions are not required towards legal aid for litigation. Furthermore, the income contributions systems vary in that in some jurisdictions, namely Sweden and the Republic of Ireland, all clients must pay a contribution regardless of how low their income is, whereas all the other jurisdictions have a lower income level below which no contribution is payable. In all systems other than Norway and Denmark, contributions are linked to income so that those with higher incomes pay a greater contribution; in Norway and Denmark there is a fixed level of contribution for all those above the lower income limit but below the upper limit at which income becomes too high to qualify for legal aid at all. In Iceland, the provisions allow considerable latitude to the Legal Aid Committee. Legal aid can be restricted to a proportion of the legal costs or to a fixed amount if, *inter alia*, the applicant's financial circumstances are such that this would allow then to afford the remaining expense.¹¹⁷⁸ Most systems make deductions for dependents from the assessed income before applying the financial limit (the exception being Norway).

Some of the other variations have at least a partial correlation with the bloc in which the jurisdiction is found. Thus, capital limits are a feature of all four systems in the UK and Republic of Ireland but largely absent in the Nordic countries, with the exception of Norway. Correspondingly, contributions from capital are required in the UK and Republic of Ireland but generally not in the Nordic countries. Interestingly, however, this time Finland is the exception; whilst there is no upper level of capital which will disqualify a person from receiving legal aid, half the value of capital over 5000 € is required as a contribution to legal aid.¹¹⁷⁹ This clearly means that an individual with high capital in a low cost case may have to pay most or all of the cost in contributions, but they will benefit from the lower legal aid rates charged by lawyers. In Norway, there is an upper capital limit but no scheme for contributions from capital; anyone with capital of under 100 000 Norwegian kronor,¹¹⁸⁰ with a low enough income, will be entitled to legal aid and will not have to use any of his capital to pay towards the legal aid costs, but anyone with capital over this amount will not be entitled to legal aid at all. The Icelandic Legal Aid Committee may, in applying the flexible provision on proportionate legal aid described above, grant a legal aid certificate which in effect requires the assisted person to pay some of their legal costs from their capital.

1178 Reglugerð um skilyrði gjafsóknar og starfshætti gjafsóknarnefndar, 2008, Article 9.

1179 Some types of capital are excluded from the calculation.

1180 Approximately 10 000 €.

There is also a bloc correlation in whether the level of contributions varies with the cost of the case; in the UK and Republic of Ireland contributions are based solely on income and capital levels whereas in the Nordic countries generally they are calculated as a percentage of the costs of the cases (although the percentage itself varies with income in Sweden and Finland, as seen above). The exception is Denmark, where the contributions are not explicitly related to the cost of the case, but as contributions only apply to advice cases, which are paid by a fixed fee, in effect the amount paid by the client does not vary, being fixed at 25% of the level 2 advice fee or 50% of the level 3 advice fee.¹¹⁸¹ In practice these contributions, which are collected by the acting lawyer, are often not enforced.

Another common feature of the UK and Republic of Ireland is the application of the 'statutory charge', a system for recovering the costs of legal aid from the winnings in a case where the assisted person has been successful in litigation. This is not generally the case in the Nordic bloc; whilst it is possible in Denmark¹¹⁸² it is rarely enforced, and in Sweden can only occur through recalculation of the contribution. Norway is alone in the Nordic jurisdictions in having a standard procedure for recovering costs in a similar way to the statutory charge.

Some aspects of financial eligibility rules vary across the jurisdictions with no discernible pattern. Sweden, Finland and Scotland means-test all types of civil cases whereas the other jurisdictions exempt certain categories of case, usually certain types of serious case involving children. However, in Sweden an individual has the right to non means-tested assistance from a Public Attorney in such cases, and thus whilst all legal aid cases are means tested, the same effect is achieved as in systems where such cases are included under legal aid but not means-tested.

A decision-maker has authority to override the financial eligibility rules in all cases (on specified broad grounds) in Iceland, and in some types of cases in Norway, Northern Ireland and Scotland. Contributions can be reduced or waived in Finland, the Republic of Ireland and Northern Ireland, although in the latter two there is also discretion to increase the contribution in certain circumstances. The contributions possibility in Iceland is defined such that the Legal Aid Committee has discretion whether to grant only a proportionate legal aid certificate, rather than the discretion to override fixed contribution rules.

Whilst it is an extremely crude measure, it is also interesting to note that there is no clear division into more generous or less generous systems; different combinations of measures are used to restrict access to legal aid through financial tests but all the jurisdictions use several mechanisms. However, as will be seen below, the level at which the financial limits are placed lead to very different

1181 Retsplejeloven, 2017, § 325. The most recent rates are set in Bekendtgørelse om offentlig retshjælp ved advokater, 2017, § 6.

1182 Retsplejeloven, 2017, § 332(2).

results and thus while the tests are structurally equivalent, the outcomes vary considerably in their generosity.

7.2.2 Proportion of population financially eligible for legal aid

The mechanisms used for financial eligibility assessment were briefly addressed in the preceding section, but the actual impact on individual applicants for legal aid depends on the quantitative content of the rules compared to their own circumstances. Taking the income limit as an example, the level at which this is set varies considerably in the various jurisdictions. Some apply a gross income limit; some apply a net limit after deduction of various allowances and some have both:

Annual, '000€	Norway	Denmark	Sweden	Finland	Iceland	Rep. of Ireland	Northern Ireland	Scotland	England & Wales
Gross income limit	25.4	43.2	-	-	16.3	-	-	-	36.4
Net income limit	-	-	25.3	15.6	-	18	13.8	30	10

Fig. 4. Income eligibility limits for a single person, 2018.

The net figure is calculated after tax and other deductions at source such as national insurance and pension contributions. Certain allowed expenses are also deducted, commonly a selection from: rent, childcare expenses, child maintenance payments, identified social security benefits and fixed allowances for a partner or children.

Because of the differences in the allowances and the precise nature of the calculations, even comparison of net income limits does not provide conclusive information. Furthermore, the relative wealth of a country and differences in standards of living could make the same actual limit more or less generous in different jurisdictions. However, information on the proportion of the population which is financially eligible for civil legal aid gives an insight into the breadth of access to legal aid. The relevant data is not collated in all jurisdictions but some indication is available for Norway, Denmark, Sweden, Finland, Scotland and England & Wales.

In Norway, the civil eligibility limits were last amended in 2009, since when average incomes have increased significantly, as a result of which the proportion of people eligible for legal aid has decreased. The current levels have been criticised as unduly strict;¹¹⁸³ when the current limits came into force the

1183 See e.g. *Rettskjøpsordningen må styrkes*, 2015.

Ministry of Justice estimated the number of eligible households at 32% and almost immediately proposed a further increase which would raise eligibility to 56% of households,¹¹⁸⁴ but this was not acted upon. The eligible proportion is now inevitably much lower than 32% but recent estimates of the exact figure are not available.

Denmark adjusts the financial eligibility limits annually in line with inflation and cost of living increases. The intention is that the proportion eligible should remain constant, but there are no very recent studies verifying this. In 2007 just under half of the Danish population was within the financial eligibility criteria for legal aid.¹¹⁸⁵

The proportion of the population eligible for legal aid in Sweden was intentionally reduced by the 1996 Legal Aid Act¹¹⁸⁶ which introduced significant changes in a successful effort to bring legal aid costs under control.¹¹⁸⁷ An assessment of the effectiveness of the Act in 2003 concluded that “the reforms have produced reduced legal aid costs for the country, state aid only when needed, increased consciousness of costs and more predictability of legal aid law”.¹¹⁸⁸ The fixing of financial eligibility provisions is delegated to the National Courts Administration¹¹⁸⁹ and levels have not changed since 1999.¹¹⁹⁰ As a result, the proportion of the population eligible can be assumed to have dropped as incomes have increased, although up-to-date percentage eligibility estimates are not available. In 2013 it was estimated that approximately 43% of the Swedish population was eligible for legal aid.¹¹⁹¹

In Finland, reforms in 2002 increased the proportion of the population eligible for legal aid from 45% to 75%.¹¹⁹² Since then, financial eligibility limits have been increased several times, most recently in 2009. Government statistics show that wages have not increased significantly in real terms since 2000¹¹⁹³ and thus it is likely that approximately the same proportion of the population is still eligible for legal aid, some with a high percentage contribution.

Eligibility in Scotland was increased substantially in 2009, and it was estimated in 2014 that approximately 75 per cent of people in Scotland are currently eligible for civil legal aid either with or without a contribution.¹¹⁹⁴ This estimate appeared still to be accepted in 2016¹¹⁹⁵ but in 2018 the estimated

1184 St.meld. nr. 26 (2008-2009), para. 8.2.5.

1185 Ellersgaard Nielsen *et. al.* 2012, p. 15.

1186 Rättshjälpslagen, 1996.

1187 The costs of the legal aid scheme almost halved from 348 million Swedish kronor in 1997 to 188 million Swedish kronor in 2010. This was achieved despite an increase in hourly rates paid to lawyers.

1188 *Utvärdering av rättshjälpslagen (1996:1619) – redovisning av ett regeringsuppdrag*, Domstolsverkets rapport 2001:6 as summarised in Ds 2003:55.

1189 Rättshjälpsförordning, 1997, 6 §.

1190 DVFS 2012:15 4-11 §§.

1191 SOU 2014:86, p. 26.

1192 Rosti *et. al.* 2008, p. 92.

1193 Statistics Finland.

1194 Law Society of Scotland 2014, p. 37.

1195 O’Neill 2016, p. 294.

percentage was slightly lower, at 70%.¹¹⁹⁶

Official figures on percentage eligibility are not produced in England & Wales, but a request to the government statistics office led to the response:

In 2015, we estimate that around 25% of the population is financially eligible for free or contributory civil legal aid. This is based on outputs from DWP [Department of Work and Pensions], informed by the Family Resources Survey (FRS) and DWP's Policy Simulation Model (PSM). Our modelling involves a number of assumptions, which bring uncertainty to the estimate.¹¹⁹⁷

Thus it can be seen, for the jurisdictions for which figures are available, that percentage eligibility levels are very varied, from 75% in Scotland and Finland to 25% in England & Wales,¹¹⁹⁸ and probably a similar figure in Norway. The discussion of legal aid spend in Chapter 8 will show that, maybe surprisingly, there is not a correlation between higher percentage eligibility for legal aid and higher per capita spend on legal aid.

7.2.3 Residence and nationality requirements

In keeping with the importance of equality before the law, legal aid in the jurisdictions under consideration is not subject to any nationality test; all persons present in the jurisdiction and requiring help with domestic law are entitled to apply for legal aid.

In an exception to this general position, the UK government made a proposal in September 2013 to introduce a residence test in civil legal aid so that only those who had been lawfully resident in the UK for 12 months (with limited exceptions) would be eligible. However, this was challenged and the Supreme Court ruled that primary legislation would be required to introduce such a test.¹¹⁹⁹ Arguments were also made before the court that such a rule would be unlawfully discriminatory, but no ruling was made on this point. No subsequent attempt has been made by the government to introduce a residence test through legislation.

7.2.4 Supplier availability

7.2.4.1 Organisational factors

Being financially eligible for legal aid is no guarantee of obtaining publicly funded assistance; obtaining legal assistance funded by the state will be dependent on finding a lawyer willing and able to take the case under the terms which the state imposes. Relevant factors include which lawyers are permitted to carry out legal aid work under the scheme established by each government,

¹¹⁹⁶ Evans 2018, p. 18.

¹¹⁹⁷ Email from legal aid statistics.gov, 31 May 2017.

¹¹⁹⁸ The percentage eligibility in England & Wales has dropped dramatically over time, from a high of 81% in 1979. See Goriely 2002.

¹¹⁹⁹ *R (on the application of The Public Law Project) v. Lord Chancellor*, 2016.

as discussed in Chapter 2, and whether lawyers with such permission are accessible and prepared to take on the work.

Governments have at least partial control over some of the factors affecting access to legal aid lawyers but other aspects are entirely within the power of the legal profession. Within the boundaries set by governments for the delivery of legal aid work, lawyers themselves have some leeway to affect availability of and access to legal aid. Lawyers directly employed by the state to perform legal aid work are of course more restricted, but private practitioners are not obliged to take on work on the terms set by the legal aid scheme and can reduce or increase access by their response to the conditions offered.

7.2.4.2 Supplier behaviour

7.2.4.2.1 Reducing access

The willingness of lawyers to carry out legal aid work is necessary for legal aid delivery. In some jurisdictions the poor terms on which legal aid is offered lead to reluctance to take legal aid work unless no other income streams are available.

In Denmark, for example, less than one in five lawyers is willing to take legal aid cases¹²⁰⁰ due to an impression that since the legislative changes in 2007, the administrative burden has increased at the same time as pay has decreased.¹²⁰¹ The reluctance of lawyers to carry out legally aided work means that there are significant geographical differences in access, as larger towns are more likely than small towns and rural areas to be served by public legal aid institutions. The shift since the legislative changes is illustrated by a 76 percent drop in lawyers' legal aid and an increase of 56 percent in the cost of legal aid institutions.¹²⁰² The Danish Institute for Human Rights has called upon the government to carry out research on the extent to which citizens have "proper access" to the legal system.¹²⁰³

One of the main challenges for the legal aid scheme in Finland is also access;¹²⁰⁴ due to large geographical distances particularly in northern and eastern Finland, it can be very difficult for potential clients to get to a Legal Aid Office, which is necessary to obtain publicly funded legal advice (as has been noted above, private lawyers in Finland can generally only act in legal aid cases which are in court or likely to proceed to court). If the opposing party in a case has already consulted the nearest Legal Aid Office, the rules on conflicts of interests will mean an even longer journey unless the Legal Aid Office can refer to a private practitioner. It is hoped that video conferencing and other technological solutions will help to alleviate the access problems. Further legislation¹²⁰⁵ on

1200 Ellersgaard Nielsen *et. al.* 2012, p. 13.

1201 *Ibidem.*

1202 *Ibidem.* See also Danmarks Nationale Menneskerettighedsinstitution 2016, Chapter 5.1.

1203 Danmarks Nationale Menneskerettighedsinstitution 2016, p. 49.

1204 Rissanen and Rantala 2013.

1205 Lag om statens rättshjälps- och intressebevakningsdistrikt, 2016.

reorganisation of the Legal Aid Offices came into force on 1st October 2016 but this does not appear to have had an effect on access as the main change has been the consolidation of back office functions and the introduction of joint working with the guardianship offices.¹²⁰⁶

In England & Wales, relationships between the relevant government bodies and the profession have been very poor over the last decade at least, arising largely from tensions over the cost-cutting exercise which has seen real rates of pay decline whilst administration costs have increased. The reduction in numbers of providers, particularly in civil work where the total fell by 50% in the five years after LASPO,¹²⁰⁷ have also caused alarm in the profession. On the criminal side the plans (currently shelved) to introduce price competitive tendering have caused great mistrust and anger.

The relationship between the profession and the government on legal aid has always been challenging in Northern Ireland.¹²⁰⁸ Criminal legal aid was introduced in its earliest form in 1945¹²⁰⁹ but civil legal aid was first available in 1965,¹²¹⁰ about fifteen years after the equivalent legislation in England & Wales. Prior to this, the profession operated a 'Poor Man's Lawyer Scheme' and there was some resistance within the profession even to the introduction of a formal civil legal aid scheme. Clear evidence of ongoing difficulties can be seen from the recent reduction in Crown Court fees for criminal work,¹²¹¹ which was the subject of an 18-month dispute between the profession and the government, including a strike and an application for judicial review by the Law Society and Bar Council. A mediated settlement in February 2016 resulted in some amendments to the fees.¹²¹² During the strike, access to criminal legal aid in the Crown Court was of course detrimentally affected. The Norwegian Bar Association has also in the past resorted to strike action in a dispute over fees, withdrawing access to legal aid services for a week in the Spring of 2015.¹²¹³

The legal profession in Scotland criticises the civil legal aid system in particular for being "overly complex, inefficient, outdated and under-funded".¹²¹⁴ The criminal legal aid scheme for summary cases is said to be "overly complex and could benefit from being simplified"¹²¹⁵ whilst the solemn criminal case legal aid fee scheme should, it is argued, be re-structured to encourage early resolution.¹²¹⁶ However, in general the profession is continuing to provide services; the Scottish Legal Aid Board carried out a monitoring exercise in December 2015 which concluded that "for the majority of the areas of law considered, there is no evidence which indicates

1206 RP 26/2016 rd, 11.

1207 Ling and Pugh 2017, para. 2.25.

1208 Hewitt 2010, Chapter 5.

1209 The Criminal Justice Act (Northern Ireland) 1945.

1210 The Legal Aid and Advice Act (Northern Ireland) 1965.

1211 The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015.

1212 Northern Ireland Audit Office 2016, paras. 3.7 - 3.9.

1213 Rønning 2018, p. 24.

1214 Law Society of Scotland 2014, p. 5.

1215 *Ibidem*, p. 19.

1216 *Ibidem*, p. 22.

the existence of systemic access problems”.¹²¹⁷ The only subject areas in which there was evidence of systemic access problems were homelessness law and public and administrative law.¹²¹⁸

In the Republic of Ireland, there are 33 Law Centres around the country which can potentially supply all civil legal aid services, employing barristers where necessary for representation.¹²¹⁹ However, there has been a significant problem of demand outstripping supply resulting in considerable and unacceptable delay. At its worst, this undersupply led to clients waiting up to 24 months for a first appointment with a solicitor at a Law Centre in non-priority cases.¹²²⁰ This was found by the High Court to “[amount] to a breach of the constitutional entitlements of the plaintiff [...] It is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time”.¹²²¹ Whilst it was stated in 2015 that the aim was to “provide a first consultation within a maximum of 2-4 months”,¹²²² delay remained a problem and indeed in a Value for Money and Policy Review, timeliness of service provided was “the main issue to be considered”.¹²²³ The issue proved difficult to resolve with limited resources and in 2012 a ‘triage’ system was put in place. This operates such that if waiting times at a Law Centre exceed 4 months, a new client will be offered a first meeting with a solicitor within one month,¹²²⁴ at which other options will be signposted and ways to prepare for the next meeting will be suggested.¹²²⁵ By this technique the wait is moved back so it is between the first and second appointments, but arguably meaningful access to services is still subject to unacceptable delays which interfere with proper access.

7.2.4.2.2 Increasing access

Unwillingness of the profession to engage in legally aided work can reduce access and costs, but there may also be an opposite effect if legal aid work appears preferable to other available types of work. In addition, the level of protectionism shown by the legal profession will impact upon availability as barring other potential providers from taking on legal aid work gives the legal profession considerable control over access.

Blankenburg suggests that the differences in legal aid expenditure in Europe may relate to the behaviour of the legal profession in each jurisdiction, in particular “their traditional policy with respect to the services to be rendered

1217 Scottish Legal Aid Board 2015, p. 5.

1218 *Ibidem*.

1219 Legal Aid Board Circular on Legal Services, 2017, Part 5, pp. 5-18 and 5-19.

1220 Priority case types are given immediate or near-immediate attention. Law Society of Ireland 2012.

1221 *O’Donoghue -v- Legal Aid Board & ors, 2004*, as per Mr Justice Kelly.

1222 Value for Money and Policy Review of the Legal Aid Board 2011, p. 4. By November 2015 the aim was to provide advice within a month; Legal Aid Board Circular on Legal Services, 2017, Part 2, p. 2-3.

1223 Value for Money and Policy Review of the Legal Aid Board 2011, para. 4.6.

1224 Legal Aid Board Circular on Legal Services, 2017, Part 2, p. 2-3.

1225 Law Society of Ireland 2012, p. 13.

by advocates and [...] how far they manage to maintain a privileged monopoly keeping other professions out of offering similar services”.¹²²⁶

The possibility that the nature and behaviour of the legal profession has a significant impact on legal aid is also considered by Bevan, in the specific context of potential “supplier-induced demand” in the UK.¹²²⁷ His suggestion is that the changing market for legal services in a jurisdiction produces changing opportunities and challenges for lawyers which affect both the types of cases which they take on (including the funding types) and also how long is devoted to each case:

The principal (as a third-party payer) is concerned about the opportunity costs of professional services: the opportunities forgone by using resources on one case as compared with another, the trade-offs of providing legal services at all, or of increases in the volume of service supplied on a particular case. This means that at the heart of a concern over supplier-induced demand is that, what ought to be social rationing decisions, are being made through the application of professional criteria. The current system provides a casual basis of rationing: for example, escalation in costs in one [sub-national geographical] region results in subsequent national reductions in eligibility.¹²²⁸

In examining whether supplier-induced demand could be proved, Bevan applies a “target income hypothesis”: that a lawyer will seek and manage work so as to secure a target income, which is likely to be the same as, or an increase on, past income.¹²²⁹ Applying this hypothesis to changes in legal aid expenditure over time, he finds considerable evidence for the hypothesis. For example, changes in expenditure on different categories of legal aid are found by him to be “the products of decision by lawyers and not the payers”;¹²³⁰ when legal aid for advice was subjected to a strict cost per unit of advice, but with eligibility assessment by solicitors, the volume of cases increased. Unit cost could not be pushed upwards but providing advice to more clients offered solicitors additional income to replace losses from falling levels of private income. Bevan considered relative needs for legal advice in various geographical regions of the UK and concluded that levels of expenditure do not reflect relative need.¹²³¹ In conclusion (in 1996), Bevan found that “the current system of legal aid enables lawyers to secure a target income rather than encourage a fair and efficient use of limited resources”.¹²³² Further:

1226 Blankenburg 1992, p. 110.

1227 Bevan 1996.

1228 *Ibidem*, p. 105.

1229 *Ibidem*, p. 107.

1230 *Ibidem*, p. 110.

1231 *Ibidem*, p. 112.

1232 *Ibidem*, p. 114.

Spend on legal aid, within the current system, is not simply determined by the eligible populations and the fee rates decided by the Lord Chancellor. A crucial determinant of expenditure is lawyers' willingness to take on legal aid work, and this in turn depends on the numbers of lawyers and scope for private work. The current system encounters the endemic problem of entitlement based on rights, that at any level of financial eligibility, "need" and the degree to which this is met can exceed what the Government can afford. Legal aid thus requires a system of social rationing to be in place.¹²³³

This study is now outdated in England & Wales, as very significant changes to the structure of legal aid have been made since it was completed, but nonetheless the arguments are interesting and may have application in other jurisdictions.

One specific way in which the structure of the legal profession impacts upon not access but legal aid expenditure is that in jurisdictions with a bifurcated profession (solicitors and barristers), at least two lawyers are involved in many cases before courts. Whilst the bulk of advice and case preparation will be carried out by a solicitor, a barrister may also advise the solicitor and client together in the preparatory stage, and at hearings the advocacy in higher courts will generally be conducted by a barrister, with the solicitor attending the hearing to assist the barrister and client. In serious cases, a senior barrister may be instructed, who will be accompanied by both a solicitor and a junior barrister at hearings. This system is in place in the Republic of Ireland and all the jurisdictions of the UK. In Northern Ireland, for example, a certificate of criminal legal aid, in addition to covering the work of a solicitor, also covers representation by a barrister and, in Crown Court cases, permission can be sought from the court for a second barrister to be appointed. Historically, the proportion of Crown Court defendants represented by two barristers was over half, but had fallen to under 20% by 2015 following the introduction of new rules.¹²³⁴

7.3 The content of legal aid

7.3.1 Amount and cost of work

Having secured the services of a legal aid lawyer, a client may well find that the amount of assistance they are given as a result of their grant of legal aid is rationed. The quantity of lawyer help may be limited and the individual may or may not be protected from a potential *inter-partes* costs risk. The latter aspect, which may well affect the demand for legal aid from potential litigants, will be considered below, but in this section the amount of lawyer work provided to a legally-aided party will be examined. This issue is evidently relevant to the cost

¹²³³ *Ibidem*, p. 114.

¹²³⁴ Northern Ireland Audit Office 2016, para. 3.13 – 3.14.

of the legal aid scheme overall, as well as providing context to the decision in each individual case.

Legal aid rarely provides the same service that a client would obtain if they were paying privately and were of unlimited means. This is to be expected; the state has limited resources and legal aid is not always a high priority for spending. Limits to the amount of work carried out on a particular case can be applied very explicitly, by the application of a ceiling for hours worked, or more covertly through lawyer payment mechanisms in the form of fixed fees. The latter schemes assume that some cases will be more expensive for the lawyer than the relevant fixed fee but some will be less expensive; on average the fee is expected to be correct. In practice such fee schemes are likely to result in some rationing of work by the lawyer conducting the case to ensure that their business is financially viable. The hourly rates paid to lawyers under legal aid are often lower than private fee rates, which does not act as a direct cap on amount of work carried out for a particular client but does impact on willingness of lawyers to engage in legal aid work, and thus availability of legal aid assistance for potential clients.

In states operating a salaried lawyer scheme (Finland and the Republic of Ireland), legal aid lawyers are not subject to hourly limits per case. However, they may have significant pressure of work including large caseloads and long waiting lists, which act as controls on the amount of time which they can afford to spend on each case.

In Finland, when work is carried out by Legal Aid Offices, the issue of hourly rates of pay does not arise; the offices have a fixed budget and thus a fixed staff complement, and the work carried can be divided between both staff and cases as the Legal Aid Office sees fit. The work of the offices is monitored against lawyer targets of 230-250 cases per year, including advice matters. Whilst the Ministry of Justice does not interfere in the conduct of individual cases, it hosts working groups and discussions with and between Legal Aid Office leaders to try to ensure that access is available for as many clients as possible.

The work of a private lawyer will be covered to a maximum of 80 hours in most Finnish cases (civil and criminal); however, the court dealing with the case may extend legal aid for up to 30 hours at a time if there are special reasons, taking into account the person's need for access to justice and the nature and extent of the matter.¹²³⁵ Within these time limits, legal aid will pay for work that is "necessary in view of the nature and extent of the matter, the value of the object of the dispute and the circumstances as a whole".¹²³⁶ The case fee ultimately paid to a private lawyer should be "a reasonable fee for the necessary measures"¹²³⁷ and is calculated under a scheme set out in

1235 Rättshjälpslag, 2002, 5 §, para. 2.

1236 *Ibidem*, 5 §, para. 1.

1237 *Ibidem*, 17 §, para. 1.

regulations.¹²³⁸ Factors such as the age of the client and his language capabilities can be taken into account when deciding which steps were necessary.¹²³⁹ Whilst a Legal Aid Office granting legal aid can limit this to certain steps in proceedings or preparations for proceedings,¹²⁴⁰ it cannot limit the number of hours covered by the certificate; that is for the discretion of the court when assessing the costs to be paid at the conclusion of the case.¹²⁴¹

The starting-point for calculation of fees is the time spent¹²⁴² but only time reasonably spent with regard to the nature of the case and the work carried out will be reimbursed.¹²⁴³ In simple criminal cases only 5 hours preparation will be allowed unless there are special circumstances.¹²⁴⁴ The current hourly rate, which has been in force since 2014, is 110€¹²⁴⁵ (which is about half the usual private rate) but the lawyer can upon request be paid a fixed fee instead. These rates are set at six different levels depending on the type of matter, the court in which it is heard and the length of the final hearing.¹²⁴⁶ The lawyer's fee can be increased by up to 20% in certain circumstances¹²⁴⁷ or reduced if the representative is not fully qualified, if the case is one of several related matters being handled by the same representative or if the case was not properly handled.¹²⁴⁸

Bills are assessed by the court or (in asylum cases, or other non-court matters dealt with outside Legal Aid Offices) by the Legal Aid Offices. The costs assessment takes place at the same time that the final ruling is given in the matter and the conducting lawyer is responsible for ensuring that the court has all the information it needs to make the assessment; later submission of costs information or claims will not usually be accepted¹²⁴⁹ and the court has no duty to prompt the attorney to make a claim.¹²⁵⁰ However, if the attorney can show that there was no realistic opportunity to submit on time, the court may accept a late bill.¹²⁵¹ In criminal cases, the prosecutors comment on the defence bill of costs as part of the court's assessment,¹²⁵² but the final decision is made by the judge. It is unlawful for the lawyer for a legally-aided client to receive any fee from the client other than the percentage contribution.¹²⁵³

1238 Statsrådets förordning om grunderna för arvoden vid allmän rättshjälp, 2008.

1239 HFD 20.9.2013/2979.

1240 Rättshjälpslag, 2002, 5 §, para. 1.

1241 HD 2012:15.

1242 Statsrådets förordning om grunderna för arvoden vid allmän rättshjälp, 2008, 2 §.

1243 *Ibidem*, 4 §, para. 1.

1244 *Ibidem*, 4 §, para. 2.

1245 *Ibidem*, 6 §.

1246 *Ibidem*, 7 §.

1247 *Ibidem*, 8 §.

1248 *Ibidem*, 9 §.

1249 HFD:2014:178.

1250 HFD:2014:177.

1251 HFD:2013:16.

1252 Rättshjälpslag, 2002, 17 §, para. 1.

1253 *Ibidem*, 17 §, para. 2.

The Finnish time limits for legally aided cases are thus generous, but the fees are relatively low. It is not generally felt that access is affected by these elements of the system, geographical access to Legal Aid Offices and reluctance to risk *inter-partes* costs being more significant factors.

In Sweden, where a private practitioner is involved in civil cases, there are limits on the amount of time which may be claimed for their work. Legal advice has a maximum of two hours, after which the client must move onto legal aid if further assistance is needed. Under legal aid for representation, there is a standard ceiling of 100 hours of work,¹²⁵⁴ although this can be extended by the granting authority (court or Legal Aid Authority)¹²⁵⁵ by a number of hours to be specified in the decision. As the Supreme Court has pointed out, the legislation does not give any indication of the factors which should be used to determine whether an extension should be granted.¹²⁵⁶ The Court clarified that the possibility of extension should amount to no more than a safety valve in a small number of cases; bearing in mind the need to save money, the option should be used sparingly. Particular attention will be given to whether the lawyer has used an inordinate amount of time in the case hitherto¹²⁵⁷ and whether any previous extensions of time have resulted in an improvement in the client's position.¹²⁵⁸ Where the opposing side is responsible for causing delay in the matter, a limited extension may be awarded.¹²⁵⁹ These time allowances are generous, and extension is possible when needed, the practical result being that a person in receipt of legal aid in Sweden will have access to as much legal assistance as is required for the case to be properly prepared and presented.

However, a lawyer acting under legal aid must be cautious because bills are carefully, and sometimes strictly, assessed at the end of the case. Only work which was "reasonable" will be reimbursed¹²⁶⁰ and the rule of thumb used by the Legal Aid Authority is that the amount of time which would have been required by a reasonably experienced lawyer for the work will be allowed. Reductions are made on the basis of an overall percentage drop with the result that it can be difficult, in the event of an unfavourable assessment, for the lawyer to know which parts of the work claimed were found to be unreasonable.

In criminal cases, the amount to be paid to public defence counsel, who are also lawyers in private practice, is based on the overall principle that:

1254 Rättshjälpslag, 1996, 15 §.

1255 *Ibidem*, 34 §.

1256 Högsta domstolen Ö722-00, 2000.

1257 *Ibidem*; see also Rättshjälpnsnämnden 20-2000.

1258 Rättshjälpnsnämnden 50-2000.

1259 Arbetsdomstolen B 52/00.

1260 Rättshjälpslag, 1996, 27 §.

Public defence counsel shall receive reasonable compensation from public funds for work and time and for disbursements made in connection with the assignment. Compensation shall be determined on the basis of, as a starting point, the time taken that is reasonable with regard to the nature of and extent of the assignment and applying the hourly costs norms determined by the government.¹²⁶¹

The authorities are empowered to “prescribe the fee schedule to be followed in certain cases and issue rules on the computation of compensation for time lost”,¹²⁶² which in practice leads to the calculation of fees using a system of fixed fees for various elements of the defence work carried out. Public Attorneys in non-criminal cases are paid on an hourly rate for work reasonably required.¹²⁶³ The hourly rates paid to lawyers under the civil legal aid scheme and under the Public Attorney schemes are the same,¹²⁶⁴ and considerably less than a lawyer would usually charge in civil cases. The rates were last set in secondary legislation in 2009¹²⁶⁵ but with a provision that the National Courts Administration shall each September provide the government with the basis for calculation of the following year’s hourly rates.¹²⁶⁶ The fee levels are then published each year in the booklet “Legal aid and tariffs”.¹²⁶⁷

In Denmark, fees are fixed for civil advice work but in representation cases the amount to be paid is calculated in the same way as in privately-paying cases. Legal advice from private lawyers is reimbursed partially by the state. The fixed fees for step 2 and 3 work are set out in legislation¹²⁶⁸ and are adjusted annually in line with the governmentally-fixed index.¹²⁶⁹ The client is responsible for payment of part of the fee but may not always pay. The resulting fees for the lawyer, if the client does not pay their contribution, are very low, amounting to only 780 DKK for level 2 advice and 1195 DKK at level 3.¹²⁷⁰

The fee level for legal aid representation is set by the court in the same way as for non-legally aided cases,¹²⁷¹ according to the value of the case. Bands are fixed and allocated a fee which is a starting point for the costs decision of the court in the specific case.¹²⁷² In family cases, there is a set figure which is to be taken as a starting point but which may be adjusted in the light of circumstances, and in other civil cases the rules provide a band of possible

1261 Rättegångsbalk, 1942, Chapter 21, 10 §.

1262 *Ibidem*.

1263 According to lag om offentligt bitrade, 1996, 5 §, the rules set out in rättshjälpslag, 1996, 26-29 §§ apply also to Public Attorneys.

1264 See e.g. Förordning om särskild företrädare för barn, 1999, 3§; Lag om målsägandebitråde, 1988, 5 §.

1265 Förordning om timkostnadsnorm inom rättshjälpsområdet, 2009.

1266 *Ibidem*, 3 §.

1267 In 2019 the hourly rate is 1380 SEK, approximately 135 €.

1268 Retsplejeloven, 2017, § 323(6).

1269 *Ibidem*, § 326(1).

1270 Approximately 105 and 160 €, respectively.

1271 Retsplejeloven, 2017, § 332(1).

1272 The lists are available at <https://www.domstol.dk/OESTRELANDSRET/TAKSTEROGSALAEER/Pages/default.aspx>.

costs awards from within which the judge will determine the amounts to be paid. However, unlike in privately-paying cases, a legally aided lawyer may not request further fees from the client¹²⁷³ and as a result the final fees received by the lawyer are usually significantly lower in these cases. Civil legal aid bills are processed and paid by the district court local to the lawyer whose bill is being submitted.¹²⁷⁴

The banded fee arrangements mean that a lawyer will always be paid more for cases of a higher value. This has a deterrent effect against taking cases for poorer litigants which are of small value, but may be complicated. This may cause difficulties in finding lawyers willing to take legal aid cases where, for example, an employment case in which six months' pay is recovered may result in a very low fee for the lawyer. Public defenders are paid by the State Treasury¹²⁷⁵ at a level decided by the court and may not receive additional payment from the client.¹²⁷⁶

Civil legal aid for advice (but not representation) in Norway is usually paid on a fixed fee basis, at between 2 and 12 hours' work, depending on the type of case.¹²⁷⁷ For many cases this is generous compared with the advice limits in Denmark and the UK. A higher fee will only be paid if the actual time spent is or will be twice the usual limit, in which case the County Governor can authorise payment for the whole case on an hourly basis.¹²⁷⁸ The intention is that the fixed fee will work as a reasonable average for all cases carried out, some of which will be shorter, some longer. However, as the decision is only made upon submission of the final bill for payment, there can be considerable uncertainty for the lawyer during the case as to whether the fixed fee or an hourly fee will be paid, which may well have an impact upon the conduct of the case. If a case takes 2 hours or less, the full fixed fee will not be paid; instead a fee of 1 ½ times the hourly rate will be paid.¹²⁷⁹

Representation under civil legal aid can be subject to fixed fees,¹²⁸⁰ but these have only been set for a small number of case types.¹²⁸¹ Other cases are paid on an hourly rate and all necessary and reasonable work will be allowed; the same test as for private bills. In cases where the grant of legal aid has been made by the court, the court will also assess and pay the lawyer's bill at the end of the case (albeit reimbursed by the Ministry of Justice). In cases where the County Governor granted the free legal representation then that will also be the body which assesses and pays the bill, on the same basis.

1273 Retsplejeloven, 2017, § 334(5).

1274 Bekendtgørelse om offentlig retshjælp ved advokater, 2017, § 9.

1275 Retsplejeloven, 2017, § 741.

1276 *Ibidem*, § 741(1) and § 334(5).

1277 FOR-2005-12-12-1442, § 5.

1278 FOR-2005-12-12-1443, § 3-5.

1279 FOR-2005-12-12-1442, § 5.

1280 FOR-2005-12-12-1443, § 4-4.

1281 FOR-2005-12-12-1442, § 6.

In Norwegian criminal cases, official defence counsel are paid by the state.¹²⁸² Payment is a combination of fixed fees and hourly assessment, depending on the complexity of the case. Simpler cases are generally paid at a fixed rate but if a case becomes complex or takes longer than usual, an application can be made by the lawyer to be paid on an hourly basis. However, this application is made at the same time that the bill is submitted and, as a result, the lawyer does not know during the conduct of the case what the payment basis will be. This can lead to difficult decisions about the extent of defence preparations for trial. Cases in which the trial lasts over a week are always paid on an hourly basis, with a rule of thumb in assessment that one and a half hours of preparation time are required for every hour in court. Work claimed above this amount must be justified. Official defence counsel are not entitled to receive any additional payment from the client.¹²⁸³ The hourly rate is the same for civil and criminal work, and is set from time to time by the Ministry of Justice.¹²⁸⁴ From 1st January 2017 the rate is 1020 NOK¹²⁸⁵ compared with common commercial rates between 1500 and 5000 NOK per hour.

The Scottish legal aid fees scheme is complicated and consists of a mixture of fixed fees and hourly rates. Criminal advice and assistance is subject to two main separate initial limits of £35 and £90, depending on the type of case.¹²⁸⁶ However, other additional limits are also in place, depending on the type of criminal advice and assistance or ABWOR being used.¹²⁸⁷

The standard initial limit of authorised expenditure in civil advice and assistance is £95, although an initial limit of £180 applies for advice and assistance or ABWOR where the solicitor is satisfied that the matter is likely to go to court and that the applicant is likely to qualify financially for civil legal aid.¹²⁸⁸ In children's legal advice and assistance, the basic initial limit is £95.¹²⁸⁹ Any of these limits can be exceeded but only with prior authority of the Scottish Legal Aid Board.

Within crime, 95% of cases are heard as summary offences before a Justice of the Peace or in a Sheriff Court without a jury. The majority of these cases are legal aid fixed fees covering work up to and including the first 30 minutes of trial. The level of fee payable depends on various factors and is set out in regulations.¹²⁹⁰ Only 5% of criminal matters are solemn cases heard by a sheriff and jury or at the high court and these, together with some summary cases

1282 Straffeprosessloven, 1981, § 107.

1283 *Ibidem*, § 107.

1284 FOR-1997-12-03-1441, § 2.

1285 This is approximately 105 €. Rundskriv G-12/2016.

1286 Advice and Assistance (Financial Limit) (Scotland) Regulations 1993, Regulation 3(c).

1287 Scottish Legal Aid Board *Criminal Legal Assistance Handbook*, Part III, para. 2.1.

1288 Scottish Legal Aid Board *Civil Legal Assistance Handbook*, Part III, para 2.10.

1289 Scottish Legal Aid Board *Handbook: Children's Proceedings under the Children's Hearings (Scotland) Act 2011*, Part II, para. 2.12.

1290 The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. See also Scottish Legal Aid Board *Criminal Legal Assistance Handbook*, Part V, Chapter 1.

exempted from fixed fees, are paid on an hourly basis for both solicitors and any involved barristers.¹²⁹¹ As was seen above in Chapter 3, there is a risk of perverse incentives within the fees structure affecting the choice of a client to plead guilty or not guilty. The police station duty scheme has been criticised for resulting in the situation that solicitors can only be paid for advising their own clients in a police station if they also agree to advise other clients who are without representation. Due to the very low level of fees for the duty work at police stations, it has been argued that accepting such duties is “simply unsustainable”.¹²⁹²

Civil and children’s fees vary according to the type of case and whether it is a defended action. Non-defended matters such as divorce petitions are usually paid on a fixed-fee basis and the payment for defended actions is often made up of a selection of fixed-fee items plus hourly rates for some aspects of a case. The fee structure is complex and there are seven separate schedules to the relevant regulations¹²⁹³ which set out the various payment levels. The intricacy of payment arrangements adds to the administrative burden on lawyers providing the service, making legal aid work additionally unattractive.

In Northern Ireland, the level of the fee paid to defence lawyers in criminal legal aid is set by the government, and account must be taken of certain factors when setting the fees.¹²⁹⁴ These criteria include the time and skill required, as well as the need to secure value for money. The vast majority of criminal matters are dealt with at magistrates’ court, under a system of standard fees,¹²⁹⁵ and since 2005¹²⁹⁶ most cases at the Crown Court are also paid on a standard fee basis. The fee is paid by the Legal Services Agency upon submission of an invoice by the lawyer.

In civil cases a basic division exists: High Court fees are paid on an hourly basis, whilst in the County Court there is a scale of fees which depends on the value of the claim.¹²⁹⁷ In some types of case,¹²⁹⁸ the solicitor can choose whether to claim a fixed fee or an hourly rate.¹²⁹⁹ The scale of costs is set by the County Court Rules Committee and applies to private bills as well as legal aid bills. The use of the scale saves administrative time checking submitted bills but does lead to the costs being out of the control of the Legal Services Agency when the Rules Committee periodically updates the fee scale. Currently, Family Proceedings Court fees are assessed on an itemised basis, making them very

1291 The Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Schedules 1 and 2.

1292 Law Society of Scotland 2014, p.3.

1293 The Civil Legal Aid (Scotland) (Fees) Regulations 1989, as amended, which deal with fees for both civil and children’s legal aid.

1294 Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, para. 37.

1295 The Magistrates’ Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009.

1296 Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005.

1297 The County Court (Amendment) Rules (Northern Ireland) 2013, Schedule 2.

1298 Such as those under the Children (Northern Ireland) Order 1995.

1299 The Civil Legal Services (Remuneration) Order (Northern Ireland) 2015, Schedule 3, Part 2.

unpredictable. Overall, “the current remuneration framework is a complex matrix of statutory and non-statutory standard and composite fees, which sit alongside the submission of time based claims by legal representatives ... The complexity of these arrangements has imposed a significant administrative burden upon the Agency”.¹³⁰⁰ As a result, the Ministry of Justice is trying to negotiate standardised fees, initially in family cases at all levels and subsequently in all civil cases.¹³⁰¹ The complexity inevitably also causes administrative burden for suppliers, but fixed fees are often unpopular amongst providers as rates of pay tend to be relatively low.

A civil legal aid certificate when issued covers only solicitor work; the solicitor must apply to the Legal Services Agency for authorisation if they wish to engage a barrister for the case.¹³⁰² If this is not sought, or if it is refused but the solicitor nonetheless employs a barrister, the solicitor will be responsible for paying the barrister’s fee. Particularly in the Family Proceedings Court, authority for instructing a barrister is rarely given. Currently only 1% of these cases are certified for counsel.¹³⁰³

In general terms, legal aid in England & Wales pays the bill of the lawyer conducting the case, court fees and other costs such as experts’ fees. However, these payments are limited to rates set by the government at levels usually considerably lower than those paid privately. Advice at the police station is covered by a fixed fee which may be increased if the actual cost exceeds an Escape Fee Threshold.¹³⁰⁴ Criminal Advice and Assistance covers work up to a value of £300,¹³⁰⁵ after which the solicitor can apply to the Legal Aid Agency for an extension if further work is still required and the client has not yet been charged with an offence. Other criminal work is paid through a system of fixed fees applying to different types of cases, with hourly rates for cases which fall outside the fixed fee schemes.¹³⁰⁶ There have been reductions in criminal fees for advocates since 2007, which are even more substantial in real terms, leading to criminal work being increasingly less financially attractive to lawyers.

Within the civil legal aid scheme, all advice and assistance matters are paid on a fixed fee, with additional recompense only available if costs exceed three times the fixed fee.¹³⁰⁷ The fixed fees for advice are such that, if converted into hours’ work, the amount paid for would be around three to five hours’ work.¹³⁰⁸ Almost all civil litigation funding certificates (for representation) are granted

1300 Northern Ireland Audit Office 2016, para. 3.20.

1301 *Ibidem*, para. 3.21.

1302 Civil Legal Services (General) Regulations (Northern Ireland) 2015, Regulation 11.

1303 Review of Civil and Family Justice in Northern Ireland, *Review Group’s Report on Family Justice*, 2017, para. 10.23.

1304 The Criminal Legal Aid (Remuneration) Regulations 2013, Schedule 4.

1305 Approximately 340 €. The Criminal Legal Aid (Remuneration) Regulations 2013, Schedule 4, para. 3.

1306 The Criminal Legal Aid (Remuneration) Regulations 2013, Schedules 1,2 and 4.

1307 The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, Table 1.

1308 Calculated using fixed fees and hourly rates contained in the Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1.

subject to two limitations: a particular step in the proceedings (which might be all steps up to the hearing) and a costs limitation, most usually £2,250.¹³⁰⁹ These limitations can be amended on application to the Legal Aid Agency or in some emergency situations by the solicitor.¹³¹⁰ Fees for the solicitor conducting the case are paid on a series of standard and graduated fees, at payment rates which vary according to the level of help being given and the subject-matter of the case.¹³¹¹ The certificate allows the solicitor to instruct a barrister in the case, as long as costs are kept within the limit, but if a second more senior barrister is sought, prior approval from the Legal Aid Agency is needed. The barrister will be paid according to a schedule of fixed fees in family cases and inquests,¹³¹² and on an hourly rate for other advocacy.¹³¹³ Civil legal aid certificates cover experts' fees and other out-of-pocket expenses such as court fees, but these are increasingly subject to fixed rates.¹³¹⁴

In the Republic of Ireland, Law Centre solicitors can only conduct civil cases; they are paid a salary and no fixed cost per case is applied. In criminal cases, legal aid is granted to private practitioners and covers the fees of a solicitor and up to two barristers, depending on the circumstances. Experts' fees and other fees, costs and expenses incurred in the preparation and conduct of the defence are also included. Fees are paid on the basis of fixed fees, with a set payment for preparation and the first day of a hearing, and an additional fee for each day in court thereafter. The exact amounts depend on which court is hearing the case, and vary for solicitors and barristers. Civil legal aid also pays barristers and privately-practising solicitors (when used) a variety of fixed fees. Fees are felt to be low, particularly at the District (lowest) Court. Indeed, over past years fees have dropped considerably in line with the financial crisis experienced by the country: fees were reduced by 8% in 2009, 8% in 2010 and 10% in 2011. Whilst the reductions in civil servants' pay over the same period are now being reversed, no increases have yet been made to legal aid fees, an issue which has been discussed in Parliamentary Committee.¹³¹⁵

A previous section of this chapter examined how the behaviour of the legal profession can affect access to legal aid for clients. The fee structures briefly outlined here are clearly relevant to the willingness of lawyers to take on legal aid work. As described above, there may be lack of provision in certain places or subject areas if lawyers do not feel the work is financially sustainable; conversely some legal aid work may be reimbursed in a way which lawyers can use to their advantage, particularly if other work is in short supply. In addition to the overall question of supply, though, payment schemes and particularly

1309 About 2570 €. Ling and Pugh 2017, para. 5.128.

1310 *Ibidem*, para. 5.130.

1311 The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1.

1312 *Ibidem*, Schedules 3 and 4.

1313 *Ibidem*, Schedule 2.

1314 *Ibidem*, Schedule 5 as amended.

1315 Committee of Public Accounts, 12 November 2015. The discussion related in particular to fees for acting for the State.

limits on the amount of work which will be paid for by the state, also impact on the significance of a grant of legal aid for an individual. If a legal aid certificate entitles a client to up to 100 hours of assistance, it is more meaningful for a client (as well as more expensive for the state) than if only 5 hours' work are routinely covered.

Amongst the legal aid schemes under comparison, Finland and Sweden are particularly generous with lawyer time, allowing 80 and 100 hours respectively. The Norwegian advice time limit of 7 hours is relatively generous compared to the Danish advice fees but for representation these jurisdictions both use the same system for settling legal aid bills as for private cases. However, a prohibition on charging additional fees to clients means that the actual resulting sums received by lawyers under legal aid are much lower than the amounts received if a client pays privately. The jurisdictions of the UK and the Republic of Ireland apply complex fees provisions to legally aided work by private practitioners, at low levels which cause much dissatisfaction within the legal profession. In addition to potential problems of access arising from lawyers refusing to take legal aid cases, low fixed fees or financial limits on certificates also impact on the amount of work which can be realistically carried out on a case. In some circumstances the limitation may be quite severe and lead to very restricted work being carried out on a case. For example, in England & Wales the fixed fee for some domestic violence cases is £608, representing about 12 hours' work at the very low nominal hourly rates for legal aid. This is very significantly lower than the hourly limits in Finland and Sweden, and it is hard to believe that this will not impact on the time taken in preparing and conducting a case.

7.3.2 Protection against inter-partes costs

Access to justice in practice also depends on the individual being willing to take on any associated risks, in particular the risk of being found liable to pay the costs of the opposing party if that party wins the case. In some jurisdictions a grant of legal aid reduces this risk or removes it altogether, whereas in others no such protection is offered.

In Denmark, a legally aided party who loses the case is protected entirely against paying the other party's costs in civil cases. Civil legal aid includes exemption from court fees, payment of lawyers' fees from the state Treasury, reimbursement of reasonable costs and exemption from paying the other side's costs,¹³¹⁶ although the legal aid certificate may be limited to only some of these benefits.¹³¹⁷ The winning party's costs will be paid by the state.

In the UK jurisdictions, protection is not total, but it is unusual for costs to be awarded against a legally-aided party. In Scotland, a court making a costs award can limit the legally-aided party's liability to an amount which is

¹³¹⁶ Retsplejeloven, 2017, § 331(1).

¹³¹⁷ *Ibidem*, § 331(2).

reasonable in all the circumstances¹³¹⁸ and award the remaining costs to be paid from the legal aid fund.¹³¹⁹ The position in England & Wales is very similar.¹³²⁰ Likewise, in Northern Ireland, if a legally-aided party loses in a civil case, she will be partially protected against having to pay the costs of the other party.¹³²¹ Costs awarded must be limited to the amount which is reasonable for her to pay, and caselaw has established that the overriding factor will be the financial means of the legally aided party.¹³²² The court may award the winning party's costs to be paid instead by the Legal Services Agency.¹³²³

In Norway, if the assisted person is unsuccessful, it will be usual for costs to be awarded against them. In this situation the legally-aided person can apply to the Civil Affairs Authority to have the liability for costs covered by the state,¹³²⁴ although such applications are rarely granted. In practice, therefore, an unsuccessful legally aided party will have to pay the other side's legal costs.

A grant of Finnish legal aid does not protect against inter-parties costs if the case is lost and it appears that the risk of having to pay the other side's costs acts as a deterrent to clients wanting to pursue cases with low chances of success. The situation in Sweden, Iceland¹³²⁵ and the Republic of Ireland is the same; legal aid has no effect on the need to pay the other side's legal costs in the event that the legally-aided person loses the case. However, in Sweden the other party's costs will be paid (up to a certain limit) by legal expenses insurance; a useful additional bonus for those whose cases are funded this way.

The issue of *inter-partes* costs may have a significant impact on a legal aid system, as the risk may deter people from accessing court. If the potential liability is large, there may be a deterrent effect even if chances of winning the case are relatively high. In systems which do not include prospects of success as a criterion for civil legal aid eligibility (such as Finland), the risk of *inter-partes* costs operates as a prospects of success test self-imposed by clients. However, it should be noted that there appear to be other factors at play which affect the impact which a costs risk has on the choice to proceed; in Finland, this is felt to be a significant deterrent, whilst similar rules in Norway appear to have little restraining effect. It may be that cultural differences in willingness to take risks, or in attitudes to legal cases overall, are present.

As has been seen above, many jurisdictions pay court fees from legal aid or exempt a legal aid recipient from court fees. This is in accordance with the interpretation of Article 14 of the International Covenant on Civil and Political Rights by the Human Rights Committee, which has held that some system is required to ensure court fees are not a barrier to access to court for

1318 Legal Aid (Scotland) Act 1986, s. 18.

1319 *Ibidem*, s. 19.

1320 The Civil Legal Aid (Costs) Regulations 2013.

1321 Access to Justice (Northern Ireland) Order 2003, Article 18.

1322 *McGucken v. McGucken*, 1991.

1323 Access to Justice (Northern Ireland) Order 2003, Article 19.

1324 Rettshjelploven, 1980, § 22.

1325 Lög um meðferð einkamála, 1991, Article 128(3).

the indigent.¹³²⁶ Whilst this could be achieved in various ways, and the state can choose its method, it is plainly appropriate for legal aid recipients to be excused court fees.

7.4 Conclusions

This chapter has given a brief summary of the reach and content of legal aid. It has been seen that the extent to which the population is financially eligible for legal aid varies considerably within the jurisdictions of North-West Europe. The details of the financial eligibility criteria have not been elaborated upon, for reasons of space, but it can be seen that there are numerous possible mechanisms for rationing legal aid according to the means of the applicant. The effects of such restrictions are two-fold: for the individual contemplating legal proceedings, a harsh financial eligibility test for legal aid may mean that they are refused legal aid although unable to afford to pay a lawyer privately. In theory, such an eligibility criterion might violate international human rights requirements, and in practice would force the individual to abandon their case or go ahead at a disadvantage, without representation. Secondly, a harsh financial test from the state's perspective can restrict the amount of money which must be spent on legal aid and represents a relatively easy to administer option for cost reduction.

The availability of legal aid to a particular individual also depends on her finding a lawyer willing to take her case, which may not be a given if legal aid fees are low in comparison with the income available to lawyers from private clients. As has been seen, this is almost universally the case; even in systems which assess legal bills the same way in all cases, a prohibition on taking additional fees from legal aid clients means that lawyers earn more from their private cases. Only where lawyers are employed by the state to carry out legal aid work, which within our jurisdictions applies mainly to Finland and the Republic of Ireland, will they be unable to earn more by taking privately paying clients. In these circumstances the choice has been made by the lawyer when choosing a job, to earn less than would be possible elsewhere. Thus, in all jurisdictions where sufficient other work is available, legal aid is dependent upon some lawyers taking a principled stand and choosing to act for poor clients. Reducing fees for legal aid work is another way for governments to save money on legal aid, but such a policy can lead to access problems either through a steady decline of willing lawyers or through abrupt cessation of services if relationships with the profession break down to the extent that strikes are called.

1326 CCPR/C/GC/32, para. 11; *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, 1997, para. 7.2.

8. Chapter 8: Comparative legal aid in context

8.1 Introduction

The core of this thesis has been a comparative examination of nine legal aid systems, considered from an administrative law perspective. The focus has therefore been on the statutory framework, administrative organisation and material content of the schemes, giving particular attention to the decision-making structures and parameters. This is a relatively narrow concentration on a specific set of public administrative actions, and it has been seen that these vary considerably in the jurisdictions concerned. However, in the comparison care is needed to ensure that any conclusions reached are not unwarranted. Whilst from a descriptive point of view the comparison is of like with like, from a functional perspective this may be only partially true. In every jurisdiction within the study, legal aid is only part of the state's response to several overlapping requirements. It has a role to play, *inter alia*, in: the functioning of the justice system as a whole; the upholding of the rule of law; the provision of access to justice; the guarantee of a fair trial; the relief of poverty and the promotion of equality. The way in which legal aid is perceived within a jurisdiction and the size and nature of the role it is designed to fulfil will have an effect on its organisation and also on the extent to which it can be judged as successful. Two identical systems in two different jurisdictions would not be equally appropriate or effective, yet different systems could be equally effective if they fit their context well.

An equivalent argument applies to the comparisons of government spend on legal aid. As will be seen below, the cost of legal aid can be controversial and both governments and the media are wont to draw comparisons between jurisdictions as ammunition for arguments in favour of reducing legal aid spend. This is ill-conceived without an understanding of the wider context. On a very basic level, for example, the costs of legal aid in a state cannot be profitably compared with expenditure in another state unless it is understood that one country has an extensive parallel system which deflects a large proportion of cases from the court system and thus from legal aid, or that a whole judicial branch is run in such a way that representation is not the norm for any party.

This is a significant limitation of a study such as this, and prevents the drawing of any conclusions which would suggest that one system is 'better' than another. Instead, the question must always be whether another system might work well, or better than the existing system, in a given jurisdiction, in light of the different context of legal aid in the two places. It may be possible, however, as will be seen in the conclusions in Chapter 9, to consider how well various legal aid systems comply with international human rights standards, and to compare the extent to which they are internally consistent and meet stated national aims.

As set out in the introductory chapter, the definition of legal aid in this thesis is the provision by the state of legal help and representation by lawyers, either through state employees or by paying for private lawyers. These schemes fund lawyers to provide advice, assistance and advocacy for current or potential future interaction with the formal legal system of the state. They represent the equivalent of a person of means engaging a private lawyer to assist with a legal problem; what is being examined is the provision in each jurisdiction for an indigent person to enable them to achieve some sort of parity with a privately represented party. There are however other methods available for states to improve access to justice and fair trial. These include keeping disputes out of the court system so far as possible; making adjustments to court procedure to improve fairness without the need for legal representation or finding other ways to fund legal assistance for those who cannot afford to pay privately. The extent to which these other mechanisms are in use in a jurisdiction is an important part of the context for legal aid, without which a comparison can be misleading.

This chapter will provide a brief overview of this context for legal aid in the nine jurisdictions under study. First, the economic context of legal aid decisions will be examined. Then, how the wealth of the country and poverty levels in the population may interact with the cost of providing legal aid and a functioning judicial system will be noted, along with a consideration of measures which may indicate levels of litigiousness.

Attention will finally turn to the systemic context of legal aid and differences in the overall judicial systems in the jurisdictions. To understand the importance of legal aid in each jurisdiction requires an appreciation of the other elements of access to justice provision as they vary across states. Alternatives to the formal justice system play a large role in some jurisdictions and these will be examined, as will the variations within the formal justice system which reduce the need for legal representation and/or for legal aid.

First, then, issues of spend and demand will be considered. The amount spent on legal aid is an important part of the context for a comparative study of the administration of legal aid systems. Legal aid is one of the three key spending areas in judicial systems alongside courts and the prosecution service; it is not just the legal aid budget itself which is relevant but also how this relates to the wider justice spend in a jurisdiction. Further, the amount of

money devoted to justice and legal aid must also be seen in the context of the economic and social characteristics of the state which impact upon the need, and demand, for justice processes and legal aid.

8.2 Economic context: spend and demand

8.2.1 Spend (courts, prosecution and legal aid)

8.2.1.1 Data collection by the European Commission for the Efficiency of Justice

All the jurisdictions under consideration fall under the auspices of the Council of Europe and a great deal of useful information on their justice systems is collected by the European Commission for the Efficiency of Justice (CEPEJ). A comparison of spend on justice is a useful starting point in the search for an appropriate comparison of context for legal aid.

CEPEJ carries out a biennial evaluation of European judicial systems, comparing aspects such as the budget devoted to justice systems, the status of judges, prosecutors and lawyers, court organisation and efficiency and quality of the activity of courts and public prosecutors. CEPEJ rightly cautions against too simplistic an interpretation of the comparative data, and points out that evident economic and size differences between states, as well as differences in data collection and reporting, can cause mis-comparison. Nonetheless, the data published by CEPEJ is a valuable tool in setting the context for the present comparison of legal aid, and the most recent report¹³²⁷ can be used as a useful source of comparative quantitative data. The online database CEPEJ-STAT,¹³²⁸ which accompanies the report, contains additional detail.

The 2018 CEPEJ survey collected data from 2016. Amongst the jurisdictions under comparison here, only Northern Ireland was unable to provide any data for the report¹³²⁹ and up-to-date comparative information on Northern Ireland is thus unfortunately unavailable from that source. Reference will, however, be made to the 2014 CEPEJ data for Northern Ireland at some points in this analysis, with suitable explanation and adaptation.

CEPEJ collects statistics on the overall 'justice system', which represents the entire budget of the relevant Ministry of Justice and thus in many jurisdictions includes not only the costs of the court system but also other costs such as those of the prison system, the probation service, enforcement services, forensic services and in some cases also the police. More useful for present purposes is the information on the 'judicial systems budget' which is defined by CEPEJ as the combined budgets of the court service, legal aid and prosecution services.

1327 European Commission for the Efficiency of Justice 2018.

1328 <https://www.coe.int/en/web/cepej/dynamic-database-of-european-judicial-systems>.

1329 European Commission for the Efficiency of Justice 2018, p. 7.

8.2.1.2 Total spend on the judicial system

The various elements taken into consideration by CEPEJ when calculating the cost of judicial systems fall into three categories, as stated above. The included components are: court costs including staff salaries, computerisation, interpreters' and experts' costs, buildings and training; legal aid costs of civil and criminal cases brought to court and not brought to court; and prosecution service costs.

Following this scheme, the budget of the whole judicial system in 2016 per capita for the jurisdictions under consideration here is set out in the chart below. The European average judicial system budget amongst the European states who responded to the CEPEJ survey was 64 € and the median was 53 €. All of the jurisdictions within this research thesis, except the Republic of Ireland, are above-mean and above-median spenders and five spend within a narrow range of 77 € to 84 € per capita per year. Iceland and Sweden spent considerably more than the others, with 2016 expenditure of 111 € and 119 € respectively. However, the nomenclature used by Sweden for the judicial system budget partially differs from the CEPEJ guidelines and caution is needed in interpreting the data.¹³³⁰ Whilst figures were not available for Northern Ireland for 2016, that jurisdiction had the highest judicial system budget amongst these comparators in 2014; the second highest in Europe at 144 € per capita.

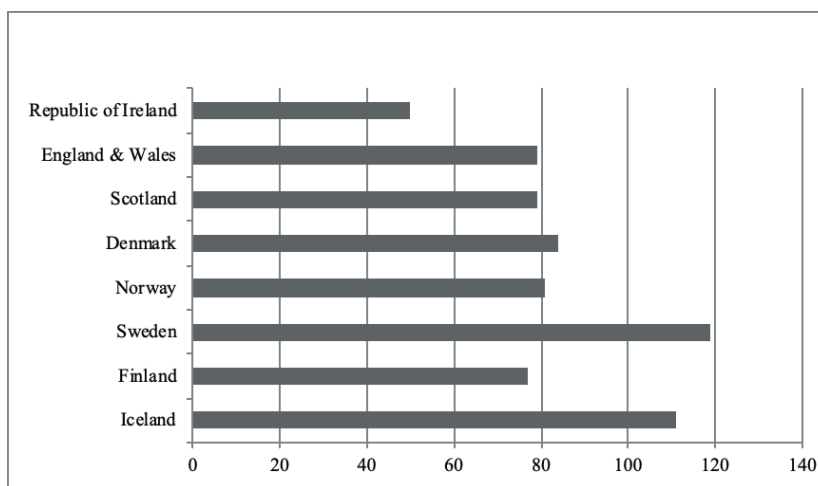


Fig. 5. Per capita allocated annual budget (€) for the judicial system in 2016

8.2.1.3 Division of justice spend between 3 elements

A consideration of the amounts spent on judicial systems by states shows that there is also a significant variation in how resources are allocated to the different aspects of the justice system. Figure 6 below shows the breakdown of the judicial system budget into court, prosecution and legal aid costs. Figures on

¹³³⁰ *Ibidem*, p. 32.

the breakdown of judicial system costs were not provided to CEPEJ by Iceland, Finland, compared to the other jurisdictions in this study, allocates the highest proportion (68%) of its judicial system budget to the courts, almost double that of Scotland (36%).¹³³¹ Within the context of Europe as a whole, the jurisdictions in this study allocate low proportions of judicial system spend to the courts; the European median is 67%. According to CEPEJ this is a characteristic of “Anglo-Saxon countries/entities and Northern Europe”. The authors posit that:

The small share of the budget of the judicial system allocated to courts in common law systems is explained by a relatively low number of professional judges. For the Northern European states, part of the explanation also lies in the fact that the society is less litigious and also because ADR (Alternative Dispute Resolution) is better integrated into these systems than in the rest of Europe.¹³³²

Caution is urged in interpreting the data, however: “differences may reflect differences in the organisation of judicial systems, as the tasks of the courts may vary from country to country”.¹³³³ It should also be noted that the court budget figure does not include the costs of any administrative tribunals which are not formally courts. This data is reflected in the overall justice system budget if paid for by the Ministry of Justice; otherwise it may not feature in the CEPEJ statistics at all.

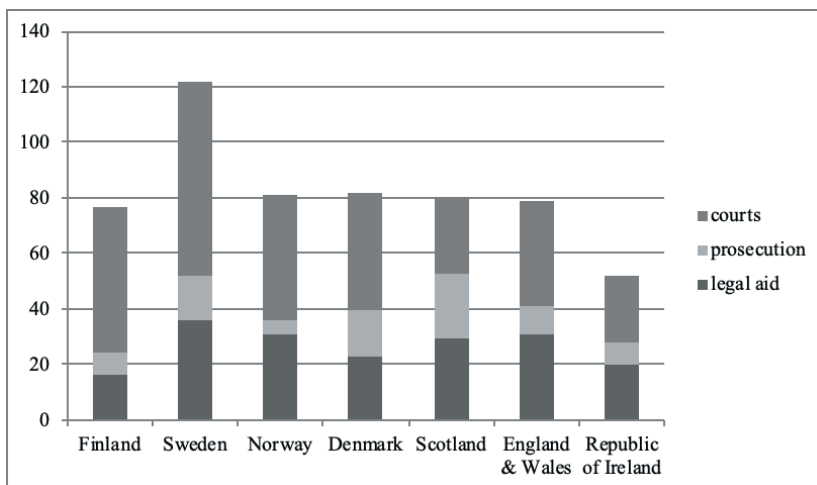


Fig. 6. Per capita annual implemented budget (€) for the judicial system broken down into the component parts of prosecution costs, court costs and legal aid.

1331 Sweden spends 59%; Norway 55%; Denmark 50%; England & Wales 48%; Ireland 48% and Iceland 45%. Figures are unavailable for Northern Ireland. The court expenditure figure for Sweden is an implemented budget; for the other jurisdictions the allocated budget is provided.

1332 European Commission for the Efficiency of Justice 2018, p. 41.

1333 *Ibidem*.

The prosecution budget per capita also varies considerably as a share of the overall judicial budget. In Scotland, the public prosecution services budget is about one third of the judicial system budget, whilst the proportion in Norway is only 7%.

For the purposes of this doctoral thesis, it is the level of legal aid spending which is most relevant, both in absolute terms and as a share of the judicial system budget. The variations in the latter measure are interesting because they may indicate that legal aid is playing a different role in the jurisdictions. Some examples will be explored later in this chapter when differences between civil and criminal law systems are examined. For the moment, however, it is worth noting that the group of jurisdictions being studied all spend a high proportion of their judicial budget on legal aid, compared to the rest of Europe. According to CEPEJ figures, this proportion in 2016 was as follows: England & Wales 39%; Norway 38%;¹³³⁴ Ireland 36%; Scotland 35%; Sweden 28%, Denmark 27% and Finland 21% (figures for Iceland were not provided). Whilst figures were not available for 2016 for Northern Ireland, it is worth noting that in 2014 that jurisdiction had the highest proportionate spend on legal aid in Europe, at 51.2%.¹³³⁵ The Netherlands at 22% was in 2016 the only jurisdiction outside this study with as high a proportion as any of the jurisdictions within the study – all the other European jurisdictions spend lower proportions on legal aid. According to the authors of the CEPEJ report, the reasons for this can be found partly in the right to *habeas corpus* which explains why the judicial systems of the United Kingdom¹³³⁶ “have always granted a special priority to legal aid”.¹³³⁷ In addition, “Northern European states also have a strong tradition of generous legal aid systems, which tend to include more people by raising the threshold”.¹³³⁸

However, within the group the differences are still considerable. It is usual for governments to compare legal aid spend when proposing policy change,¹³³⁹ but this figure may be misleading because it does not take into account differences in the amounts spent on other aspects of the judicial system, which may mitigate an apparently large difference in financial commitment to justice. This point can be most dramatically illustrated by an example from outside the North-Western European group; in 2016, France had a legal aid budget of only 5 € per capita, much lower than any of the study group. However, the per capita budget for the whole judicial system was 64 €; higher than the Republic of Ireland and relatively close to the 77 € to 84 € per capita per year group of jurisdictions identified above. Within the comparison group, in 2016 Finland spent almost exactly half as much per capita on legal aid as England & Wales,¹³⁴⁰

1334 The figure for Norway is based on approved, rather than implemented, legal aid budget.

1335 European Commission for the Efficiency of Justice 2016.

1336 And presumably also Ireland, although CEPEJ do not explicitly suggest this.

1337 European Commission for the Efficiency of Justice 2018, p. 77.

1338 *Ibidem*, p. 76.

1339 See the literature review in Chapter 1.

1340 16 € in Finland; 31 € in England & Wales.

yet the total judicial system budgets were almost the same.¹³⁴¹ Norway had an overall judicial spend lower than that of Denmark, but spent a third more on legal aid.¹³⁴²

Thus, a simple comparison of legal aid spend between jurisdictions is likely to be too blunt an instrument for public policy development. As the various aspects of the judicial system function and interact in a unique configuration in each jurisdiction, the role of legal aid and consequently its cost are enmeshed within the wider judicial system. The goal of reducing legal aid expenditure so as to match lower spending in another jurisdiction is ill-conceived, as the interrelationship between the various parts of the judicial systems will not be the same. Worse, reduction of legal aid spend may be counterproductive as the consequences on the rest of the judicial system will be specific to that jurisdiction and may result in greater expense in other parts of the system, or a reduction in functioning of the judicial system overall. A clear example of this can be found in the experience in England & Wales, where significant reductions in legal aid took effect in 2013. The National Audit Office estimated a reduction in legal aid spending of £300 million in the financial year 2013-14 but pointed out that:

The reforms have the potential to create additional costs, both to the Ministry and wider government. In the year following the reforms, there has been a 30% year-on-year increase in family court cases in which neither party had legal representation. What research there is suggests that such cases increase costs to HM Courts & Tribunals Service (an agency of the Ministry). Based on the increase in self-representation, we estimate the additional cost to HM Courts & Tribunals Service at £3 million per year, plus direct costs to the Ministry of approximately £400,000. The Ministry has committed to approximately £2 million for additional support for litigants in person over the next 2 years. There may also be costs to the wider public sector if people whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid.¹³⁴³

The direct financial consequences were modest in relation to the savings made on legal aid, but the costs to the wider public sector have not been quantified, and within the justice system there may be non-financial costs in terms of reduction in quality of service, increased waiting times etc. A recent study in Scotland has addressed the financial, economic and social impacts of spending on legal aid and supports a conclusion that money spent on legal aid provides wider advantages with a worth well beyond the direct outlay. For example, the study found that £1 spent on legal aid in a housing case can produce a return of approximately £11 for both the legal aid recipient and wider society;

1341 77 € in Finland; 79 € in England & Wales.

1342 Norway has a judicial system spend of 81 € and legal aid budget of 31 €; Denmark's judicial system spend is 84 € and legal aid budget 23 €.

1343 National Audit Office 2014, p. 6.

80% of the return benefits the individual due to fewer evictions and cases of homelessness and 20% benefits public services including the health service and local authorities with reduced demand for health and social services.¹³⁴⁴

8.2.1.4 Legal aid spend

Having made the above caveats concerning the usefulness of legal aid budget figures in isolation, it is nevertheless important to be aware of the comparative legal aid spend when considering the organisation and administration of legal aid in a jurisdiction. As this is the central theme of this thesis, a closer examination of the cost of legal aid in the systems concerned is appropriate, and consideration of any recent or proposed significant changes will be made in section 8.2.2.2 below.

Within the CEPEJ study, the definition of legal aid costs includes amounts paid to litigants or their lawyers in criminal and non-criminal cases before courts and also amounts paid to individuals in measures “aimed at preventing or accompanying appeals before the courts” such as conciliation and mediation.¹³⁴⁵ In addition, CEPEJ includes “legal aid granted by the States or entities outside the courts, to prevent litigation or to offer access to legal advice or information”.¹³⁴⁶ Thus, the sums included in the CEPEJ studies include access to information and to legal advice and assistance as well as representation at court, including disbursements such as court fees. This definition is close to the one used for this thesis, but in including conciliation and mediation costs may be slightly broader, depending on the collection of statistics and organisation of services in each jurisdiction. In so far as resources for mediation and conciliation are spent on lawyer services (as, for example, in England & Wales), they will be included in both the CEPEJ figures and in this thesis, however, in some jurisdictions mediation services may be separate (as in Norway) and potentially included in the CEPEJ figures yet outside the remit of the rest of this thesis. Nonetheless, the definitions are close enough for the CEPEJ figures to be useful as part of the discussion of context. Due to the very large difference in population sizes in the jurisdictions being studied (see the section on national variables, below), the per capita legal aid spend, rather than the absolute spend, will be considered here.

The figures used are those for implemented budget (i.e. actual spend) rather than allocated budget, except in the cases of Norway and Denmark, where the figure for implemented budget was not supplied to CEPEJ and thus the allocated budget is substituted in the table below. In the case of Denmark, significant overspend compared to budget had been an issue in previous years and the allocated budget was therefore considerably increased in 2014, which should mean that the implemented budget can be reasonably replaced by the allocated budget for present purposes.

¹³⁴⁴ Law Society of Scotland 2017.

¹³⁴⁵ European Commission for the Efficiency of Justice 2018, p. 17.

¹³⁴⁶ *Ibidem*, p. 71.

The previous CEPEJ report,¹³⁴⁷ on 2014 data, showed Northern Ireland as the highest spender on legal aid, by a considerable margin, at 74 € per capita. In order to allow some comparison here despite the lack of CEPEJ material for 2016, the 2014 figure has been adjusted down by 20%, which is the drop in spend on legal aid reported by the Legal Services Agency Northern Ireland in its Annual Reports over the relevant period.¹³⁴⁸

Around 6.5 € per capita were allocated on average by the European states to legal aid in 2016, with a median value of 2.1 €. ¹³⁴⁹

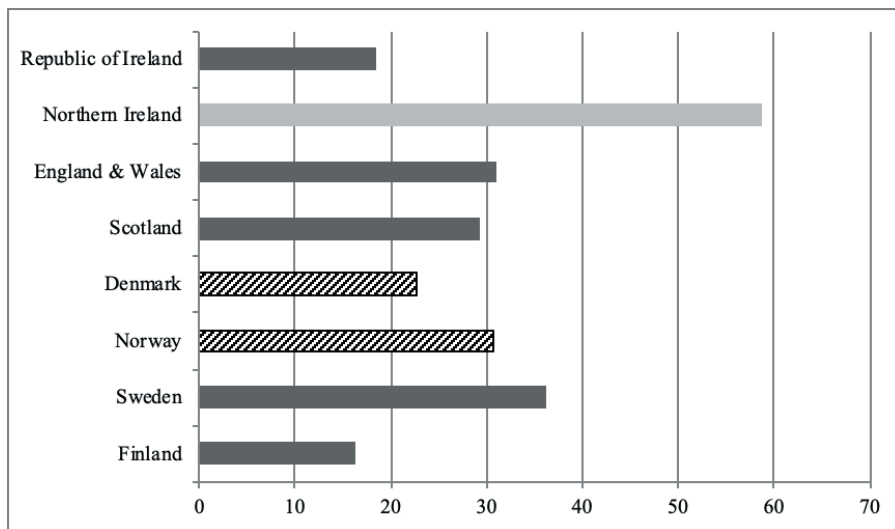


Fig. 7. Implemented legal aid budget per capita 2016 (€). The figure for Northern Ireland is the adjusted 2014 budget. The figures for Denmark and Norway are the allocated budget.

The authors of the CEPEJ study point out that depreciations and appreciations of local currency can affect comparison and lead to misinterpretation of the statistics¹³⁵⁰ and also warn that:

¹³⁴⁷ European Commission for the Efficiency of Justice 2016.

¹³⁴⁸ Northern Ireland Legal Services Commission 2014, Northern Ireland Legal Services Commission 2015, Legal Services Agency Northern Ireland 2016 and Legal Services Agency Northern Ireland 2017. Northern Ireland, in common with the rest of the UK, uses an accounting year running from 1st April to 31st March. The reported spends on legal aid in 2013-14 and 2014-15 were apportioned accordingly to give an estimated spend of £104.75 million for the calendar year 2014. A similar exercise resulted in an estimated spend of £84.53 million in 2016; a drop of almost exactly 20%.

¹³⁴⁹ European Commission for the Efficiency of Justice 2018, p. 78.

¹³⁵⁰ *Ibidem*, p. 15.

A note of caution is necessary, as the analysis of legal aid expenditures in the States cannot be complete without taking into consideration the level of demand (the number of individuals and cases requiring legal aid), the granting criteria (criteria of scope and eligibility used by the States), the case complexity and the level of professional and administrative expenses. It is, therefore, necessary to always interpret budgetary data with caution.¹³⁵¹

The amount spent on legal aid may not simply be dependent upon the political commitments of a government; socio-economic factors affect both the ability of a state to devote resources to access to justice, and the demand for legally-aided advice and representation.

The measures available are relatively crude but can be used here for two purposes. Firstly, to ascertain whether there might be a simple explanation for differences in legal aid spending, external to the legal aid systems themselves. If this is the case, analysis of the systems must depend heavily on the budgetary context; an explanation for the expense of legal aid will not be found in the organisation of legal aid in a particular jurisdiction if it is socio-economic issues which drive spending. Secondly, a consideration of economic and social factors may throw into question some of the political arguments for reducing legal aid spend based on a bare comparison of legal aid spend per capita in different states.

In considering the factors which might affect legal aid spend, tables will be arranged with the jurisdictions in order of descending per capita legal aid spend, to assist easy consideration of any possible correlation between the two elements. The order will thus be: Northern Ireland, Sweden, England & Wales, Norway, Scotland, Denmark, Ireland, Finland.

8.2.2 Economic and social variables

8.2.2.1 Wealth of state

Simply comparing expenditure on elements of the justice systems between two jurisdictions does not give a full picture, as pointed out by the CEPEJ authors in the context of the entire judicial system:

Considering the budget allocated per inhabitant in absolute values is not sufficient for representing the effective budgetary effort for the judicial system performed by the States or entities, which can be very different from the perspective of their level of wealth. The same budget allocated to the judicial system may correspond to a considerably different budgetary effort, depending on the level of the available wealth.

1351 *Ibidem*, p. 80.

The figure [can be put into perspective] by comparing it to a measure of the wealth of the States and entities, the per capita GDP, thereby giving a more meaningful representation of the effective budget effort for the judicial system performed by each State and entity. It makes it possible to measure the budgetary effort devoted by a country to the access to justice and judicial activity.¹³⁵²

The comparison of justice spend per inhabitant with GDP per capita carried out by CEPEJ across the whole of Europe unsurprisingly shows a correlation between the two. However, within the jurisdictions being examined here, Norway and the Republic of Ireland are outliers, spending relatively little on their judicial systems with respect to their GDP.¹³⁵³ The 2014 figures showed Northern Ireland spending considerably more than would be expected given its relatively low GDP.¹³⁵⁴

A similar comparison is also appropriate when considering expenditure on legal aid. The wealth of a state might be expected to impact upon legal aid in two contrasting ways. Firstly, a rich country can quite simply afford to spend more on legal aid. This would logically particularly be the case if a wealthy state was also committed to a social welfare model of government; a combination which might be at least a partial explanation of the high spending on legal aid in Norway, which has a GDP per capita of 65,747 €, ¹³⁵⁵ almost three times that of Northern Ireland (at 23,600 €¹³⁵⁶ the lowest within this study). Conversely, a low GDP as an indicator of poverty may signal a greater need within the population for access to justice (in securing social rights) and a greater proportion of the population which cannot afford to pay for their own legal advice and representation. Thus the low GDP of Northern Ireland may to some extent explain the very high expenditure on legal aid there.

At this point it may also be worth considering the very different population sizes within the study, ranging from England & Wales with over 57 million inhabitants to Northern Ireland with under 2 million. Iceland, which does not feature in the CEPEJ statistics which have been adopted here, has only about a third of a million. Again, population size may have both raising and lowering effects on legal aid spend; a larger legal aid system may benefit from economies of scale, but on the other hand a large scheme may be more complicated to administer.

1352 *Ibidem*, p. 27 and 28.

1353 *Ibidem*, p. 27.

1354 European Commission for the Efficiency of Justice 2016, p. 25

1355 European Commission for the Efficiency of Justice 2018, p. 12.

1356 Eurostat, 2018.

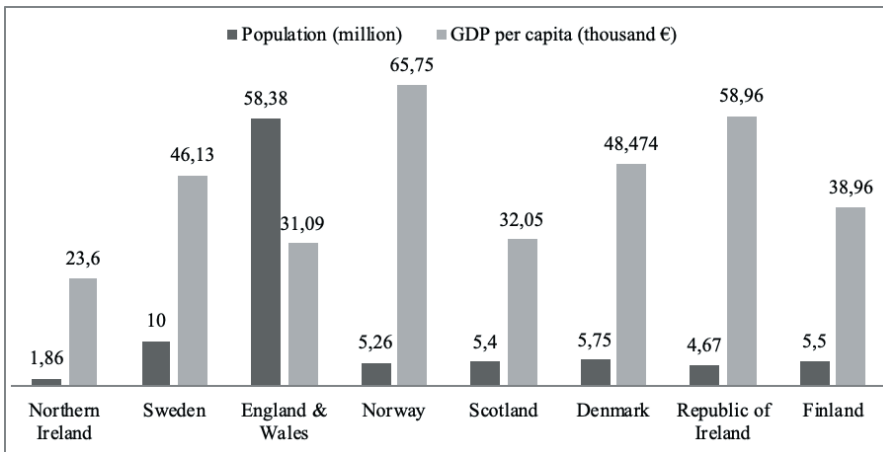


Fig. 8. GDP per capita and population size.

The GDP per capita¹³⁵⁷ and population sizes of the relevant jurisdictions are shown in the table above. There is no direct correlation between legal aid spend and either population size or GDP per capita; England & Wales with the largest population is the third highest spender on legal aid and Norway with the highest per capital GDP is the fourth highest legal aid spender. Northern Ireland has the lowest population (with the exception of Iceland) and the highest legal aid spend, which factors may be related as suggested above; however, population size alone is very unlikely to explain the amount spent on legal aid, particularly considering the lack of correlation across the jurisdictions.

8.2.2.2 Legal aid spend in times of austerity

The perceived ability to dedicate public money to legal aid can of course change over time. Inevitably, in each of the jurisdictions there is a particular political and social context to the cost of legal aid, with some governments working towards reducing spend and others not proposing significant changes. Major reforms targeted at reducing legal aid expenditure have taken place since the 1990s in several jurisdictions, and recent years have seen a concerted attempt by many European states to reduce public expenditure overall in response to economic pressures. Legal aid has been a target of cuts in many jurisdictions, including several of those under consideration in this thesis. The main changes are summarised below, in chronological order.

In Sweden, successful action was taken in the 1990s to bring legal aid costs under control¹³⁵⁸ through the implementation of new legal aid legislation, the

1357 As reported to CEPEJ, except for the Northern Ireland figure which is taken from Eurostat.

1358 The costs of the legal aid scheme almost halved from 348 million Swedish kronor in 1997 to 188 million Swedish kronor in 2010. This was achieved despite an increase in hourly rates paid to lawyers.

Legal Aid Act 1996.¹³⁵⁹ An assessment of the effectiveness of the Act in 2003 concluded that “the reforms have produced reduced legal aid costs for the country, state aid only when needed, increased consciousness of costs and more predictability of legal aid law”.¹³⁶⁰ The main device by which the cost reduction was achieved was the implementation of strict rules concerning legal expenses insurance in non-criminal cases, which will be considered further below. Despite this success, problems continue with the criminal budget, which is consistently overspent by about a third each year.

Changes to legal aid in Norway in 2005 were driven by the view that “in today’s circumstances it is not appropriate to cover citizens’ expenses for legal assistance in full”,¹³⁶¹ and were successful in reducing legal aid expenditure on advice to some extent.¹³⁶² However, the budget for representation continued to expand and the government undertook an exercise in 2008-2009 reviewing the operation of the legal aid scheme and adopting proposals for reform. This process was driven at least partly by a concern at the high expenditure on legal aid in comparison to in particular Finland.¹³⁶³ Due to a change in government, the proposals were not in the event realised.

Radical reforms of legal aid in Denmark in 2007 and 2008 were ostensibly an attempt to modernise and simplify the rules, but resulted in a significant drop in legal aid expenditure through private lawyers. Whilst there was a corresponding increase in spending on legal aid institutions, the result in terms of court representation was stark. The number of civil court cases in which at least one party was legally aided fell from about 8000 in 2001 to about 3000 in 2011.¹³⁶⁴ There have been mixed views on the general success of the reforms, with the Bar Council in 2010 releasing a study which determined that the aims of the reforms had not been realised, whereas the Ministry of Justice in the same month stated that there was no reason to conclude that the intentions had not been met.¹³⁶⁵

Legal aid in England & Wales has undergone major changes since 2011, and the situation has not yet stabilised. The government policy from 2010 to 2015 was “to reduce unnecessary costs and make sure that legal aid helps those who need it”, to deal with the fact that the jurisdiction was said to have “one of the most comprehensive, and expensive, legal aid provisions in the world”.¹³⁶⁶ In concrete terms, the aim and effect was a considerable reduction in spending, particularly on civil cases. The spend on civil legal aid fell from approximately £1.1 billion in 2012-13 to roughly £795 million in 2017-18.¹³⁶⁷

1359 Rättshjälpslagen, 1996.

1360 *Utvärdering av rättshjälpslagen (1996:1619) – redovisning av ett regeringsuppdrag*, Domstolsverkets rapport 2001:6 as summarised in Ds 2003:55.

1361 Ot.prp. nr. 91 (2003–2004), para. 3.1.

1362 St.meld. nr. 26 (2008–2009), para. 1.31.

1363 *Ibidem*, para. 2.5.1.

1364 Danmarks Nationale Menneskerettighedsinstitution 2016, p. 19.

1365 *Ibidem*.

1366 Ministry of Justice 2010.

1367 Legal Aid Authority Annual Report and Accounts 2013-14 and 2015-16.

Across the same period the number of civil cases funded dropped from 724,275 to 251,230 cases.¹³⁶⁸ Criminal legal aid, which (as seen above in Chapter 3) is the mechanism by which representation is provided for indigent criminal defendants, has also seen significant changes largely focused on the introduction of fixed fees and moves towards competitive tendering. The aim, again, is to reduce costs, with the Ministry of Justice announcing in 2013 an aim to reduce the annual expenditure on civil and criminal legal aid together by £220 million within 5 years.¹³⁶⁹

Legal aid spend in Finland has traditionally been stable, but increased between 2014 and 2016 by 37% (from €65.3 million to €89.4 million), a rise which is believed to have resulted from an increase in demand for immigration assistance from asylum-seekers.¹³⁷⁰ In an attempt to control this expenditure, the right to legal aid at the initial asylum interview was removed in 2016.¹³⁷¹

The process of attempting to reduce the amount spent on legal aid in Northern Ireland has been protracted. In August 2011 the report of the Access to Justice Review Northern Ireland¹³⁷² was published, with “three strategic objectives for reform: improving access to justice; bringing legal aid within budget; and improving governance”.¹³⁷³ A further report was commissioned in 2014 and published in 2015 in accordance with a government wish:

first, to identify and prioritise services where publicly funded advice and/or representation should be provided to meet human rights obligations, safeguard the interests of vulnerable people and meet the wider public interest; secondly, to consider the delivery models that might be best suited to the provision of publicly funded legal services through mechanisms other than legal aid; and, thirdly, to consider whether there are aspects of the justice system where efficiencies might contribute towards reducing the cost of publicly funded legal services while sustaining the quality of service provision.¹³⁷⁴

The report *A Strategy For Access To Justice: The Report of Access to Justice (2)*¹³⁷⁵ was published in September 2015 and contains 150 recommendations. The government has consulted on these but no changes to legal aid have yet been made following the review. Spending remains the biggest source of concern; the National Audit Office concluded in 2016 that the legal aid budget was out of control after expenditure spiralled from about £40 million to about £100 million over a decade and that the criminal legal aid reforms had not

1368 Ministry of Justice, *Legal Aid Statistics quarterly, England and Wales, January to March 2018*.

1369 Ministry of Justice 2013, para. 1.3.

1370 European Commission for the Efficiency of Justice 2018, p. 86.

1371 Utlänningslag 2004, 9 §, as amended by law 12.8.2016/646.

1372 Access to Justice Review Northern Ireland, 2011.

1373 David Ford, Ministerial Statement – in the Northern Ireland Assembly at 10:30 am on 3rd November 2015 <https://www.theyworkforyou.com/ni/?id=2015-11-03.2.1&s=david+ford#g2.23>.

1374 *Ibidem*.

1375 Stutt 2015.

achieved the aim of saving public expenditure.¹³⁷⁶ Northern Ireland had in 2014 the highest per capita spending on legal aid in Europe,¹³⁷⁷ and there is ongoing tension between the government which wants to make savings and the profession and citizens' interests groups which resist cuts.

The situation in Scotland appears to have been less urgent, with the Scottish Government expressing a need to improve value for money, rather than taking significant action to reduce spend. In 2011 a number of Best Value Reviews were undertaken by the Scottish Legal Aid Board, covering various aspects of legal aid provision including civil legal assistance, mental health work, immigration and asylum. A government White Paper entitled *A Sustainable Future for Legal Aid* was published the same year with a focus on finding ways to make necessary savings on legal aid. In the event, no legislation was passed as a result of the White Paper although "a package of reforms and efficiency savings has resulted in significant savings".¹³⁷⁸ The government has an annual costs projection for legal aid, but the actual budget is open and spend continues to outstrip the budget. The Scottish Legal Aid Board in its Corporate Plan for 2014-2017 stated that:

The size of the gap between the Scottish Government's allocation for legal aid expenditure and our forecast expenditure is such that significant levels of further savings measures are required if that gap is to be closed. We are currently forecasting a total shortfall of £39m over the three years of this corporate plan.¹³⁷⁹

Another review of legal aid took place between February 2017 and February 2018, with a view to the creation of a "sustainable and cost effective" legal aid system.¹³⁸⁰ Despite the government's position that legal aid expenditure must be controlled, the Law Society of Scotland called for more resources to be made available.¹³⁸¹ The review reported that legal aid expenditure in Scotland "has been falling since 2010-11"¹³⁸² as a result of lower demand, particularly in criminal cases, and the review conclusions urge increased efficiency and a focus on users, rather than financial savings.

The political ease with which several governments have attacked legal aid in financially difficult times may be related to the strange position access to justice and legal aid occupy within the classification of human rights. Access to justice, seen holistically, is a civil right and therefore, in Western democracies, fully protected in a way that social rights are not:

1376 Northern Ireland Audit Office 2016, p. 2.

1377 73.53€ per person per year. European Commission for the Efficiency of Justice, 2016, p. 72, Figure 2.39.

1378 O'Neill 2016, p. 290.

1379 Scottish Legal Aid Board Corporate Plan 2014-2017, p. 5.

1380 Scottish government legal aid review, Website of the Scottish Government.

1381 Law Society of Scotland 2014, p. 6.

1382 Evans 2018, p. 15.

the status of access to justice as a civil right gives it, or should in principle give it, a more secure position in our culture than social rights. The importance of civil rights is accepted across the political spectrum. The position of social rights, however strong the arguments made on their behalf, is less certain. Whether there should be specific legal rights to say, health care or housing remains a matter of dispute but no one can consistently deny that each citizen should be equally able to protect whatever legal rights she does have¹³⁸³

However, legal aid is often treated as a social right, possibly because it is means-tested; a characteristic usually shared with social benefits such as social security benefits rather than civil rights such as the right to vote. This means that legal aid, whilst in fact an element of a civil right, is wrongly made vulnerable to cuts as a social right. Cornford persuasively argues against this approach:

The elision of access to justice with social rights and the idea that it is satisfied by providing a basic minimum tend to encourage the view that if there is a need for cuts in public spending, these can be achieved in part by reducing what is provided by way of legal aid to the poor. In a perfect system, there would be no difference in the degree of access to justice enjoyed by different sectors of society and a cut in spending would lead to an equal diminution on the extent to which each citizen's rights were protected. In our system, access to legal services is grossly unequal, but the ideal of equal access demands nonetheless that the need to reduce public spending (if there is such a need) should not be allowed to increase the gulf between rich and poor in access to legal services.¹³⁸⁴

Flynn and Hodgson argue that the broad societal consequences of failing to address civil law issues should result in higher priority for legal aid; a "simplistic view of civil law as an individualised want of only some sections of the community allows for cuts to civil legal aid to be more readily accepted".¹³⁸⁵ Nonetheless, it is currently the case that many governments are prepared to make significant cuts to legal aid without serious consideration of their international obligation to realise the rights to access to court and fair trial.

8.2.2.3 Poverty levels

In addition to the overall wealth of a country, levels of relative poverty may affect the demand for legal aid. Poverty levels are not necessarily related to national wealth, as income distribution and levels of inequality play an important role. The simple figure of average gross annual salary is provided by CEPEJ, which gives an idea of the level of income enjoyed overall, but does not provide the more relevant information on how well the poorest in society are provided for:

1383 Cornford 2016, p. 34.

1384 *Ibidem*, p. 35.

1385 Flynn and Hodgson 2017, p. 9.

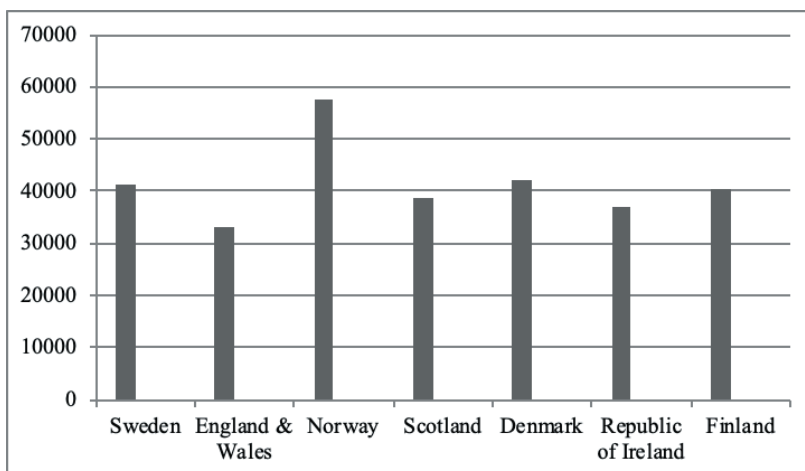


Fig. 9. Average gross annual salary by jurisdiction

More detailed statistical information is available from other sources to illuminate the question of relative poverty in the jurisdictions under consideration, although this does not generally differentiate between the different parts of the UK. Studies of social cohesion within the EU have placed Denmark, Finland and Sweden, respectively, in first, second and third place, the Republic of Ireland sixth and the UK twelfth.¹³⁸⁶

According to other figures, in 2016 the following proportions of populations were at risk of poverty or social exclusion:¹³⁸⁷

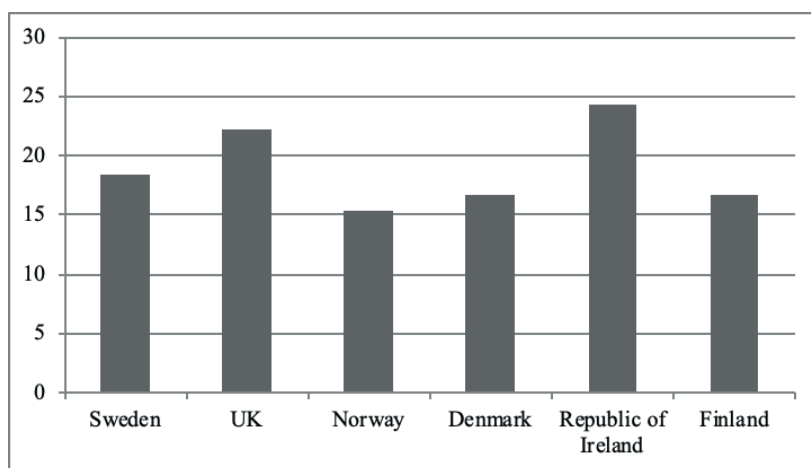


Fig. 10. Proportion of population at risk of poverty or social exclusion

1386 Dhéret 2015. Norway and Iceland were not included in the study.

1387 Eurostat, 2018.

Again, the figures show a range which does not readily correlate to legal aid spend: the Republic of Ireland with the highest proportion of population vulnerable to poverty or social exclusion is the second lowest spender per capita on legal aid; the lowest spender, Finland, has the median position on social exclusion and Norway has legal aid expenditure in the middle range with low social exclusion ratings.

Here, it is also interesting to note that the proportions of the population financially eligible for legal aid, examined in Chapter 7 above, offer little correlation with spend. The high eligibility proportion jurisdictions of Finland and Scotland are respectively lowest and fourth lowest spenders; low proportion eligibility England & Wales and Norway are mid-spenders. Scotland with 75% eligibility spends 29€ per capita annually on legal aid and Norway with under 30% eligibility spends almost the same, at 31€ per capita.

8.2.2.4 Level of recourse to law

Another factor upon which the cost of providing legal aid depends is how many people wish to obtain legal advice on potential action or to be assisted in court actions, in other words on demand. Various factors will influence this, including the level of criminal prosecutions brought; whether the laws in force are seen by the public to be useful tools for achieving their goals; and the extent to which citizens are willing or even eager to go to law. In the recent review of Scottish legal aid, for example, falling crime rates and diversion of criminal cases away from the courts was found to be significant in the falling cost of legal aid in that jurisdiction.¹³⁸⁸ The quality of 'litigiousness' is complex and its exploration is not within the remit of this thesis. However, as a broad contextual factor, it may be useful to briefly consider the numbers of lawyers in each of the relevant jurisdictions. A high concentration of lawyers suggests a society which uses law to a more significant extent than one with low lawyer density, although other factors such as the presence of a significant legal and financial services market may increase the figure without indicating a higher level of litigiousness in the general population. The CEPEJ report provides the information on number of lawyers per 100,000 inhabitants in 2016.¹³⁸⁹ Once again, a correlation with legal aid expenditure is absent.

¹³⁸⁸ Evans 2018, p. 15.

¹³⁸⁹ European Commission for the Efficiency of Justice 2018, p. 172. The figure for Northern Ireland is the 2014 figure.

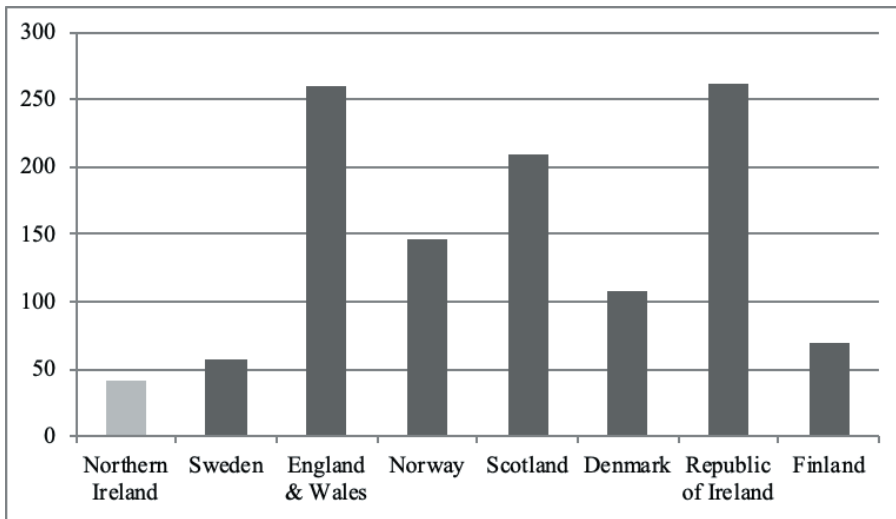


Fig. 11. Lawyers per 100,000 inhabitants in 2016.

It would be logical for the level of trust in the justice system also to have an effect on the demand for legal aid; if a system is trusted, it is less likely that a person will feel a need for legal representation. Interesting research on social attitudes in Europe has been carried out by the European Social Survey (ESS). Not all the nine jurisdictions included within this dissertation were included in the ESS work, but Denmark, Norway, Sweden Finland and the UK (as a whole, rather than divided into legal jurisdictions) are covered. Respondents were asked about their views on the police and criminal courts and the conclusion was drawn that “clear patterns emerge: the Nordic countries are most trusting of their police and courts and believe that their institutions are legitimate holders of power and authority”.¹³⁹⁰ In particular, the Nordic countries showed high levels of perceived common moral values with the police, and trust in courts’ procedural fairness and competence.¹³⁹¹

Blankenburg has pointed out that the relationship between legal aid and litigation levels is not straightforward; the two “vary independently of each other, presumably because legal aid helps to fund access to courts just as much as it leads the way to avoiding courts or even serves as an alternative to litigation”.¹³⁹²

¹³⁹⁰ Jackson *et. al.* 2011, p. 8.

¹³⁹¹ *Ibidem.*

¹³⁹² Blankenburg 1995, p. 178.

8.3 Systemic context

8.3.1 Strategies for achieving access to justice without legal aid

The role of legal aid in different jurisdictions cannot meaningfully be compared without an understanding of the extent to which other mechanisms contribute to access to justice in each system. There may be less need for legal aid in a jurisdiction where many disputes are dealt with in ways consistent with access to justice but which do not require parties to have legal advice or representation. Approaches to access to justice which avoid the need for representation may take the form of dispute resolution mechanisms outside the formal justice system or adaptations and variations within it, including structural differences in the operation of courts. Furthermore, the provision of legal representation funded by third parties, particularly legal expenses insurance, reduces pressure on legal aid.

8.3.2 Achieving access to justice outside the formal justice system

8.3.2.1 Policy perspectives

One of the ways in which governments can potentially achieve access to justice despite restricting legal aid is to provide alternative methods to resolve disputes fairly. Diverting problems away from the formal justice system saves court time (and potentially enables savings in the court budget) as well as reducing individuals' need for legal assistance in dispute resolution. Many alternative dispute resolution methods discourage legal representation and some even prohibit it, as a way of levelling the playing field without the public expense of legal aid.

The resolution of problems before they reach court can also be seen as desirable from a human perspective, particularly in family cases. As the Civil and Family Justice Review in Northern Ireland stated, “solutions found among families should be preferred, which leads to a consideration of mediation and other alternative dispute resolution prior to litigation”.¹³⁹³ In other civil cases, the preliminary report suggested that “unnecessary escalation of disputes should be emphatically discouraged and kept out of court wherever possible with increased emphasis on mediation and early neutral evaluation”,¹³⁹⁴ although the final report on civil justice¹³⁹⁵ did not propose any substantial structural changes in this regard.

In England & Wales, legal aid restrictions were said to have a role to play in encouraging the use of non-court based dispute resolution processes:

1393 Review of Civil and Family Justice in Northern Ireland: Review Group's Report on Family Justice, 2017, p. 14.

1394 Review of Civil and Family Justice in Northern Ireland: Preliminary Civil Justice Report, 2016, para. 27.11.

1395 Review of Civil and Family Justice in Northern Ireland: Review Group's Report on Civil Justice, 2017.

the Government's proposed reforms to legal aid are intended to encourage people, rather than going to court too readily at the taxpayer's expense, to seek alternative methods of dispute resolution, reserving the courts as a last resort for legal issues where there is a public interest in providing access to public funding.¹³⁹⁶

Common systems for resolving problems outside court are administrative tribunals and mediation. In family matters it will be seen that the jurisdictions under consideration have developed a wide range of structures. Concern has at times been voiced, though, about the non-public nature of such alternatives: "if dispute resolution is relocated into private, confidential fora, how do we know whether justice is being delivered, particularly for the less powerful?"¹³⁹⁷

8.3.2.2 Administrative tribunals and appeal boards

The use of the term 'tribunal' here requires some explanation. In the UK and, to a lesser extent, the Republic of Ireland, tribunals as referred to here are administrative dispute resolution fora tasked with hearing appeals in a particular sphere. The UK Courts and Tribunals Service website lists 24 different tribunals within its remit, covering various types of dispute including social security, employment, care standards, immigration and asylum, and war pensions. Some, including the Employment Tribunals and the Social Security Tribunals, have first-tier tribunals and also an upper-tier Appeal Tribunal. Tribunals are quasi-judicial administrative settings, designed to be accessible to lay persons,¹³⁹⁸ and representation is therefore rarer than in courts, as set out in the discussion of the scope of civil legal aid in Chapter 5. Legal aid is often not available for first-tier tribunals as "it has been assumed that lawyers and legal aid are not necessary to do justice in those alternative fora".¹³⁹⁹

Such tribunals aim to assist in the resolution of disputes without recourse to court and "were originally introduced to provide a proportionate and easy to use service, mainly for citizens appealing decisions of the state".¹⁴⁰⁰ Some of this thinking is long-term and remains relevant:

One of the key drivers of the development of citizens' remedies since the late nineteenth century has been a perception held by government policymakers that courts were not suitable for resolving the disputes that arose from modern schemes of public administration. They were thought to be slow, excessively formal, disproportionately costly, and the judges lacking in relevant expertise and unsympathetic to much regulatory and social welfare legislation and so likely to interpret it contrary to its intent.¹⁴⁰¹

1396 CP12/10, para. 1.8.

1397 Hunter, Barlow, Smithson and Ewing 2017, p. 240.

1398 Tribunals, Courts and Enforcement Act 2007 ss2(3)(a) and 22(4)(b). See also Jacobs 2016, Chapter 1.

1399 Mullen 2016, p. 70.

1400 Cm 9321, 2016, para. 5.1.

1401 Mullen 2016, p. 76.

However, it should be noted that tribunals are not restricted to appeals against administrative decisions; employment and care standards tribunals, for example, also cover disputes between individuals, albeit relating to statutory rights. The extent to which tribunals continue to provide access to justice without legal representation is under question, with the UK government accepting that “over time they have become complicated and slow to deal with, burdened with paper and unnecessary bureaucracy.”¹⁴⁰² There has even been a suggestion that it is inevitable that quasi-judicial institutions over time will become more court-like and formalistic:

A pilot study [...] found that the process of taking a claim to an [Employment Tribunal] was experienced as overly legalistic, time-consuming and extremely stressful. [...] The reason for this has been convincingly explained as arising out of a process of ‘institutional isomorphism’ by which an organisation becomes similar to another which operates in the same field where both experience coercive pressures by the body controlling their resources, in this case government.¹⁴⁰³

In England & Wales, the accessibility of employment tribunals was significantly reduced by the imposition of significant fees in 2013.¹⁴⁰⁴ However, the fees were subsequently found by the Supreme Court to be unlawful and were revoked, with repayments ordered of all fees already paid.¹⁴⁰⁵

The UK and Irish tribunals system is comparable to administrative appeal boards seen in some of the Nordic countries. In Denmark, in particular, Administrative Boards of Appeal play a “prominent part”¹⁴⁰⁶ in ensuring access to justice and “many conflicts are taken care of by tri-partite institutions of the welfare state”.¹⁴⁰⁷ These Boards are informal in nature and it is not usual for parties to be represented before them. Many decisions are made without oral hearings, but the Boards have investigatory powers. Legal aid is not available for representation before these Boards and thus their existence has the effect of reducing the burden on legal aid. Some Boards have a higher tier Appeal Board but where this is not the case, appeals can be brought before the courts, on limited grounds. Because the Boards deal with specific subject areas (for example, immigration, environmental law and social security law) cases can be highly technical and some argue that representation would be desirable to ensure fair hearing of issues.¹⁴⁰⁸

As will be seen below, separate administrative courts in Finland and Sweden decide administrative cases, often without oral hearings, and generally without representation for the parties. These, though, are formally courts and thus cannot

1402 *Ibidem*.

1403 Busby and McDermot 2016, p. 180.

1404 The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013.

1405 *R (on the application of UNISON) v. Lord Chancellor*, 2017.

1406 Conradsen and Götze 2014, p. 164.

1407 Blankenburg 1995, p. 181.

1408 See e.g. Ellersgaard Nielsen *et. al.* 2012, p.31-32.

be seen as mechanisms for diverting cases away from formal resolution.

8.3.2.3 Mediation

Some jurisdictions put the emphasis on early resolution by assisted agreement between the parties to a dispute. Diverting cases to mediation is a way to reduce pressure on courts (and legal aid) and reduce the need for access to formal justice.

In Norway, much emphasis is placed on attempting to resolve matters before court proceedings. To this end, an attempt at mediation is compulsory in many civil cases; matters must be dealt with by Conciliation Boards (*forliksråd*) before they can be brought before the court. The role of Conciliation Boards, as set out in the Civil Disputes Act,¹⁴⁰⁹ is to “achieve a simple, swift and cheap resolution of the case through conciliation or judgement”.¹⁴¹⁰ Boards cannot hear, *inter alia*, family or administrative law matters,¹⁴¹¹ but are available to the parties in most other types of civil case. In cases involving claims to assets of under 125,000 Norwegian kroner,¹⁴¹² the Mediation Board procedure must be used.¹⁴¹³ The Board can pass judgment when the parties are in agreement and in some cases, notably assets cases under 125,000 kroner and money claims where there is no applicable defence, at the request of one party only.¹⁴¹⁴ There are limited grounds for appeal to the District Court against a ruling of the Mediation Board.¹⁴¹⁵ It is noteworthy that the boards provide a combination of mediation and imposed resolution.

In England & Wales, mediation services are available for solving disputes non-judicially, but these have not made significant inroads other than in commercial cases and to some extent in family cases (see below). Some mediation services can be funded through legal aid.

8.3.2.4 Family law alternatives to court

Family law, in particular, is an area in which many jurisdictions try to reduce reliance on courts for resolving disputes. This is seen as being better for the ongoing relationship between parents and thus better for the children concerned. Furthermore, family disputes tend to make up a high proportion of non-criminal disputes, and therefore any success in keeping these out of court is likely to provide significant financial savings. All the Nordic jurisdictions have to a greater or lesser extent diverted private family law cases away from the ordinary courts.

In Sweden, financial issues arising on relationship breakdown are in the first instance dealt with completely outside the court system. In the case of a

1409 Tvisteloven, 2005, Chapter 6.

1410 *Ibidem*, § 6-1(1).

1411 *Ibidem*, § 6-2(1).

1412 Approximately 13,000€ in April 2018.

1413 Tvisteloven, 2005, § 6-2(2).

1414 *Ibidem*, § 6-10.

1415 *Ibidem*, § 6-14.

dispute concerning allocation of property following a relationship breakdown, one or both parties can apply to the court to appoint a “division of property official” (bodelningsförrättare), usually a practising lawyer, who will attempt a negotiated settlement. If agreement is impossible, the official will impose a division and an application to court will only occur if one of the parties appeals this decision. Legal aid is not available for the division of property process but, depending on the financial circumstances, up to 5 hours’ help from a division of property official can be reimbursed by the state.¹⁴¹⁶ Disputes concerning children are dealt with by the District Courts, but parents are encouraged to use local authority mediation services to try and agree child residence and contact issues before taking a case to court.

Local authorities also play a role in Denmark, where civil disputes in family matters do not go directly to court but are first considered by the regional State Administration (Statsforvaltningen)¹⁴¹⁷ whose nine offices administer various areas on a local level. They attempt to settle family cases through mediation and negotiation and, if unsuccessful, forward the matter to court for a decision to be made. Similarly, in Iceland, mediation is compulsory in custody disputes before a court application can be made.¹⁴¹⁸

In Finland, family cases concerning residence of children and contact with their parents can, but need not, be dealt with by the courts. An equally binding outcome can be achieved with the help of local child welfare services. A welfare officer is able to give the parents information and advice and assist in reaching an agreement. The agreement can then be confirmed by the social welfare board, making it legally enforceable.¹⁴¹⁹ Mediation is also available, if couples are willing to try and resolve their disputes through this means.

Access to the courts in many family matters (as well as civil cases, see above) in Norway is conditional upon an attempt at mediation having failed. In family cases, free mediation is available at local family welfare offices, and it is compulsory for couples with at least one child under 16 to undergo mediation before divorce or separation.¹⁴²⁰ Agreements about child access and related matters made between the parties can be given legal force by the County Governor without the need for a court process, if both parents agree to the administrative processing of the matter.¹⁴²¹

In the UK, conversely, the norm is still for family disputes to be dealt with by the courts, and the resulting burden on the legal aid fund is high. In the financial year 2017-2018, £546 million (or 91%) of the total £601 million expenditure on civil legal aid for representation in England & Wales, was spent on family cases.¹⁴²² Strikingly, the legal aid system in England & Wales has been

1416 Äktenskapsbalken, 1987, Ch. 17, para. 7a.

1417 Further information on their website at <http://www.statsforvaltningen.dk/site.aspx?p=5466>.

1418 Barnalög, 2003, Article 33a.

1419 More information is available from the Department of Justice website.

1420 Barnelova, 1981, § 51 and Ekteskapsloven, 1991, § 26.

1421 Barnelova, 1981, § 55.

1422 Ministry of Justice, *Legal Aid Statistics quarterly, England and Wales, January to March 2018*.

explicitly used as a tool to encourage people not to use the courts in family cases, but to handle disputes through mediation instead. The government's proposals which led to the Legal Aid Sentencing and Punishment of Offenders Act 2012 stated:

The Government believes that, wherever possible, it would be in the best interest of those involved in private law family cases which do not involve domestic violence to take a more direct role in their resolution, using mediation and keeping court proceedings to the minimum necessary. For this, and the other reasons set out below, we consider that legal aid can no longer be justified routinely for such cases. This approach is consistent with our wider policy of diverting cases away from court, which often gives rise to higher costs, both for those directly involved and the taxpayer.¹⁴²³

Unfortunately, this aim was not achieved and use of mediation in fact fell in the year after the reforms.¹⁴²⁴

There is concern in Northern Ireland to improve the performance of the family justice system and to this end a major review of family justice was recently undertaken with the aim of “improving access to justice; achieving better outcomes for court users, particularly for children and young people; creating a more responsive and proportionate system; and making better use of available resources, including through the use of new technologies”.¹⁴²⁵ A final report was published in September 2017 and, whilst it is clear that reliance on courts for many, if not most, family disputes will continue, the recommendations include a “fresh emphasis on solutions outside the court system, with more accessible mediation and educative parenting programmes in private law cases involving children, with a special focus on the future well-being of children and not on the conflict between the adults”.¹⁴²⁶

The approach to family breakdown in a jurisdiction is clearly a very significant factor affecting legal aid:

The practical impacts of governments' human rights obligation to provide legal aid [...] depend on the structure of their judicial systems. If one state—such as Ireland—practises complex and restrictive rules for divorce that demand that the irreversible breakdown of the marriage is established, and if divorces are available only through complex court proceedings, then the individual need for legal aid can be considerable among poor people who want to divorce. If other states—such as Finland and Norway—have no-fault divorce based on the request of one of the parties, and process divorce administratively, then brief legal advice might suffice in most cases.¹⁴²⁷

1423 CP12/10, para. 4.69.

1424 Law Society of England and Wales 2014, p. 24.

1425 Review of Civil and Family Justice in Northern Ireland: Review Group's Report on Family Justice, p. v.

1426 *Ibidem*, p. ix.

1427 Johnsen 2018, p. 242.

Further characteristics of the jurisdiction are also important: “liberal states, however, might see far more divorces than do restrictive ones, and might have to establish schemes capable of handling such cases for large numbers of people.”¹⁴²⁸ As family law is a significant area for legal aid spend, the extent to which family-related dispute resolution processes are in demand, formal and complex will have a significant effect on legal aid in a jurisdiction.

8.3.3 Achieving access to justice inside the formal justice system

8.3.3.1 Non-legal aid formal justice system solutions

Even in cases which are dealt with through the formal court system, differing approaches can be seen in how to ensure individuals are able to meaningfully engage with the process. One major factor is the level of assistance the court itself gives to a litigant and how active the judge is in directing the progress of a hearing. In two of the Nordic countries (Finland and Sweden), administrative matters are heard separately and require an enhanced level of court involvement. More generally, the differences between civil and common law systems may affect engagement by the individual. In addition to structural variations, there is of course the possibility of levelling the playing field by paying for representation for parties who would otherwise be at a disadvantage due to lack of funds. Whilst legal aid is one way of doing this, legal expenses insurance also provides such access for a considerable number of people in the jurisdictions under consideration.

8.3.3.2 Structural solutions in the administrative court

Administrative law is subject to particular rules in many jurisdictions. The Nordic countries all have overarching Public Administration Acts, which specify that at the point of contact between a member of the public and the administrative body, the latter has a duty to advise and assist.¹⁴²⁹ In Norway, the government has made it clear that legal aid is not intended to replace this “traditional information and guidance duty”.¹⁴³⁰

In Finland and Sweden, as seen in Chapter 2, there are separate court streams for administrative cases, which are often dealt with on papers only without an oral hearing. In both countries, administrative court judges have a responsibility to ensure that the matter has been properly investigated by the authorities¹⁴³¹ and in Finland, the court (or other appeal body) has an additional duty to order further investigations and evidence collection as necessary.¹⁴³² As a consequence

1428 *Ibidem*.

1429 Finland, Förvaltningslag, 2003, 8 §, para. 1; Denmark, Forvaltningsloven, 2014, § 7; Norway, Forvaltningsloven, 1967, § 11; Sweden, Förvaltningslag, 1986, 4 § (the new Förvaltningslag in force from July 2018 contains a similar provision at 6 §).

1430 St.meld. nr. 26 (2008-2009), para. 1.6.

1431 Sweden, Förvaltningsprocesslagen, 1971, 8 §; Finland, Förvaltningsprocesslag, 1996, 33 §.

1432 Förvaltningsprocesslag, 1996, 33 §.

of this approach, legal representation of parties is rare in the administrative courts in these two jurisdictions.

Denmark and Norway have unified court systems where civil, criminal and administrative cases are all heard by the same courts. In Denmark, however, as seen above, administrative boards of appeal divert most administrative cases away from the courts at first instance. Additionally, legal aid is not available for advice concerning the actions of an administrative authority¹⁴³³ because it is intended that the duty to advise, which applies to all administrative authorities, should suffice. However, there are some concerns that the conflict of interests between the authorities and their clients may make the provision of good, impartial advice unlikely.¹⁴³⁴

In Norway, there is no general reliance on administrative boards of appeal and indeed Conciliation Boards cannot hear administrative law matters.¹⁴³⁵ Therefore, Norway is the only one of the Nordic jurisdictions in which administrative law matters are fully integrated into the normal courts although, as seen, the duty of administrative authorities to advise is important.

In the UK, much administrative legal business is diverted to tribunals, as seen above. However, matters which do reach the judicial system are dealt with in the ordinary courts. Access to the courts in administrative law matters is restricted, due to the nature of the judicial remedy available. Essentially, decisions can only be annulled or rectified by a court if unlawful, which requires more than that the wrong decision was reached. The remedy in question is judicial review, which has as its object of consideration the first instance decision, rather than the merits of the matter which was decided; it is not a re-hearing of the evidence presented at the initial stage. Decisions which were improperly made can be challenged on specific grounds which have been developed through caselaw and which are not codified. In summary, a decision can be overturned if it is unlawful (which includes decisions made in error of law or fact, decisions made which went beyond the powers of the decision-maker and decisions on the basis of irrelevant factors), irrational or if an improper procedure was followed (breach of statutory procedures or the rules of natural justice).¹⁴³⁶ The court cannot replace its own decision for that made by the administrative authority, but can only check that the decision was not so unreasonable that no reasonable person could have made it, bearing in mind that “not every reasonable exercise of judgment is right, and not every mistaken exercise of judgement is unreasonable”.¹⁴³⁷

A judicial review does not have the same strength as an appeal on the basis that the decision was unreasonable; “On an appeal the question is ‘right or

1433 Retsplejeloven, 2017, § 323(4)(4).

1434 Ellersgaard Nielsen *et. al.* 2012, p.35.

1435 Tvisteloven, 2005, 6-2 §, para. 1.

1436 Proportionality is only a ground of review in cases concerning EU law or human rights.

1437 *Re W (an infant)* [1971] AC 682, p.700, per Lord Hailsham LC.

wrong?’ On review the question is ‘lawful or unlawful?’¹⁴³⁸ It has been said that “neither the possibility of judicial review nor of complaining to an ombudsman could be considered a satisfactory substitute for appeal or review on the merits”.¹⁴³⁹ The requirements for judicial review are already strict, but moves are underway to make it even harder to obtain a hearing for a court to consider the lawfulness of an administrative decision. Despite its shortcomings, judicial review is thus currently being defended in England & Wales:

We must ... be concerned if judicial review becomes less available to citizens both because individuals directly affected by decisions may not have access to a remedy and because challenges to unlawful policies which govern many decisions may become less likely or be delayed.¹⁴⁴⁰

With the exception of Norway, it can be seen that the jurisdictions endeavour to achieve access to justice in administrative matters either outside the formal court system (Denmark), through less formal court processes (Finland and Sweden) or by limiting access to formal court proceedings in combination with the availability of some extra-judicial routes (the UK and Republic of Ireland). Whilst the reasoning is often based in the political structure of a state, the outcomes include a reduced need for legal representation amongst those with administrative law grievances.

8.3.3.3 The civil/common law divide

Another element of a judicial system which may affect the need for litigants to be represented, and the extent and therefore expense of that representation, is the nature of the legal system: civil or common law. This may on the face of it be a useful explanation:

There seems to be an easy explanation for the national differences which lies in the role which lawyers play in common law courts as compared to the civil law tradition. Comparative lawyers like to emphasise that adversarial procedure lays the full responsibility on argumentation and investigation for each party in court on to the lawyers representing their case, while in an inquisitorial procedure the judge has to actively search out the facts and legal arguments for both sides.¹⁴⁴¹

However, some scholars reject this explanation for the different levels of legal aid spending, at least in Europe:

1438 Wade and Forsyth 2014, p. 26.

1439 Mullen 2016, p. 81.

1440 *Ibidem*, p. 84.

1441 Blankenburg 1992, p. 106.

I do not regard such arguments to provide sufficient explanation for the lack of legal aid in many European countries. Procedural representation is only a small fraction of what lawyers do for their clients; consultation, negotiation and advice how to avoid litigation being more important than representation in court. Furthermore: an explanation along the lines of the procedural role of lawyers in the civil law tradition would have to hold true for all countries on the European continent alike, because they do not differ much in their procedural law systems. What we observe with respect to legal aid, however, are great differences from one country to the next.¹⁴⁴²

Blankenburg agrees that “representation in court is only a fraction of lawyers work, and it should also not exhaust what legal aid is subsidising. Most of the public’s needs concern advice and assistance before considering court action, and studies of lawyer work points in the direction of precourt activities avoiding litigation as much as enabling parties to engage in it”¹⁴⁴³

Even the basic assumption of a much greater role for the judge in civil law systems is challenged by Zuckerman:

The court in civilian systems may have a greater role in managing the hearings and in eliciting witness testimony, but the process remains strictly adversarial [...]. As in England, the parties define the issues. The continental civil court has no greater power than the English court to decide what matters to investigate. Since legal representation is compulsory, the litigation process is conducted by lawyers and not their clients. The advocates present their parties’ allegations and indicate to the court the evidence they wish to adduce and witnesses they wish to call. The court summons only witnesses indicated by the parties; it does not seek witnesses of its own motion. While it is true that witnesses in civilian systems are questioned by the court and not the parties’ advocates, the court tends to pursue the line of questioning suggested by the advocates. This is only to be expected since it is the advocates who define the issues and therefore determine the matters that require examination.¹⁴⁴⁴

He is also dubious about the possibility of systems becoming more inquisitorial in order to avoid the need for expensive legal representation for the parties. Referring to the situation where a litigant in person may need to cross-examine a vulnerable witness, he considers a case where the Court of Appeal decided that if necessary the public purse would have to pay for representation via the court’s own budget, and concludes:

1442 *Ibidem*.

1443 Blankenburg 1995, p. 182.

1444 Zuckerman 2014, p. 361.

Providing legal representation at the court's own expense is a novel and radical solution, one which may well be challenged by the treasury. For our purpose, however, the important aspect to note is that the Court of Appeal has recognised that there are situations where it is impossible to do justice without an adversarial process in which all parties are legally represented. No increase in the inquisitorial nature of the proceedings can make up for the adversarial deficit in such situations.¹⁴⁴⁵

Zuckerman does, however, accept that “while there is no alternative to the adversarial process, it is the case that there is room for improving the adversarial process so as to make it easier for unrepresented litigants to manage”.¹⁴⁴⁶ This is particularly pertinent at present in England & Wales. Due to cuts in legal aid, self-representation in civil cases is increasing, according to the government¹⁴⁴⁷ and senior judges have expressed concern that this may be leading to miscarriages of justice.¹⁴⁴⁸ The review of civil justice mentioned in Chapter 1 is considering the sorts of adaptations that Zuckerman may have had in mind, to make it easier for unrepresented litigants to navigate the judicial system.

It has also been suggested that “inquisitorial systems are especially conducive to alternative non-legal forms of dispute resolution [...] in adversarial jurisdictions [...] there might be entrenched, system-related obstacles to non-legal routes to justice”.¹⁴⁴⁹ If this is so, there would very likely be a consequent effect on demand for legal aid.

8.3.3.4 Legal expenses insurance

Whatever the successes of the government in keeping cases out of the formal court process, or making these processes easier to negotiate by unrepresented parties, there are inevitably some cases which end up in court and in which one or more parties need representation. Particularly if one of the parties is able to obtain legal representation by paying privately, the need for at least relative equality of arms may require funding to be found to pay for representation also for the other party. There are two main ways in which this is achieved in the jurisdictions studied here: legal expenses insurance and legal aid.

As a matter of government policy, legal expenses insurance is expected to significantly reduce the financial burden on the state of providing legal assistance in several jurisdictions, most notably Sweden. One of the major reforms implemented there in 1997 was that access to legal aid was ended for those with legal expenses insurance. The government actively negotiated with insurance companies so that legal expenses insurance was included in home insurance policies under conditions which dovetail with the restructured legal aid scheme. Unifying features included the harmonisation of fees paid

1445 *Ibidem*, p. 367.

1446 *Ibidem*, p. 372.

1447 House of Commons Briefing Paper 07113.

1448 New Law Journal, 4 December 2014.

1449 Moore and Newbury 2017, p. 32.

to lawyers under insurance and legal aid, although under insurance schemes lawyers can and often do charge an additional fee directly to the client, thus increasing the *de facto* fees, which is prohibited under the legal aid scheme.¹⁴⁵⁰ Legal expenses insurance tends not to cover employment cases, or family cases which arise within a year of divorce or separation. Furthermore, insurance tends not to cover low-value cases (generally those under half the ‘base sum’).¹⁴⁵¹

In addition to those who have applicable legal expenses insurance, in Sweden legal aid will also be refused to those who ought to have such insurance, unless there are special reasons to grant legal aid upon consideration of the type of case and its importance to the individual.¹⁴⁵² The Legal Aid Agency uses a rule of thumb that it should not be found that those on a very low income should have had insurance. The interpretation of the rule on “ought to have had insurance” has been the subject of a number of court cases which form part of the Collection of Interesting Precedent issued by the National Courts Administration. These include a decision of the Supreme Court that those entirely dependent on income maintenance benefits who do not have possessions worth insuring should not be expected to have legal expenses insurance.¹⁴⁵³ However in another case it was made clear that a mixed income including social security benefits should not be assumed to mean that a person need not have legal expenses insurance, particularly as the Social Services Act provides that home insurance should form part of the minimum costs covered by social security.¹⁴⁵⁴

The Court of Appeal has held that a person on low income who had only recently found accommodation after a prison sentence should also be allowed legal aid despite not having insurance¹⁴⁵⁵ and it has been confirmed that the overall economic and personal circumstances of the applicant should be considered as a whole.¹⁴⁵⁶ However, where a case comprised a dispute about the purchase of a car, the fact that the legal aid applicant was in the position to purchase a car meant that he ought to have had insurance covering the situation for which he sought legal aid;¹⁴⁵⁷ the same applied in the case of purchase of a horse.¹⁴⁵⁸ An applicant who wrongly believed his insurance would cover the circumstance which arose was not entitled to legal aid, and ought to have had effective insurance cover.¹⁴⁵⁹ The “ought to have had insurance” rule is not generally applied in family cases as these are considered to be of such importance

1450 Rättshjälpslagen, 1996, 29§ and Rättegångsbalken, 1942, Chapter 21, 10 §.

1451 This ‘prisbasbelopp’ is set annually; in 2018 it is 45 500 kronor, and thus legal expenses insurance will generally not cover cases worth under 22,750 kronor or about 2,300 €.

1452 Rättshjälpslagen, 1996, 9 §, para. 2.

1453 Ö647-99, 1999.

1454 Ö1327-99, 2001.

1455 RH 1998:26, 1998.

1456 RH 1998:64, 1998.

1457 Rättshjälpdsnämnden 405-1998.

1458 Rättshjälpdsnämnden 623-1998.

1459 Rättshjälpdsnämnden 478-1998.

that the exemption applies, as illustrated by various decided cases.¹⁴⁶⁰

Under Danish legislation, legal aid is not available if the person has legal expenses insurance which would cover the case,¹⁴⁶¹ although it may be available if the costs exceed the maximum payable under the insurance.¹⁴⁶² Legal expenses insurance is a standard element of household insurance in Denmark and it is felt that legal aid and legal expenses insurance together successfully ensure that there is not a significant problem with unrepresented litigants. However, it should be noted that insurance does not generally cover family matters or employment or industrial injury cases which have traditionally been part of the operations area of trades unions.

In Norway, if a potential litigant has legal expenses insurance which covers the case, he will not be eligible for legal aid under the subsidiarity rule.¹⁴⁶³ Likewise, in Finland, individuals with legal expenses insurance will not be eligible for legal aid for cases covered by that insurance,¹⁴⁶⁴ which is an automatic additional element in most household insurance policies. Legal aid may be available to cover additional legal work beyond the limit of the insurance policy and in some cases also for the insurance excess payable by the client.¹⁴⁶⁵ The 'ought to have had insurance' rule does not apply in Denmark, Norway or Finland.

In the UK and Republic of Ireland, legal expenses insurance is not an explicit barrier to obtaining legal aid. This may be because of a very different insurance market to that in the Nordic countries; the UK Financial Ombudsman has said that there is "generally no cover available for: bringing/defending defamation proceedings; or funding actions where state funding is more widely available".¹⁴⁶⁶

8.3.3.5 Legal advice provision outside formal legal aid

There exist many other types of arrangement which provide legal advice to the public, which are not the subject matter of the thesis despite the fact that they fulfil a very similar purpose to legal aid, and indeed are included in some studies of legal aid.¹⁴⁶⁷ Such schemes include pro bono advice clinics run by the legal professions; charitable organisations providing advice which can be partly legal; student-staffed legal advice clinics and advice services provided by administrative bodies as part of their statutory duties. In addition, in some jurisdictions legal professionals agree to waive their fees in cases which have particular public importance or which are significant for the client, if the client cannot afford to pay and legal aid is not available.

1460 See e.g. Ö 38/00; Ö1327-99.

1461 Retsplejeloven, 2017, § 325(1).

1462 *Ibidem*, § 336(1).

1463 Rettshjelploven, 1980, § 5.

1464 An applicant must produce any relevant policies when making an application for legal aid. Statsrådets förordning om rättshjälp, 2002, 8 §, para. 2.

1465 Rättshjälpslag, 2002, 3 §.

1466 http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html.

1467 Halvorsen Rønning and Hammerslev 2018.

The Norwegian legal aid system is a good example of such an arrangement. The public legal aid scheme focuses on providing free legal advice and representation in areas of law which are felt to particularly impact upon individuals' lives, as seen above in Chapter 5. One outcome of this approach is that many areas are not covered, including many money cases and others, such as social welfare cases, which might be thought of as high impact. In an attempt to deal with this unmet need, many not-for-profit organisations provide legal advice free of charge to members of the public; some of these are funded in whole or in part by the Department of Justice and Public Security,¹⁴⁶⁸ thus providing an alternative from the same arm of government that funds the formal legal aid scheme.

Similarly, in Denmark, private legal aid institutions provide much of the level 2 and 3 advice. There is a considerable variety between institutions; they may be open part- or full-time and some specialise in particular subject areas. At these levels there are financial eligibility criteria which must be applied by lawyers, but not all private legal aid institutions apply a means test and legal aid institutions may provide advisory assistance in areas of practice which are excluded from coverage by lawyers under the Administration of Justice Act. Furthermore, legal aid institutions offer level 2 and 3 services free of charge to the recipient; the 50% or 25% charge is not applicable. Institutions also provide assistance in areas which traditionally have not been covered by lawyers in private practice, such as conditions of employment and debt restructuring.¹⁴⁶⁹ Such institutions make a significant contribution to the provision of legal advice, operating partly within the formal legal aid scheme but partly outside it, with more generous rules and additional funding.

Ad hoc, but well established, not-for-profit NGOs and volunteer schemes provide wide-ranging services in the UK and Republic of Ireland.

The narrow definition of legal aid used in this thesis may lead to an impression that Cousins' 1994 finding¹⁴⁷⁰ that the vast majority of legal aid schemes focus on traditional legal advice and representation still holds. Caution should however be exercised as many services which would counter this conclusion have not been studied in detail here.

8.4 Conclusions: the role of legal aid

It has been seen that the jurisdictions under comparison show significant disparity on a number of levels. The use of administrative tribunals and appeal boards, mediation and mechanisms to divert family cases away from court, as well as court structures themselves, all vary and affect the need for legal representation. Furthermore, there can be multiple sources of legal help for the

1468 E.g. JussBuss <http://foreninger.uio.no/jussbuss/>.

1469 Ellersgaard Nielsen *et. al.* 2012, p. 23.

1470 Cousins 1994, p. 114.

indigent in addition to legal aid. These variations may be historic or the result of recent governmental policy, but appear to have little direct relation to the amount spent on legal aid.

Some structural patterns are discernible: the jurisdictions of the UK and Republic of Ireland share similar approaches to administrative tribunals, to family law cases and to legal expenses insurance, and are all common law systems, except for Scotland, which is a mixed system. The Nordic countries are all civil law systems with, in the main, either separate administrative law courts (Sweden and Finland) or administrative appeal boards (Denmark) which remove most administrative law matters from the courts. They also have active legal expenses insurance markets which provide meaningful cover for a considerable proportion of the population, and mechanisms which remove a large part of family law dispute resolution from the courts. Despite these similarities within the two groups, and the differences between the groups, there is no pattern showing higher spend on legal aid per capita in one of the groups.

Furthermore, none of the economic or social factors examined in the first part of this chapter revealed a correlation with legal aid spend, suggesting that there are complex factors behind the cost of legal aid in a jurisdiction. It is possible that these may be a combination of the matters considered in this chapter, but the necessary statistical analysis is not within the remit of this thesis or the competence of the author. Alternatively, other factors not contemplated may be at play, including political considerations.

9. Chapter 9: Conclusions

9.1 Introduction

The introductory chapter of this thesis posed five research questions:

- (i) What are the organisational forms and procedures for legal aid decision-making and for the oversight of such decisions in the relevant jurisdictions?
- (ii) What are the material rules limiting decision-making discretion in legal aid?
- (iii) What is the nature and extent of the connections between legal aid, international human rights law, and the rule of law, and to what extent do the jurisdictions comply with the relevant obligations?
- (iv) How do the procedural and material aspects of legal aid vary between jurisdictions and what reasons might there be for this variation?
- (v) Can transfer or learning between jurisdictions take place within the sphere of legal aid and, if so, how?

The first two questions have been addressed in detail in Chapters 3 to 6, which were largely concerned with the minutiae of legal aid decision-making structures and with the material content of decisions. Further detail is not needed for conclusions to be drawn, but a summary will be given of the findings of those chapters. The third research question was also addressed in the core chapters, as part of the incorporated analysis, as well as being considered in theoretical terms in Chapter 1. However, as a measurement against international human rights law standards is an important part of the comparative methodology of this thesis, it will be necessary in this final chapter to take an overall view of the measurement of the legal aid systems against that benchmark, and to make normative recommendations.

Throughout this thesis, an attempt has been made to draw comparisons between the nine jurisdictions, and to identify any patterns which might be present within each topic being considered. At the level of detail, thus, the fourth research question has been addressed, but further analysis is now

needed to identify similarities, differences and patterns in the overall systems, as well as to tentatively consider possible reasons for these. A great deal of variation has been revealed in the legal aid and public defender schemes of the Nordic countries, the UK and the Republic of Ireland, and in their context, indicating that these are complex systems which may have a delicate, symbiotic relationship with the societies in which they operate. In order to answer the fifth research question, which asks whether learning or transfer between systems is possible in practice, an understanding of these patterns must be developed, and an attempt to do this will be made in this conclusive chapter.

In addition to answering the research questions, this thesis has also highlighted the complexity of the administration of legal aid, and the challenges of comparing schemes in different jurisdictions. There is a clear need for further research encompassing more jurisdictions, if the comparative understanding of legal aid is to be of practical benefit in the establishment of new schemes and the transformation of existing systems. This comparison of nine jurisdictions has enabled insights into the connections between the various elements of a legal aid system, and the interrelationship between the material content of rules and the policy positions they signify. These observations inform a proposal for the development of a framework for the systematic analysis of legal aid systems, which will constitute the final part of this chapter.

9.2 Overview of substantive findings

It was established in Chapter 2 that judicial systems and legal professions can be considered to be the operational background for a comparison of legal aid, and that these elements vary between the Nordic countries, the Republic of Ireland and the jurisdictions of the UK. The discernible patterns of these factors will be considered below. The distribution of legal aid work amongst various categories of lawyers, and sometimes non-lawyers, was also considered in the chapter, and the distribution of legal aid work was found not to correlate to the structure of the legal profession overall.

State-funded assistance for criminal suspects and defendants was considered in Chapter 3, with an examination of criminal legal aid systems and public defender schemes which considered both organisation and qualifying criteria. The two types of organisation were found to be relatively similar in practice, as public defender work in the Nordic countries is performed by private practitioners. However, there are differences in the financial implications for clients of the system, and in the detail of the criteria for eligibility. Overall, though, the criminal defence assistance available throughout the jurisdictions considered is relatively similar from the perspective of a client. This may be surprising given that the schemes are nominally of two different types, whilst civil legal aid is, on the face of it, of the same nature throughout the area yet shows greater variation.

The greater complexity of the procedural and material requirements for civil legal aid necessitated, within this thesis, three separate considerations: of decision-making and appeals, scope, and merits criteria. The research identified private lawyers, government agencies and courts as the three groups of first-instance decision-makers and found that these groups were used in different configurations in the jurisdictions, with consequent differences in the extent to which indirect public administration is used for legal aid. In particular, it was seen 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.

Scope restrictions were found to be a significant mechanism for limiting civil legal aid and thus maintaining control over expenditure. However, the policy basis for such restrictions is often insufficiently explained, given the serious effects upon access to justice of these material rules. As with other aspects of the civil legal aid systems, there was great divergence between the schemes on subject scope with some interesting and unexpected patterns which will be considered below.

Despite the evident wide diversity of merits tests, four main significant criteria were found to be in use: need for representation; reasonableness; prospects of success; and proportionality between cost and benefit. The manner of the application of these criteria, and their combination with each other and with other less-used factors, produce the variation described in Chapter 6. However, despite some unifying themes, such as the universal presence of some form of reasonableness test, it is difficult to find similarities between jurisdictions. Therefore patterns were not found in the application of the merits tests overall, with the exception of the reliance on prospects of success as a decisive factor, as seen below.

It should be noted that the division of the material criteria for civil legal aid into 'scope' and 'merits' proved to be, to some extent, artificial. There is an overlap between merits tests and other eligibility criteria, which is particularly evident in the Icelandic legislation which does not separate the two elements but includes case type as one of the elements to be considered alongside other matters such as prospects of success. Even where the legislative scheme separates the components, there can be different approaches to the same concept; for example, importance to the client can be a factor used in deciding whether a case is in scope, or part of the relevant merits criteria. Nonetheless, as both aspects are within the remit of this thesis, the relevant material elements of civil legal aid eligibility have been considered in one or other chapter.

Continuing the theme of wide variation, the reach and content of legal aid were found to diverge within the jurisdictions. The percentage of the population which is financially eligible for legal aid ranges from about 25% to about 75%,

circumscribed by a number of different requirements. Availability of lawyers willing to carry out legal aid work is also a significant factor for access to publicly-funded services. Almost universally, private practitioners are unhappy with the low rates of pay and high levels of administration which accompany legal aid work, but even where the state directly employs lawyers to provide legal aid services, sufficient access is not guaranteed, as illustrated by the waiting times for assistance from the Legal Aid Board offices in the Republic of Ireland. All the legal aid systems are reliant on there being lawyers willing to undertake work for lower rates of pay than would be possible in other areas of legal practice, although opinions differ as to whether such lawyers are cynically using legal aid as a convenient complementary income which it is possible to manipulate to financial advantage, or whether they are desperately trying to keep their practices afloat in the light of falling real incomes.

No easy explanations for the disparity of legal aid schemes were found in the wider social or economic context. The structures of the judicial systems, and in particular the extent to which cases are diverted away from formal justice solutions, do follow clear patterns, with a different approach being taken in the Nordic countries compared to the other jurisdictions. Whilst there is no direct correlation with the expense of the legal aid scheme, these findings are important when attempting meaningful comparison of legal aid systems.

9.3 Compliance with international human rights requirements

9.3.1 Human rights as a benchmark

The relevant provisions of international human rights treaties, and their application by treaty bodies, have been referred to throughout this thesis as they apply to the topics under discussion. These international requirements can be used as a neutral benchmark against which the different legal aid schemes can be measured,¹⁴⁷¹ to make the comparison valid and as objective as possible. However, in using this method it must be borne in mind that:

In the human rights setting, legal aid is perceived as one of several vehicles for access to justice. It is part of a broader rule of law and access to justice obligation for governments. Others include accessible courts, simple procedures, alternative dispute resolution (ADR), conflict prevention measures, such as legal planning, educational measures to ensure that people themselves are legally competent, etc.¹⁴⁷²

Thus, an absence of legal aid for a particular case will not amount to a breach of the international obligations of the state if legal assistance is not needed for the individual to achieve access to fair dispute resolution. However, the discussion in Chapter 6 established a caveat to the discussion of legal aid as an element of

1471 Michaels 2006, p. 375.

1472 Johnsen 2018, p. 238.

access to justice. The explicit provisions of the human rights treaties refer to fair trial (or hearing), rather than to access to court (or to justice); the latter concept has developed through the interpretation of the provisions by the treaty bodies but has gained, it is submitted, a pre-eminence over the explicit provisions.

This tendency to ignore fair trial rights skews the discussion of human rights as applied to legal aid; in particular, it changes the question posed to determine whether the absence of legal aid is acceptable. When the focus is on access to justice, the question asked is whether there are mechanisms which would enable that individual to have meaningful access to justice without legal aid. However, if fair trial is allowed its proper place in the discussion, the question becomes whether the individual has a right to use court to resolve the dispute and, if so, whether a potential court hearing would be fair if this party was not represented, even if the other party does obtain representation. The fair trial aspect has sometimes been addressed by the European Court of Human Rights, but only as a second issue after consideration of access to court:

Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in spite of all the difficulties, the question may nonetheless arise as to whether this procedure was fair.¹⁴⁷³

The second question posed above is not only necessary to address the human right to fair trial but also must be asked in defence of the rule of law. The rule of law requires equal access to the law and equality before the law; an access to justice focus can work against equality by leading to the establishment of different justice processes for those who are of limited means, whilst the formal court-based justice system becomes the preserve of the well-to-do. Alternative methods of dispute resolution undoubtedly have their place, but only if they represent a real choice by the parties to the dispute to eschew the courts. If, however, a person of low means cannot exercise the option to go to court due to financial difficulties, there is not equal access to the courts and thus no equality before the law. Furthermore, it must be remembered that the dispute resolution venue may be imposed by the party who commences the action, and an individual defending a court case also has the right to a fair hearing, an issue ignored by many discussions on access to justice which focus on the person wishing to instigate the process.

As noted in Chapter 1, the rule of law will require legal aid in some cases in all jurisdictions unless: either the judicial system and laws are so simple that any individual could understand and use them without help or all disputes which might ever involve a person with limited financial means are capable of binding resolution through a non-judicial process which provides a fair hearing

1473 *Laskowska v. Poland*, 2007, para. 54.

without representation of the parties. If the latter, it must be impossible for one of the parties to choose to resolve proceedings through a judicial route unless the other party agrees and impossible for one party in judicial proceedings to be represented if the other is not. These conditions are not met in Europe and thus legal aid is a necessary part of the protection of the rule of law, in addition to, and with a wider reach than, the role it plays in access to justice.

The legal aid jurisprudence of the European Court of Human Rights, which forms the bulk of the human rights praxis noted in this thesis, often lacks consideration of the explicit fair trial right in Article 6 and focuses on the implied right of access to court, with some limited application of an implied right to equality of arms, as discussed above in Chapter 6. Guidance as to the application of the right to fair trial or hearing is thus inadequate, and a discussion of the compliance of the legal aid systems of North-West Europe with this right must rely largely on theory. In addition to consideration of the Court's jurisprudence, reference will also be made to the role of legal aid in upholding the rule of law, in the following argument.

9.3.2 Evaluation of criminal assistance in North-West Europe

As has been seen, the relevant treaty provisions are different for criminal and civil cases and therefore, as in the main body of this thesis, it is appropriate to consider them separately here. In both types of case (and in administrative cases, as established by the jurisprudence of the Court),¹⁴⁷⁴ Article 6(1) provides the right to a fair and public hearing; in non-criminal proceedings, this is the provision from which a right to legal aid can be implied. In criminal cases, however, Article 6(3)(c) explicitly states that every person charged with a criminal offence has the right to be given legal assistance with his defence free of charge, albeit that this right is limited to situations where the interests of justice so require and the defendant does not have sufficient means to pay for legal assistance. In cases brought under Article 6 concerning criminal legal aid, it is unsurprisingly the more specific provisions of subsection 3(c) which have been relied upon, with the consequence that the judgments deal largely with the application of the 'interests of justice' test.

The explicit nature of the requirement to provide state-funded legal assistance with criminal defence to those with insufficient means to pay for their own defence may explain why the right is well-observed in the jurisdictions under consideration.

The 'interests of justice' jurisprudence of the European Court of Human Rights takes the approach of considering all the circumstances of the case, and does permit the exclusion of very minor matters such as traffic offences from eligibility for legal aid or a public defender. It has been seen that the UK jurisdictions and the Republic of Ireland use the same test, the interests of justice, as the merits selection criterion for criminal legal aid eligibility, with

1474 See e.g. *Aerts v. Belgium*, 1998.

the effect of ensuring compliance with Article 6, as long as the test is applied appropriately and in accordance with the interpretation of the Court. Whilst there is not an explicit interests of justice test in the Nordic public defender schemes, the combination of relevant factors in deciding eligibility amount to a similar test to that evident from the Court's praxis. The human rights obligation does not in this instance assist in differentiating between the jurisdictions, as they all comply; it is the method of compliance which is varied and of interest, and this will be considered below.

In criminal cases, Article 6 has also been interpreted by the Court as requiring the provision of legal assistance early in criminal proceedings, including during questioning at the police station. Again, this is now provided by all the jurisdictions although in Norway there is currently no general right to assistance pre-trial unless in custody. At the other end of the proceedings, after conviction, legal aid is also, according to the Court, to be made available for appeals. The criteria for deciding whether legal aid is required replicate those at the initial trial, i.e. whether the interests of justice mandate such assistance, and all the jurisdictions either provide automatic assistance at appeal or apply an interests of justice test also at that level, thus complying with the Court's interpretation of Article 6. All the jurisdictions also provide sufficient choice of lawyer in publicly-funded criminal cases to satisfy the international standard within the margin allowed by the Court in decided cases.

Financial eligibility criteria apply to criminal legal aid, although not to public defender schemes; this is an important difference between the jurisdictions and it may be possible to make normative recommendations based on compliance with international standards, on this point. Assistance must be given free of charge to a defendant who does not have 'sufficient means to pay', according to the international treaties. Whilst it is unclear precisely how this element of the right would be applied in a case before the European Court of Human Rights, it is self-evident that the non-means tested public defender schemes of the Nordic countries would comply. The financial eligibility tests in the Republic of Ireland and Northern Ireland also comply, as they explicitly award legal aid if the defendant's means are insufficient to enable him to pay privately for a defence lawyer. However, in Scotland and England & Wales, detailed fixed tests apply. In Scotland the test is similar to the test for civil legal aid, and therefore it can be estimated that about the same proportion of the population, 70%, is eligible. Furthermore, even if the income or capital limit is exceeded, legal aid may be granted if paying her own legal costs would cause the defendant undue hardship.¹⁴⁷⁵ This provision, properly applied, should ensure that the requirements of Article 6 are met. In England & Wales there is no such relief provision; in most criminal cases there are fixed income and capital limits above which legal aid will not be granted, whatever the likely costs of the defence or the difficulty which the defendant may have in meeting

1475 Scottish Legal Aid Board *Criminal Legal Assistance Handbook*, Part III, paras. 12.2 and 14.

these costs. This situation would almost certainly be found a violation of Article 6 if a defendant successfully persuaded the Court that, despite being above the financial eligibility limits, she was unable to pay privately for her defence as the case was complex and lawyer's fees prohibitive even for a person of her means. In these circumstances a defendant may well not have 'sufficient means to pay', even with a comfortable middle-class income. In order to ensure compliance with the right to legal aid in criminal cases, England & Wales should introduce a provision to exempt a defendant from the financial eligibility test if paying privately would be unrealistic. A similar provision to that in Scotland might well be suitable.

9.3.3 Evaluation of civil legal aid in North-West Europe

In civil and administrative cases, there is no equivalent to Article 6(3)(c) and thus reliance must be placed on the 'fair hearing' right in Article 6(1). In theory, this should be a very useful right; it is not limited by references to the interests of justice or the financial means of the individual, but is a free-standing, absolute right to a fair hearing. As discussed at some length in Chapter 6, the European Court of Human Rights has established an implied right of access to court which is now more commonly applied than the explicit right to a fair hearing. The implied right, as developed by the Court, is capable of limitation in the same way as rights under Articles 8 to 11 of the Convention. The explicit right to a fair hearing, however, is not capable of limitation and there is a line of cases which emphasises that Article 6(1) is only met if an individual can satisfactorily present his or her case either without assistance or, if that is not possible, with assistance paid for by the state. This focus on the explicit right is in keeping with the rule of law requirement for legal aid proposed above, whilst the access to court focus more commonly adopted by the Court confirms with the access to justice approach which, it has been argued here, is too narrow.

Johnsen has compared Nordic legal aid provision against human rights norms, largely illustrated by the examples of Norway and Finland. In his analysis, Johnsen states that his focus is on legal aid as part of a human rights obligation to provide legal assistance to enable those without financial resources to access judicial remedies;¹⁴⁷⁶ the narrower 'access to justice' viewpoint described above. However, his conclusions also address elements which attach to a 'fair hearing' approach:

1476 Johnsen 2018, p. 238.

none of the schemes cover costly civil trials for the more affluent part of the population—not even when costs become exorbitant. [...] We might note some differences between welfare ideology and access to justice. Human rights protect every human being, whether rich or poor. Welfare benefits are mainly limited to the poorer part of the population, unless the scheme is universal, which legal aid is not in any Nordic country, except for a few case categories in Norway.¹⁴⁷⁷

Whilst Johnsen's analysis describes a dichotomy between welfare ideology and access to justice, the same example could be used here to illustrate a difference between fair hearing and access to justice. Assistance with high cost civil cases for those with moderate or good financial circumstances would be required under the fair hearing provision if the hearing would otherwise be unfair; under the right of access to court the state could argue reasonable limitation of legal aid.

It may be useful here to examine the compliance with international human rights standards of the various elements of civil legal aid schemes which have been addressed in Chapters 4 to 6, in turn. The consideration of decision-making structures at first instance and at appeal, in Chapter 4, included a discussion of relevant findings of the international human rights treaty bodies. It was argued that, to comply with human rights obligations, applications for legal aid must be dealt with diligently,¹⁴⁷⁸ the appearance of the fair administration of justice must be maintained,¹⁴⁷⁹ decisions must not be arbitrary¹⁴⁸⁰ and reasons must be given for rejection of an application for legal aid.¹⁴⁸¹ The requirement of diligence is relevant in particular to the long waits for access to lawyers at the Law Centres run by the Legal Aid Board in the Republic of Ireland, and in the high level of delays reported in processing of civil legal aid applications in Denmark. Delays occur in the practical implementation of the administrative procedures set out in law; whilst they are thus not central to an administrative law consideration of legal aid, they can be extremely important in practice. Indeed, a long delay may completely subvert the objective of providing legal aid as proceedings may have gone ahead, or a deadline for an application passed, before help is received. Courts are not always willing to postpone proceedings for long periods whilst a legal aid applicant waits for a reply.¹⁴⁸²

The making of decisions in a non-arbitrary manner, and the maintenance of the public appearance of fair administration of justice, both depend on good decision-making processes. The European Court of Human Rights has commented favourably on systems which provide neutrality or balance in decision-making bodies.¹⁴⁸³ It was argued in Chapter 4 that the interrelationship

1477 *Ibidem*, p. 241.

1478 *Laskowska v. Poland*, 2007, para. 54.

1479 *Ibidem*.

1480 *Gnahore v. France*, 2000, para. 41; *Del Sol v. France*, 2002, para. 26.

1481 *Laskowska v. Poland*, 2007, para. 54.

1482 FLAC 2009.

1483 *Del Sol v. France*, 2002.

between the legal aid decision-makers at first-instance and at appeal is key to ensuring that decisions are legitimate and perceived to be so. The jurisdictions of North-West Europe do not all achieve decision-making and appeal processes which are evidently protected against unconscious bias. Of special concern are the systems where legal aid decisions are made within government agencies and the appeals are handled by the same agency. In particular, the fact that only internal review of legal aid is possible in Iceland, in the majority of cases in Scotland, and in lower court cases in Northern Ireland, provides insufficient protection against arbitrariness. At the least, some independence should be inserted into the appeal process through the use of independent legal professionals as in Ireland, England & Wales and in Northern Ireland higher court cases; ideally, appeals should be heard completely outside the body taking the original decisions, as in Norway, Sweden, Denmark and Finland. To ensure the coherence of decision-making, feedback should occur from appeal decisions to first-instance decision-makers. The proposed mechanisms for this in Northern Ireland and the Republic of Ireland are to be welcomed and an official feedback process in England & Wales should also be developed. The lack of reasons provided for appeal decisions by the Appeals Permission Board in Denmark is not only a hindrance to consistency of decisions, but also in breach of the specific requirement for written reasons for legal aid decisions¹⁴⁸⁴ and the general administrative duty to provide reasons. This problematic situation should urgently be addressed.

It is clear from the jurisprudence of the European Court of Human Rights that legal aid must be available if necessary to ensure a fair hearing in any type of case (other than tax or some aspects of immigration status). Thus, any civil legal aid scheme which completely excludes any category of case from its scope will be in violation of Article 6 unless there are saving provisions which function effectively so that even in excluded case types, legal aid can be granted if required in order for a hearing to be fair under the Convention. As Johnsen asserts, the case of *Steel and Morris* establishes that “legal aid schemes cannot exempt selected categories of problems from legal aid irrespective of their importance to the individual”.¹⁴⁸⁵ Saving provisions allowing legal aid to be granted in excluded case types in exceptional circumstances are absent in the Republic of Ireland and in Scotland (apart from in defamation cases), which is problematic. Ideally, in keeping with the fact that the right to fair hearing in Article 6 is not explicitly restricted to any types of hearing or capable of limitation due to other societal demands, there should not be scope restrictions at all. A legal aid scheme with universal scope would fully comply with the demands of the rule of law as it would not limit equal access to court in any matter.

Some of the jurisdictions under comparison are very generous as to scope, most notably Iceland (with no restrictions) and Denmark (where there are few

1484 *Laskowska v. Poland*, 2007, para. 54.

1485 Johnsen 2018, p. 241.

restrictions and even these are covered if there are special reasons). Finland and Sweden are also generous, with short lists of absolutely excluded case types. Norway is problematic in respect of scope; in addition to very restrictive scope in general, the saving provisions are interpreted in such a way that case type is also crucial in obtaining legal aid outside the usual scope. Only cases of a nature which are in general considered to be of grave importance to a client can be granted legal aid, and this is judged by similarity to the in-scope categories. It is highly likely that this system fails to grant legal aid in many cases where, according to the criteria laid down by the European Court of Human Rights, it should be granted. Northern Ireland and England & Wales provide specific saving provisions to allow legal aid to be granted if failure to do so would breach Article 6 fair trial rights, or any other rights under the Convention, but it may be that in practice they do not fully achieve this goal.

It would be naïve to imagine that systems such as Norway and England & Wales, which have very limited scope, would move towards universal, or even considerably wider, scope. However, in order to comply with international human rights obligations they must at least provide a realistic possibility of legal aid being granted in out-of-scope cases where this is necessary for fair hearing to be achieved, bearing in mind at least ‘the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively’.¹⁴⁸⁶ One effective option would be to adopt the suggestion mooted in Northern Ireland, that scope might be reconsidered and aligned with groups of people identified according to need, rather than groups of cases.

The variety of merits tests for civil legal aid were set out in Chapter 6, and these were judged against the requirements of Article 6, as interpreted by the Court, and also against the rule of law and the right to a fair hearing in practice. The Court has been generous to governments, it is argued, in allowing a wide range of merits criteria including prospects of success and proportionality between cost and benefit. These restrictions on the availability of legal aid have been held to comply with Article 6 as long as they are not arbitrary or disproportionate, and do not impinge on the essence of the right of access to a court.¹⁴⁸⁷ As pointed out above, in concentrating on the implied right of access to court with the possibility of limitation which has been granted by the European Court of Human Rights, decisions have been made in legal aid cases which do not give full recognition to the role of legal aid in ensuring the rule of law.

Many of the merits tests used by the jurisdictions under comparison have been approved by the Court: prospects of success, need for representation and the importance of the matter for the client have all been pleaded in cases before the Court and have been found not to be in breach of the right to access to court. Other tests are inherently unproblematic from a human rights

¹⁴⁸⁶ *Steel and Morris v. United Kingdom*, 2005, para. 61.

¹⁴⁸⁷ *Laskowska v. Poland*, 2007, para. 52.

viewpoint: *Probabilis causa litigandi*, compliance with international human rights obligations and the need for a case to be properly prepared all fall within this group. There is no clear praxis from the Court on how proportionality between cost and benefit and the various reasonableness tests might be viewed. However, the general approach is that limitations to legal aid (which would include merits tests) will be acceptable if they “pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”,¹⁴⁸⁸ which suggests that in principle the tests would be tolerated. Even within this generous environment, individual merits criteria which deny legal aid without room for consideration of other relevant factors will be found wanting, as the Court’s final evaluation is always whether overall the right to a (fair) tribunal was impaired in the particular case.

Although, in all likelihood, none of the tests would be found by the Court to impermissibly impair the right of access to court, some of them endanger the right to a fair hearing, and the rule of law, and are on this ground unacceptable. The worst offender, as explained in Chapter 6, is the prospects of success test, relied upon in all the jurisdictions other than Finland and Norway. In particular the approaches in the UK jurisdictions and the Republic of Ireland are problematic, as these jurisdictions bar cases with below a certain chance of success from legal aid funding. In the Nordic countries, where the test is used, it is as one of the factors to be considered and is not decisive. As has been suggested earlier in this thesis, the use of prospects of success as a decisive test for civil legal aid eligibility should be discontinued, as it is counter to the right to fair trial and the rule of law. At the very least, the use of percentages in prediction of prospects of success should be abandoned urgently due to the serious practical and theoretical problems inherent in such an approach, as detailed in Chapter 6.

Similarly, a strict test of proportionality between cost and benefit is only justifiable within the implied right of access to court, and not acceptable as a limitation on the right to fair trial. This test is particularly significant in Iceland, Northern Ireland and England & Wales, and changes should be made to ensure that cases whose value is low compared to the cost of representation can be covered by legal aid if the other circumstances make this necessary for a fair hearing to be achieved. Judging the legal aid systems according to how well merits tests comply with the rights of access to court, fair hearing and the rule of law, Finland and Norway fare particularly well whilst England & Wales falls far short of full compliance.

Although they have not formed a central part of this comparison, financial eligibility rules for legal aid also have human rights implications. In particular the proportion of the population financially eligible for legal aid is important, as if this proportion is low there will be many people who are ineligible but whose means are nonetheless modest. This group will have particular difficulty

1488 *Ibidem*.

accessing court and obtaining a fair hearing, particularly in complex, high-cost cases.

The issue of ability to pay for complex trials was in issue in the factually extraordinary case of *Steel & Morris*,¹⁴⁸⁹ discussed above in Chapter 5. In that case, the applicants would have been financially eligible for legal aid, but a scope restriction meant that legal aid was not available for defamation proceedings. The scope restriction was found to amount to a violation of Article 6, but Johnsen also draws a wider conclusion from the case. In his evaluation of the Finnish and Norwegian legal aid systems against Article 6, he is particularly critical as regards fixed financial eligibility criteria:

For people of some means, the human rights consequence is—as spelled out in *Steel and Morris*—that they can claim access to legal aid if trial costs exceed what they can reasonably be expected to pay. Human rights do not lay down a right to free trials, but costs must be adjusted to the economic capacity of the individual. A legal aid system that demands that middle-income people pay affordable legal aid costs themselves will not conflict with human rights if this protects against exorbitant costs. For the better-off, contributions might therefore be significant. However, since both Norway and Finland have upper income limits for cover, their schemes do not fully conform to human rights requirements.¹⁴⁹⁰

However, it should be noted that although legal aid is not universal, there is in Norway the possibility to award legal aid to persons who do not satisfy the financial eligibility criteria if the cost of the case will be substantial in relation to the applicant's economic situation,¹⁴⁹¹ which provision may well save that scheme from violating Article 6 in this regard.

If it is reasonable to assume that there is comparability between the affordability of legal fees for those of average income across the jurisdictions, percentage eligibility for legal aid is an indicator that a system conforms to Article 6 in protecting the rights of middle income individuals as well as the poorest. In all the jurisdictions other than Scotland and Finland, some cases are exempted from means testing, but these do not impact on the risk of violation of Article 6 in means-tested cases. Finland and Scotland have good cover across the middle income group, with approximately 75% eligibility; Sweden and Denmark, with very roughly half the populations eligible, are at risk of financially excluding some people who need assistance with legal costs; and Norway and England & Wales, with only about 25% eligibility, are undoubtedly refusing legal aid in cases in cases where there is no possibility that the individual can pay privately.

1489 *Steel and Morris v. the United Kingdom*, 2005.

1490 Johnsen 2018, p. 244.

1491 *Rettskjelploven*, 1980, § 11(4) and § 16(4); for application of these rules see SRF-1/2017, Section 4.4.

9.3.4 Comparison of jurisdictions

In drawing conclusions on the compliance of legal aid schemes with international human rights law, this section considers the extent to which each jurisdiction, through its legal aid and public defender scheme, shields individuals against violation of the rights to fair trial, access to court and the rule of law. This is not the same as an overall assessment of the generosity of the scheme against the same criteria; an example concerning financial eligibility illustrates this point. In comparing the Finnish and Norwegian legal aid systems against the benchmark of Article 6, Johnsen concludes that the Norwegian financial eligibility criteria are more generous.¹⁴⁹² This finding is based on the fact that many cases in Norway are not means-tested, whereas in Finland all cases are means-tested. However, in means-tested cases, the applicable tests mean that 75% of the population of Finland is eligible, whereas only about 25% of Norwegians qualify. From this perspective, the Finnish system is more generous and better protects against the risk of a group of individuals falling outside the protections offered by human rights law, in some kinds of case. The Norwegian system provides generous help for those covered, but leaves more people behind, and thus is less effective at protecting all individuals against violations of their rights. In this thesis, therefore, the Norwegian financial eligibility scheme fares worse in the comparison.

In criminal cases, it has been concluded that all the jurisdictions provide legal assistance with the defence when this is necessary in the interests of justice, including in the police station. During the investigation stage, all except Norway provide assistance. In respect of the requirement that assistance be free if the defendant has insufficient means to pay for their own defence, England & Wales has fixed means tests (set at an ungenerous level) and does not protect defendants above the limit even if the trial is particularly complex and expensive. In criminal cases, therefore, Norway and England & Wales compare unfavourably with the other jurisdictions considered.

Delays in Denmark and the Republic of Ireland raise the risk of violations of Article 6 in civil legal aid decision-making, whilst Iceland, Scotland and Northern Ireland all have failings in the decision and appeals processes, which do not sufficiently protect against arbitrariness. In terms of scope, the civil legal aid provision in Norway is particularly problematic, and clearly in breach of Article 6 as interpreted by the European Court of Human Rights. England & Wales is also very restrictive in scope and only saved by the exceptional case funding possibility, if this can be made to function properly in practice. Civil merits tests appear to breach the right to fair hearing, and the rule of law, in the UK jurisdictions and the Republic of Ireland, through use of a decisive prospects of success criterion, and there is a risk that Iceland also may fail to protect against breaches if the test of proportionality between cost and benefit is strictly applied. Financial eligibility rates are a concern in particular in England & Wales and Norway.

¹⁴⁹² Johnsen 2018, p. 246.

Within the nine jurisdictions under consideration, only the legal aid schemes of Finland and Sweden escape significant criticism of the protection afforded against violations of the rights to fair trial, access to court and the rule of law; Denmark just fails to join this group by virtue of administrative failings. It is noteworthy that Sweden and Finland are, respectively, at the upper and lower ends of the spending scale, and Denmark is in the middle; the good levels of human rights compliance have been achieved seemingly independent of financial investment in the legal aid scheme. However, even these jurisdictions cannot be held up as paragons: in Finland the lack of protection from other side costs has a chilling effect on access to court, and choice of lawyer is limited and in Sweden relatively low financial eligibility levels and the 'ought to have had insurance' rule are of concern.

9.4 Patterns and variation

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. The previous section judged the different systems against the benchmark of human rights and the rule of law. However, the methods used by the various jurisdictions do not only vary as to whether they comply with these measures; they also vary significantly as to how they comply. Consideration will next be given to whether there is any discernible order in the solutions chosen by governments to the functional need to provide legal aid.

It has been seen throughout this thesis 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 was suggested in the introduction at Chapter 1 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, during the course of the thesis it has become apparent that the situation is far more complex than this.

To facilitate the search for patterns, the following table (Figure 12) considers three background elements (the organisation of the legal profession, the distribution of legal aid work and the nature of the court system); six procedural and material elements of legal aid (the choice of criminal legal aid or a public defender scheme; the nature of the criminal merits test; the civil decision-making structure; the independence of civil appeals; the scope of civil legal aid; and whether the prospects of success test is decisive), percentage eligibility, the amount of help provided under legal aid and three contextual elements (the diversion of family cases, legal aid spend and GDP per capita). Within each category, the jurisdictions are grouped, according to similarity of approach, into a maximum of four classes, each represented by different shading. In this exercise there is no attempt to place value on any alternative,

only to indicate similarities in order to identify patterns. The groupings are necessarily somewhat crude; full details of the similarities and differences of the various schemes can be found in earlier chapters. Some aspects of the comparison are not included on the chart because the sheer scale of variation renders this method unsuitable. It is for this reason that the only element of civil merits testing included in the chart is the presence of a decisive prospects of success test, and that much of the economic and systematic context is absent. A lack of shading indicates that information is not available.

England & Wales	Northern Ireland	Scotland	Republic of Ireland	Denmark	Iceland	Norway	Sweden	Finland		
[Diagonal shading]			[Dark grey shading]		[Dark grey shading]		[Light grey shading]		Legal profession	
[Diagonal shading]	[Light grey shading]	[Vertical lines]	[Dark grey shading]	[Vertical lines]	[Light grey shading]		[Dark grey shading]		Distribution of legal aid work	
[Dark grey shading]			[Diagonal shading]				[Vertical lines]		Court system	
[Light grey shading]				[Dark grey shading]					[Light grey shading]	Criminal legal aid/public defender
[Dark grey shading]				[Diagonal shading]						Criminal merits test
[Vertical lines]			[Light grey shading]	[Dark grey shading]	[Vertical lines]	[Dark grey shading]	[Diagonal shading]	[Light grey shading]	Civil decision-making structure	
[Dark grey shading]	[Light grey shading]	[Dark grey shading]	[Vertical lines]	[Light grey shading]	[Diagonal shading]	[Vertical lines]	[Vertical lines]	[Vertical lines]	Independence of civil appeals	
[Light grey shading]	[Diagonal shading]			[Dark grey shading]	[Light grey shading]	[Diagonal shading]	[Dark grey shading]		Civil scope	
[Dark grey shading]				[Vertical lines]						Prospects of success decisive
[Light grey shading]	[Dark grey shading]	[Diagonal shading]	[Dark grey shading]	[Dark grey shading]	[Light grey shading]	[Dark grey shading]	[Dark grey shading]	[Diagonal shading]	Percentage eligibility	
[Dark grey shading]	[Diagonal shading]	[Dark grey shading]	[Diagonal shading]	[Light grey shading]	[Light grey shading]	[Diagonal shading]	[Light grey shading]		Amount of help provided	
[Vertical lines]				[Dark grey shading]						Diversion of family cases
[Light grey shading]			[Diagonal shading]		[Light grey shading]	[Light grey shading]	[Diagonal shading]		Legal aid spend	
[Vertical lines]			[Dark grey shading]		[Light grey shading]	[Dark grey shading]	[Vertical lines]		GDP	

Fig. 12. Legal aid comparison chart.

The table is useful for identifying trends in individual aspects of the legal aid systems, and also for comparing two or more countries across all aspects.

With respect to the practical background to legal aid, the three jurisdictions of the UK are very similar, with closely related legal professions and comparable court systems. In respect of the legal profession, the Republic of Ireland also joins this group. The Republic of Ireland has more in common with Norway, Denmark and Iceland as regards the structure of the courts system, as there is no division of courts by category of case, although Ireland's court system is more complex than the other three. Norway, Denmark and Iceland share the characteristic of regulated, unified legal professions. Sweden and Finland have similar judicial structures and legal professions, which are distinctive within our group of nine jurisdictions.

The distribution of legal aid work to lawyers does not follow the same pattern of groupings of jurisdictions as the structure of the legal profession; there does not seem to be a connection between organisation of the legal profession and distribution of legal aid. England & Wales has a restrictive contracting system for allocation of legal aid work; Denmark and Scotland have registration systems which are much looser. There is free or almost free access for lawyers to legal aid work in Northern Ireland, Norway, Sweden and Iceland and in criminal matters in the Republic of Ireland. The Republic of Ireland and Finland share a system of state-employed legal aid lawyers acting as gatekeepers for civil legal aid work and performing most of the work themselves.

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, with the practical and theoretical consequences discussed in Chapter 3. There is a clear division here between the Nordic jurisdictions and the others, although Finland of course 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 it has been seen that 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. The pattern here is much more complex than in criminal legal aid decision-making 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. In contrast to the general mosaic in the chart within civil legal aid, there is a clear division between the Nordic jurisdictions and the others as regards the prospects of success merits test; this is decisive in the UK and the Republic of Ireland but not in the Nordic countries.

As can be clearly seen from the chart, percentage eligibility patterns do not follow geography, nor do they match the pattern of any of the other aspects. The groupings are England & Wales and Norway; Denmark and Sweden; and Scotland and Finland. The amount of help provided also appears relatively scattered across the jurisdictions, although the most generous systems, Finland and Sweden, are both in the Nordic countries whilst the least generous, England & Wales, Scotland and the Republic of Ireland, are not. The important structural contextual element of diversion of family cases away from formal court processes is, however, clearly different in the two geographical groups. The Nordic countries all have significant structures in place to resolve family disputes without the use of court; the UK and Republic of Ireland do not. The economic structural elements of legal aid spend and GDP per capita do not follow any similar pattern.

In summary, a clear difference between Nordic and non-Nordic jurisdictions can be seen in the following areas: the organisation of criminal defence work; the structure of the criminal merits test; the decisiveness of the prospects of success test in civil merits assessment; and the diversion of family cases away from courts.

As has been discussed in Chapter 8, and as evident in the chart, there is no clear direct correlation between the amount spent on legal aid and any of the other factors considered, whether procedural, material or contextual. However, some interesting observations can be made. Both systems which are very restrictive on scope (Norway and England & Wales) are in the higher-spending group. Both systems which use employed solicitors to provide the bulk of legal aid (Finland and the Republic of Ireland) are in the lower spending group, and the systems which keep civil legal aid decision-making within government departments or agencies (the UK jurisdictions) are in the most expensive group.

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. Their legal professions and court systems are similar, and 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. Percentage eligibility levels and amount of help provided vary within the group, but none carry out significant diversion of family cases and all are in the lower GDP group and the higher legal aid spend group, compared to the other jurisdictions.

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. They have similar levels of independence in civil legal aid appeals and provide generous amounts of assistance to each legally-aided individual, although Sweden, in the higher-spending group of jurisdictions, spends more than twice as much as Finland per capita on legal aid. Despite their similarities in legal structure, 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 and the percentage of the population which is financially eligible are 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. There is nothing to suggest that the resemblance occurred intentionally; no comparative exercise appears to have been undertaken resulting in a transfer of laws. Both jurisdictions are low spenders on legal aid, within the overall group, and it may tentatively be suggested that the decision-making and service delivery system they share enables greater government control over expenditure and therefore allows costs to be kept low. The characteristics which may be relevant here are the heavy reliance on government-employed lawyers who, in addition to carrying out the majority of the work, also act as gatekeepers of legal aid to private practitioners (although to a lesser extent in Ireland than in Finland).

This breadth and irregularity of variation in legal aid systems does not lend itself to simple explanation. It was seen above that the nature of the legal professions has been proposed as the main determining factor in legal aid, but this would not explain the variety disclosed in this study. 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, as discussed above, 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.

This study 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, as pointed out in the methodology section of Chapter 1, cultural differences must be borne in mind when undertaking an exercise in functional comparison. Cultural issues were touched upon in Chapter 8 in sufficient detail to raise questions, but not provide answers, about their influence on legal aid.

9.5 The possibility of inter-jurisdictional learning and transfer

9.5.1 Transplant theory

This study set out to consider the possibility of inter-jurisdictional learning and transfer in legal aid, as one of its research questions. From the above summary, whilst bearing in mind the limitations of this research, it is at least clear that caution is needed when seeking inspiration from other jurisdictions, supporting the assessment of Moore and Newbury referred to in Chapter 1.¹⁴⁹³ Some attention was given to the theory of comparative law in Chapter 1; it may here be useful to return to theory and consider the particular issue of legal aid transplants, with some practical historical examples.

Whole-scale transplants of legal aid systems are rare within North-West Europe, as schemes already exist and the intention is generally to improve, rather than completely replace, these. Occasionally the potential for importation of a complete system does arise as, for example, in the possible forthcoming establishment of a legal aid scheme for Wales, although it is of course far from clear that a full-scale transfer would be proposed by the Commission on Justice in Wales. Small-scale transfers, on the other hand, are from time to

1493 Moore and Newbury 2017.

time proposed and attempted, and these are relevant to a discussion of legal transplant theory.

There are two opposing schools of thought as to whether legal transplants are possible. The main proponent of the argument against is Legrand, who rejects a formalistic interpretation of law as rules and therefore condemns proponents of legal transplants for having “a particularly crude apprehension of what law is and of what a rule is.”¹⁴⁹⁴ He asserts that the words of a rule can never represent the whole rule, which is dependent on the culturally specific meaning put upon the words by the interpreter and that “because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.”¹⁴⁹⁵ To Legrand, context is not only the legal system but the whole ‘cultural ambiance’ absorbed by a member of the society in question from childhood. To effect a meaningful legal transplant it would be necessary to transplant both elements of the rule; the words and the cultural context. This is clearly impossible as no two different jurisdictions can have identical cultural environments.

Critics of Legrand’s approach argue that it is possible to gain a good understanding of another legal system and suggest that the problem is his insistence on a complete understanding. It can be argued that it might not be possible to see even one’s own system clearly, for lack of perspective¹⁴⁹⁶ and that legal cultures are not fully evident to their members or to outsiders.¹⁴⁹⁷ To this might also be added the observation that there can be several legal cultures within the same jurisdiction; a family lawyer within a particular country might well not be able to fully understand the nuances and specific cultural context of commercial law in that same place. Academic lawyers and practicing lawyers also have very different cultures and thus a strict application of Legrand’s argument would lead to very limited possibilities for research.

Nelken counters Legrand by questioning the need to see another legal system as a native does. Transplants, he suggests, can still take place and it is possible to usefully predict how a native lawyer will act upon the implant of a foreign law. An investigation of the relationship between law and society can help to predict and understand potential problems in transplanting laws but it is important to remember that law does not always need to perfectly fit with society; it can be out of step for a while and may even be an expression of desired change.¹⁴⁹⁸

In addition to those who refute Legrand’s stance on the possibility of understanding another legal system, many scholars disagree with Legrand on an experiential level, pointing out that legal transplants take place frequently and thus their existence cannot be denied. Watson, for example, takes a view based largely on his study of Roman law and its historical spread that “borrowing,

1494 Legrand 1997, p. 113.

1495 *Ibidem*, p. 114.

1496 Lasser 2003, p. 197.

1497 Rosen 2003, p. 493.

1498 Nelken 2003, p. 437.

even mindless, is the name of the legal game”.¹⁴⁹⁹ As Smits puts it, “the use of comparative law while drafting new legislation is as old as the phenomenon of statutory law itself”.¹⁵⁰⁰

Many scholars, when discussing legal transplants of smaller bodies of law within a system, take it for granted that these can and maybe even will involve changes to the law being moved. For example, Graziadei states that “even when those vested with authority have decided what law to import, the process of adaptation to the local environment will often add new and unexpected elements to the import. This is inevitable”.¹⁵⁰¹ He is of the view that “it is idle to ask if there can be perfect imitation because such perfection is simply not the point”¹⁵⁰² and denies Legrand’s argument its force by proposing that “although the meaning of law, like any other cultural element, may be manipulated rearranged, transformed and distorted as it is passed on, the transmission of law from one culture to another can still take place”.¹⁵⁰³ Örucü also takes a practical approach which starts from the understanding that borrowing and imitation are an important part of legal change. What is essential, according to him, is to ensure that the appropriate adjustments are made to the law to suit its new context. He likens the process to that of transposing music for a different instrument and adopts the term ‘legal transposition’ as preferable to ‘legal transplant’. The incoming elements of a transposition are legal culture, legal structure and legal substance. All of these must be made to harmonise with the host system if a successful move of law is to be achieved.¹⁵⁰⁴

The question of whether transplants should be directed towards legal rules or towards policies is raised by Siems,¹⁵⁰⁵ who points out that the two often overlap. He accepts that there are valid criticisms of legal transplants which have a disruptive effect on the recipient legal system, but proposes that these should not be taken to mean there cannot be “reflective learning from abroad”.¹⁵⁰⁶ Interestingly, one of Smits’ main examples is the spread of laws permitting same-sex marriage, but he in fact traces the spread of the policy rather than of any specific legal formulation. Whether this is an instance of legal transplants is arguable.

It is apparent from this brief look at some of the theories of transplants that a wide range of learning and borrowing activities are included in what various scholars debate within the theme of ‘transplants’, ‘transpositions’ or ‘transfers’. Different conclusions as to the possibility of transplants can be drawn depending on whether a small-scale or large-scale transplant is proposed, and also on the degree of similarity between the two jurisdictions involved.

1499 Watson 2007, p. 5.

1500 Smits 2006, p. 515.

1501 Graziadei 2068, p. 465.

1502 *Ibidem*, 469.

1503 *Ibidem*, 470.

1504 Örucü 2003, p. 467.

1505 Siems 2014, p. 192.

1506 *Ibidem*, p. 197.

Smits has suggested that in both civil and common law countries, inspiration is sought in the drafting of major new statutes from other jurisdictions, through various mechanisms.¹⁵⁰⁷ He suggests that one way to categorise different types of foreign influence on legislation is to “distinguish between the wholesale importation of large pieces of law (like a complete civil code) and the adoption of specific rules”.¹⁵⁰⁸

Large-scale transplants may pose a particular challenge due to the difficulties of achieving a good enough match. As Örüçü states, large-scale transpositions need a compatible receiving culture and if this is not in place changes will need to be made to ensure a good match. This may involve, *inter alia*, training lawyers and judges.¹⁵⁰⁹ Small-scale transplants, on the other hand, may be easier to achieve. Indeed, as many authors have been able to discuss numerous examples, such transplants are clearly possible, and have been attempted within the sphere of legal aid.

9.5.2 Small-scale transfers within legal aid

9.5.2.1 Past examples

Two recent examples of proposed or attempted small-scale transfers of legal aid law are Northern Ireland learning from the other UK jurisdictions, and Norway considering lessons from Finland. In 2010, the Northern Ireland Justice Minister appointed a team to review legal aid in the jurisdiction and develop proposals to ensure access to justice. In the introduction to its report, delivered in 2011, the review team stated:

While we are clear that this review should produce outcomes suited to the particular circumstances of Northern Ireland, it makes sense to take account of the experiences of the other jurisdictions in these islands which have legal systems bearing many similarities with our own. During the consultation period, we undertook visits and had discussions with government departments, legal aid authorities and other organisations in the Republic of Ireland, Scotland and England and Wales.¹⁵¹⁰

However, when drawing conclusions the team was conscientious in considering the fit between the approaches in other jurisdictions and the operational circumstances in Northern Ireland. The outcome was that some of the most significant potential transplants were rejected. A prime example of this concerned the scope of legal aid in family cases. At the time of the Northern Irish review, major changes were being proposed in England & Wales which led to the adoption of the contentious Legal Aid, Sentencing and Punishment of Offenders Act 2012, significantly reducing legal aid for family cases, as has been seen in Chapter 5, amongst other reforms. The Northern Irish review team were

1507 Smits 2006, p. 516.

1508 *Ibidem*, p. 517.

1509 Örüçü 2003, p. 467.

1510 *Access to Justice Review Northern Ireland: The Report*, 2011, p. 14.

aware of the recommendations being pursued in the neighbouring jurisdiction and considered whether they should follow the same course:

Cases concerning family and children accounted for around 70% of the spend on civil legal aid in 2010/11. We gave serious thought to whether, following proposals in England and Wales, we should recommend removing from scope private family law cases (primarily matrimonial and associated matters) other than those where domestic violence or child abuse was a factor. [...] However, largely as a result of our observation of proceedings in court, we came to the view that an increase in unrepresented parties would impede the effective management of a court system already under pressure and render more difficult the resolution of differences between the parties, especially where children were involved. We therefore recommend that private family law remains in scope.¹⁵¹¹

Not all the laws of neighbouring jurisdictions which were considered were rejected, however. Further research was sought on some topics to further explore the potential benefits of developing certain aspects of access to justice, for example criminal legal aid fee arrangements, in line with the other jurisdictions:

We note the possibility of introducing one standard fee to apply whether there is a plea or the case goes to trial (as is the case in Scotland) and suggest that the way this works in other jurisdictions and its possible application in Northern Ireland should be further researched.¹⁵¹²

Most impact was achieved by comparative legal studies in areas where it was recommended that provisions which were working well elsewhere should immediately be adopted in Northern Ireland:

We recommend that high priority is given to developing guidance for the use of fixed penalty notices and the Code of Practice on conditional cautions as required by the legislation. And we suggest that urgent consideration is given to legislating to enable the introduction of prosecutorial fines in Northern Ireland and to assessing whether other direct measures of the type deployed in Scotland might be applicable in this jurisdiction.¹⁵¹³

The very close relationship between Northern Ireland and the other UK jurisdictions makes it unsurprising that attention is given to developments in the neighbouring areas. The comparative law approach involved consideration of solutions used in nearby jurisdictions and assessment of whether they would be suitable in Northern Ireland. Some of the ideas examined were adopted and some were rejected, as a result of the analysis of the research team.

A further example can be found in Norway, which undertook an exercise in 2008-2009 reviewing the operation of its legal aid scheme and adopting

1511 *Ibidem*, p. 8.

1512 *Ibidem*, p. 7.

1513 *Ibidem*, p. 45.

proposals for reform. Part of the review was an academic comparative law project undertaken by Professor Jon Johnsen of Oslo University at the request of the Ministry of Justice. In particular, he was asked to compare the Norwegian and Finnish legal aid systems and report on any lessons which might be learnt from Finland in developing the strategy for reform.¹⁵¹⁴ The original request for the comparison came from parliament, which asked the government to “assess the current legal aid scheme, among other things in light of the Finnish legal aid scheme”.¹⁵¹⁵ As well as the report of Professor Johnsen, the Finnish National Research Institute of Legal Policy was engaged by the Norwegian government to produce a document mapping the Finnish legal aid system and visits were made by government officials to the Finnish Ministry of Justice and to a Legal Aid Office in Helsinki.¹⁵¹⁶ Visits were also made to Sweden and Denmark and written information was sought from the UK and the Netherlands. The focus of the comparative legal work seems to have been on Finland; although a separate report was also commissioned from Professor Johnsen on England & Wales, the scale of the investigation into the Finnish scheme was greater. Interestingly, one of the reasons for taking Finland as the comparator was that “Finland is more different from Norway than the other Nordic countries when it comes to legal service and legal aid” and it was felt that “such contrasts might produce more incentives for reforms than comparing jurisdictions that have almost identical systems”.¹⁵¹⁷

The comparative law element of the exercises referred to led to a variety of legislative outcomes. The Norwegian recommendations have not resulted in any legislation because the reforms were shelved upon change of government. NGOs continue to call for the recommended changes to be made.¹⁵¹⁸ Some of the Northern Irish recommendations were implemented, with the introduction of standard legal aid fees for guilty pleas¹⁵¹⁹ and of police-issued fixed penalties for low level offences and prosecutorial fines.¹⁵²⁰ The recommendation not to follow England & Wales in restricting the scope of family legal aid has been respected, in that no changes have been made.

Whilst no practical outcome can be measured from the Norwegian comparative work, the Northern Irish experience suggests that legal transplants are possible. The legal cultures of the origin and receiving jurisdictions were very similar and the absorption of the new rule appears to have been straightforward. Little adjustment was needed to the nature of the rule, but the form which the legislation took was not the same as in the jurisdiction of origin. The copying of ‘prosecutorial fines’ from Scotland is a case in

1514 Johnsen 2009a, p. 2.

1515 St.meld. nr. 26 (2008–2009), para. 1.1.

1516 *Ibidem*.

1517 Johnsen 2009a, p. 2. This comment on the similarity of the other Nordic schemes is not supported by the current thesis.

1518 *Rettskjøpsordningen må styrkes*, 2015.

1519 Implemented for magistrates’ courts on 26th June 2014 and for Crown Court on 5th May 2015.

1520 Justice Act (Northern Ireland) 2015.

point, and relevant to legal aid as it diverts a group of criminal cases away from the courts, thus removing the need for criminal legal aid for those cases. In Scotland, legislation sets out the option for a ‘fixed penalty conditional offer by procurator fiscal’:

Where a procurator fiscal receives a report that a relevant offence has been committed he may send to the alleged offender a notice under this section (referred to in this section as a conditional offer); and where he issues a conditional offer the procurator fiscal shall notify the clerk of court specified in it of the issue of the conditional offer and of its terms.¹⁵²¹

The conditional offer is to give “such particulars of the circumstances alleged to constitute the offence to which it relates as are necessary for giving reasonable information about the alleged offence”¹⁵²² as well as the amount of the penalty, the length of time for which the offer will be valid (28 days), and the consequences of accepting or rejecting the offer.

In Northern Ireland, legislation provides for the equivalent system under the name of ‘prosecutorial fines’ and provides that:

Where a Public Prosecutor receives a report that a summary offence has been committed and that the alleged offender was at the time of the offence aged over 18, the Public Prosecutor may issue a notice to that person offering that person the opportunity of receiving a prosecutorial fine notice in respect of that offence.¹⁵²³

The requirements for the contents of the notice are in effect the same as in Scotland but expressed in different words and arranged differently in the statute. It can be seen that the danger perceived by Legrand, that the words would not mean the same in a new jurisdiction, was avoided by changing the words so that they blend properly into the receiving system. The process closely resembles Özüçü’s ‘transposition’, with adjustments being made to ensure that the same tune is played albeit by a different instrument.

9.5.2.2 Future possibilities

Thus, despite the theoretical difficulties, transplants have been proposed and carried out, albeit very small-scale, in the jurisdictions under consideration. A research question of this thesis is whether transfer or learning can take place between jurisdictions within the sphere of legal aid (and if so, how) and the future potential for further transplants must therefore also be considered. It has been discussed above that Legrand believes transfer is impossible because the meaning of a law cannot survive the journey; law cannot move and still be applicable as it is jurisdiction-specific. “As it crosses boundaries, the original

1521 Criminal Procedure (Scotland) Act 1995, s. 302.

1522 *Ibidem*.

1523 Justice Act (Northern Ireland) 2015, Part 3, s. 17.

rule necessarily undergoes a change that affects it *qua* rule”.¹⁵²⁴ However, it can be seen from the examples in the preceding section that policy-makers and legislators when considering borrowing laws for other jurisdictions do not in fact talk about the precise wording of the laws, they talk about the ideas inherent in the laws.

It is submitted that it is not necessary for the transplant country to fully understand the functioning of the law in the country of origin because, precisely as Legrand warns, the same functioning will never be achieved in the destination country. Policy-makers and legislators inherently understand that Legrand is right in this regard, and do not simply copy laws with an expectation that it will lead to outcomes identical to those in the origin state. However, it is common to investigate how things are done in other countries, particularly those which are geographically close or share similarities such as a historical link. One reason for doing this is a conscious desire to seek an efficient solution¹⁵²⁵ by using a model which is already proven to work well in another jurisdiction, or by reducing the direct costs of legislative preparation. In addition, there may be a simple motivation to seek a number of different ideas which can be considered as options for the desired transformation. Comparative law, as a knowledge project,¹⁵²⁶ can help in displaying a number of possible alternatives.

This thesis has, in highlighting the complexity of legal aid systems, provided a warning of the challenges of effective micro-comparison within legal aid. Whilst it might be tempting, for example, for a government, inspired by the low cost of legal aid in Finland, to borrow some aspects of Finnish legal aid in the hope of reducing their own expenditure, care is needed. Referring back to the table at Figure 12, characteristic elements of the Finnish scheme include wide scope, minimal prospects of success assessment, a dual criminal legal aid/public defender arrangement, and the concentration of legal aid in state legal aid offices. Firstly, it is apparent that many of these elements are generous, and to simply transfer, for example, wide scope rules across to a higher-spending jurisdiction such as Northern Ireland would be more likely to increase than to reduce costs. The main apparent cost-limiting element, the use of state employed-lawyers for the bulk of the work, would seem like a better option. However, outcomes of state legal aid offices in other jurisdictions would be very different if, for example, financial eligibility rates and scope limitations were much more restrictive in the destination jurisdiction. Furthermore, experiments with state legal aid offices in other jurisdictions have not provided costs savings. Overall, in fact, the Finnish legal aid system is very generous, yet cheap compared to the other, less generous schemes in this study. This paradox is likely to be explained by cultural factors, such as low inclination to use the judicial system as a means for resolving disputes, or by combinations

1524 Legrand 1997, p. 120.

1525 Siems 2014, p. 192.

1526 Kennedy 2003, p. 345.

of factors, such as the lack of protection against *inter-partes* costs in a relatively risk-averse population. These aspects are not readily changed, certainly not in the short term.

In addition to the complexity of the configurations of various elements in the different jurisdictions, the weight of each factor may vary, which also makes transplants challenging. For example, the changes to the insurance rules in Sweden in 1997 led to significant costs savings and appear to be a major element in the overall picture of access to justice. However, similar rules in the other Nordic countries do not appear to occupy such a central role.

When considering a legal transplant in legal aid, the focus must be on how well that particular idea would work in the receiving jurisdictions. Indeed, the success of the policy in the origin country is not necessarily highly relevant, depending on the degree of difference in the other interrelated aspects of the legal aid scheme and its context, although an unsuccessful idea is unlikely to be thought of as attractive in the first place. Likewise, the reasons for the policy in the origin country are not particularly pertinent. What is important is how the idea could be used in the recipient country. A similar concept is expressed by Smits:

It is not so much foreign law that is taken over by a national lawmaker or court, but the argument expressed in foreign legislation, or in a foreign court decision. That argument itself, however, is not specifically ‘foreign’; it has persuasive authority because of its inherent quality, not because it is used in another country.¹⁵²⁷

The experience of other countries can act as a source of ideas but such inspiration will only give results if it chimes with the needs of the recipient country. This analysis also raises the possibility of ‘overfitting transplants’,¹⁵²⁸ i.e. those which work better in the transplant country than in the origin country. If it is ideas that are borrowed, rather than laws *per se*, it is clearly possible that there may be a wide range of factors which enable the idea to work better when put into law in the new country than it did in its place of origin. This should also encourage policy-makers to actively investigate the detail of a variety of other schemes, as good ideas may be found in situations where they are not being well-used, or as a well-functioning part of an overall poorly-functioning legal system.

Learning and borrowing from other jurisdictions, in the field of legal aid, is thus possible and desirable, but must be undertaken with extreme caution. The complexity of legal aid schemes renders any presumption as to cause and effect in another jurisdiction unsafe, unless a very detailed study of all aspects of that legal aid scheme and its context are undertaken. An appropriate alternative approach, given the paucity of detailed country studies of legal aid, is a thorough and careful consideration of how a rule would operate in

¹⁵²⁷ Smits 2006, p. 536.

¹⁵²⁸ Siems 2015, p. 133.

the circumstances of the destination jurisdiction. As long as this exercise is undertaken with a recognition that the functioning in the origin jurisdiction is not necessarily understood and that replication of outcomes cannot be assumed in the destination jurisdiction, a reasonable prediction of performance after transfer should be possible.

9.6 A new analytical framework for legal aid

9.6.1 Construction of the framework

This thesis, which concentrates only on the administrative procedural and material aspects of legal aid, has disclosed diversity on a scale which is almost overwhelming. This leads to a dilemma; comparative law is useful and to be encouraged, yet daunting in its complexity. Meaningful comparison of legal aid requires broad consideration of the various elements of each scheme and how they interact, in a systematic way which enables consistent assessment. Within access to justice research, a methodology has been proposed for consistent measurement of the “cost and quality of access to justice from the perspective of the user of justice”¹⁵²⁹ and work has begun on its development. This thesis suggests that a similar project would be beneficial for legal aid research.

Full development of an analytical framework for the structural analysis and comparison of legal aid systems requires more data than is available here, particularly if robust connections are to be found between structures and outcomes. Nonetheless, the detailed comparison in this thesis between a large number of legal aid systems, albeit similar schemes from a global or even European perspective, has already enabled consideration of many varied component elements of a scheme and a wide range of possible solutions to the need for a legal aid scheme. Some links between policy and practice have been identified and thus the tentative starting point for an analytical framework can be proposed. If developed, the framework would enable the methodical analysis of one system or a structured comparison of legal aid schemes.

The elaboration of such a framework would also enable a coordinated collation of the varied research relevant to legal aid. As was seen in Chapter 1, existing literature 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 which was not summarised in that chapter. 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.

1529 Gramatikov, Barendrecht and Verdonschot 2011, p. 353.

Within the variables identified in the comparison of the Nordic countries, the Republic of Ireland and the jurisdictions of the UK, four categories can be proposed, as illustrated below.



Fig. 13. Diagram showing categorisation of legal aid variables.

Three of these groups are internal to legal aid and represent the choices which can be made in creating a scheme, at three different levels. The highest level is the establishment of underlying principles; these may be expressly determined by parliament or government or may only be discernible by implication from the next category, policy choices. Policies are, ideally, consistent with the underlying principles, and largely derive from them. However, it may be that there is conflict between the stated ideals of a legal aid system and the policies which determine the reach of the scheme in practice. This has been illustrated in the current study in the area of scope and merits tests which have been found to work against the principles of fair trial and access to justice, thus negating, in practice, government policy declarations.

The following level of elements of variation is the practical delivery methods. These have little connection to the theoretical basis of the scheme but may be dictated to a greater or lesser extent by the 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 has been seen to be 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 at any level may have consequences for other elements in the same or other categories, either mandating a change elsewhere in the system or resulting in logical inconsistency.

Such a framework, 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. In analysis of existing legal aid systems, the structure could be used to consider delivery and policy choices to indicate which principles are demonstrated, which could then be compared with the values which the system purports to support in order to determine whether the legal aid scheme is fit for its stated purpose. This will not always be the case, as the system may not have been set up in a coherent manner; often economics and a history of piecemeal reform lead to internal contradictions. Development through comparison with other jurisdictions may also have led to a system not being fully rational if the context and interrelationship of factors were not fully explored or understood when changes were made.

Comparison of legal aid schemes in different jurisdictions also may be 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.

When used in planning, the framework would provide a series of issues to be addressed, identify the range of options available and alert policy-makers to the implications of their choice for the values demonstrated by the legal aid system. It could also highlight practical consequences of a given choice, the interrelationship between that and other elements of the system and draw attention to areas where there is a risk of falling foul of international human rights obligations. Very many of the choices to be made involve compromises, often with a tension between budget and principles, and these need to be carefully considered in a structured manner. A framework for doing this would improve the chances of a rational outcome and help to avoid unintended and unwanted consequences arising from the interactions between policy and practice in the interwoven elements of a necessarily complex legal aid system. The aim would be to enable the development of a coherent legal aid scheme, consistent with the underlying principles on which the system is founded.

Depending on the purpose for which the framework is being used, some change may be desired or envisaged but the four identified sets of variables are not equally open to change. The least flexible category is context, which includes some elements which can only be altered long-term, if at all, through social and attitudinal change. Both guiding principles and, more frequently, policy choices may be revisited when large-scale reviews of legal aid are conducted. Organisational choices are sometimes also included in such reviews, or implicitly determined by them, but may also be made as part of the ongoing management of the legal aid scheme, hopefully consistently with the policy and principles already established.

As stated, it cannot be within the scope of this thesis to fully develop the suggested framework. 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 and make some initial observations on the links between them. The following section aims only to describe the outline of each category and populate it with the findings from this thesis; a small start to the considerable work which is needed in the field.

9.6.2 Sets of variables

9.6.2.1 Context

The context of legal aid varies between jurisdictions but is not always variable over time. Some significant elements are outside the justice system and therefore unlikely to be within the scope of access to justice reviews and similar. Those within the justice sphere may be included in such reviews but several are long-term attitudinal issues resistant to change. Any framework for analysis, comparison or planning of legal aid systems must include 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 factors vary considerably in nature and, importantly in planning, in the extent to which they are susceptible to strategic change, and the speed at which such change may be possible. 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. However, it may be possible to redesign parts of the justice system so that certain cases are diverted away from formal court proceedings, in conjunction with an overhaul of legal aid.

9.6.2.2 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.”¹⁵³⁰ 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. As Kiraly and Squires suggest, “in some [EU] member states, legal aid is still seen as a kind of privilege, a part of welfare law, while in others, legal services and access to justice is a commonly accepted social factor”.¹⁵³¹

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. The need to ensure access to justice and uphold the rule of law is politically unassailable and in debates and publications concerning legal aid, governments often make reference to these factors. 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”.¹⁵³²

1530 Young and Wall 1996, p. 10.

1531 Kiraly and Squires 2011, p. 40.

1532 CP12/10, para. 1.2.

As well as its contribution to ensuring access to justice, however, legal aid also at times forms part of state policy in other areas such as equality and poverty reduction. One example is the approach of the Scottish government. In that jurisdiction, access to justice is considered as being of primary importance but legal aid is in addition seen as contributing to the Scottish Government's aim of reducing inequality.¹⁵³³ Prevention of and early intervention in legal problems is seen as key.¹⁵³⁴ 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",¹⁵³⁵ and thus equality is a guiding principle for legal aid in that jurisdiction also.

Within the Norwegian legislation, legal aid is stated to be a social benefit scheme, consistent with the suggestion that "legal aid in the Nordic countries has been framed as a welfare right, rather than being viewed from the perspective of access to justice".¹⁵³⁶ Legal aid in Norway is "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".¹⁵³⁷ This ideological basis was established as early as 1954 during a process of legal aid reform¹⁵³⁸ and legal aid is officially acknowledged as an important measure in the fight against poverty,¹⁵³⁹ with an explicit statement of this function of legal aid being added to the legislation in 2005.¹⁵⁴⁰

In England & Wales, Moore and Newbury suggest that the theoretical basis for a societal understanding of legal aid has changed: "Once seen as a form of social welfare, since the mid-1980s legal aid has come to be framed as a benefit operating extrinsically to the legal system and understood in primarily economic terms".¹⁵⁴¹ Others have argued a different approach, echoing that in Finland and Scotland, arguing that "legal aid is not a welfare benefit; it is an equalising measure".¹⁵⁴² Meanwhile, as Peers points out, the Court of Justice of the EU has indicated that in EU law, Article 47 of the Charter of Fundamental Rights of the European Union does not conceive of the right to legal aid primarily as social assistance.¹⁵⁴³ The absence of legal aid from the 'social rights' provisions of Title IV of the EU Charter of fundamental rights tends to this conclusion.¹⁵⁴⁴

1533 Scottish Legal Aid Board Annual Report and Accounts 2015-16, p. 2.

1534 O'Neill 2016, p. 294.

1535 RP 26/2016.

1536 Hammerslev and Rønning 2018, p. 323.

1537 Rettshjelploven, 1980, § 1.

1538 St.meld. nr. 26 (2008-2009), para. 1.2.1.

1539 *Ibidem*, paras. 1.3.2.1 and 8.2.3.

1540 Innst. O. nr. 43 (2004-2005), para. 3.

1541 Moore and Newbury 2017, p. 69.

1542 Halford and Schwarz 2013.

1543 Peers 2016, p. 59.

1544 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 2010.

The content of the category of guiding principles is clearly open to considerable debate. Hynes and Robins, for example, suggested six ‘foundation principles’ for legal aid in England & Wales in 2009. These were that: access to justice is the constitutional right of each citizen; the right to access to justice applies equally to civil and criminal law; the interests of the citizen should determine policy on access to justice issues, not those of the providers of services; the constitutional right to be regarded as innocent until proved guilty should be respected as a cardinal principle of criminal law; promoting access to justice requires policies across a range of areas including law reform, education and legal services; and proposals for reform must take account of the realistic levels of resources but these should not be seen as defining policy. Whatever they may be, it is desirable that the principles governing legal aid are overtly stated so that compliance with them on the policy and practical levels can be assessed.

The provisional list which follows is not derived from the various theories mentioned, but is drawn from the arguments in the earlier chapters of this thesis. The guiding principles are expressed as a set of scales, with a choice to be made as to where on each scale the jurisdiction wishes to position itself. It is suggested that the legal aid policy decisions made will also indicate a position on each scale, in the absence of or even in conflict with any express commitment to principle by government.



Fig. 14: Guiding principles

9.6.2.3 Policy decisions

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.

An illustration of repeated politically-driven change to policy, in the form of financial eligibility levels, can be found in Iceland:

In recent times, discussions on legal aid in Iceland can be characterised along the lines of right-wing vs left-wing politics and in narrow legalistic terms. Those to the right of the political spectrum have generally advocated for a more restricted access to legal aid, to be solely granted on the basis of low economic status, while those to the left of the political spectrum advocate for a broader access to legal aid for cases that are deemed to be of great significance for individuals or larger groups.¹⁵⁴⁵

In Norway, “gaining political support for selective schemes that prioritise support to the poor is significantly more difficult than getting support for universal schemes, even when they become more costly”.¹⁵⁴⁶

Again, the factors below have been drawn from the findings of the comparison of legal aid schemes in North-West Europe and represent the crude beginnings of a list which should be developed. Many of these are decisions as to where on a scale the system will be fixed; others are choices between options.

1545 Antonsdóttir 2018, p. 141.

1546 Johnsen 2018, p. 237.

Legal aid is the main element of access to justice	↔	Legal aid is a minor player in access to justice
Use legal aid policy to change demand for the justice system	↔	Use the justice system to change demand for legal aid
Decisions on legal aid should be judicial	↔	Decisions on legal aid should be governmental
Independent appeal and/or oversight	↔	Internal review/appeal
Focus on advice	↔	Focus on court representation
Legal aid should cover all types of case	↔	Legal aid should cover few types of case
Public defender scheme	or	Criminal legal aid
Aim to mirror behaviour of private payers (equality of arms?)	↔	Aim for objectively fair hearings for all
Prioritise cases to be in scope according to:		individual's characteristics and ability to obtain fair trial
Case type		
bringing or defending		
individual culpability		
importance to the individual		
Some in-scope case types privileged (absence of means/merits test)	↔	All in-scope case types treated equally
No reliance on merits test	↔	Significant reliance on merits test (especially prospects of success test)
	Choice of principles for selection	
High percentage of population financially eligible	↔	Low percentage of population financially eligible

Fig. 15: Policy choices

9.6.2.4 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”¹⁵⁴⁷

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.

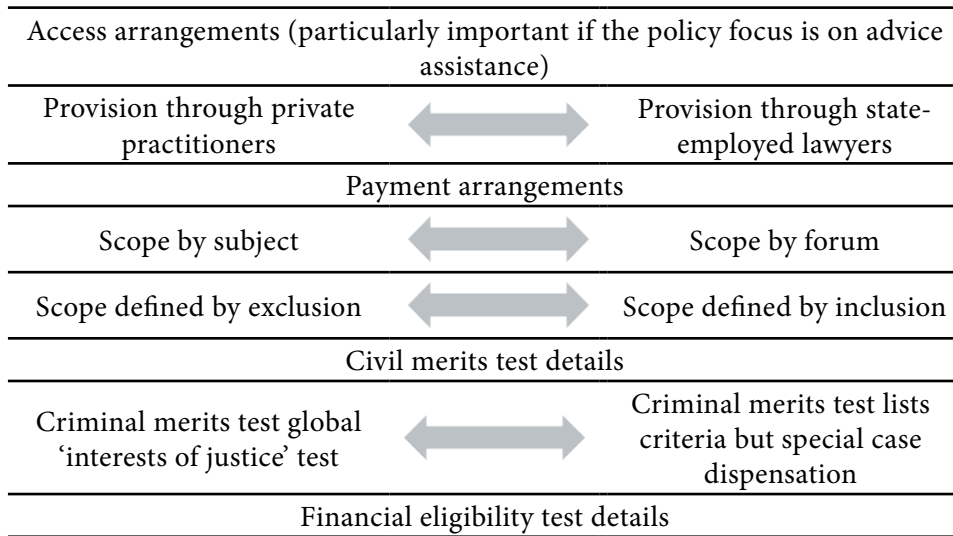


Fig. 16: Organisational choices

9.6.3 Links between categories

The outline presented above is open to debate; some issues may be better placed in other categories and many issues are missing. This is simply a tentative beginning from the perspective of this author, although it may even in this form be useful to law-drafters.

Returning to the diagram of the levels, connections may and, indeed, must be noted between the categories and elements within them, if the framework is to be useful. Some examples of links between categories are as follows. Organisation and context are linked by access arrangements (which need to take account of geography, language, attitude to law and lawyers); the use of private practitioners or state-employed lawyers (not only the structure of the legal profession is relevant but also public confidence in lawyers and how high the threshold is for seeking legal advice from private firms); payment arrangements for legal aid (which need an awareness of payment rates and mechanisms for payment from private clients); and the details of the financial eligibility test (which need to harmonise with the social security system, level of financial information available to government etc.). A link is also present

¹⁵⁴⁷ Rissanen 2018, p. 94.

between these two categories in the choice of civil scope determination by subject or forum (which will be affected by the structure of the justice system and the level of diversion of cases away from formal judicial resolution).

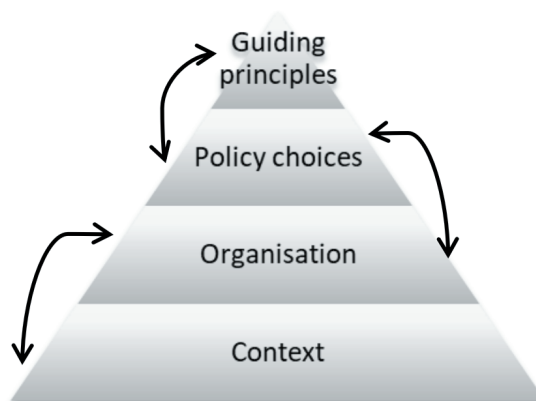


Fig. 17 . Diagram showing connections between categories of legal aid variables

Connections can also be noted between organisational details and policy choices: the details of the civil merits test, as seen in Chapter 6, indicate policy priorities; access arrangements should vary depending whether there is a policy focus on early advice or not; financial eligibility tests must tie in with policy on the proportion of the population which should be covered; defining scope by inclusion rather than exclusion may be easier if scope is very restricted.

Between policy and principle there should be consistency, which can be seen, for example, by considering the percentage financial eligibility for legal aid, which may vary according to whether legal aid is seen as a social benefit or as a justice issue. The principles adhered to concerning the right to a criminal defence should balance with the choice of criminal legal aid or a public defender scheme, and a concentration on ensuring fair trial will influence the merits criteria used in civil legal aid.

These links are those immediately arising from this thesis, and thus are of a legal, theoretical nature. Other links should be explored, including those apparent from other disciplines; socio-legal scholars, experts in public administration, economists and others all have important perspectives to contribute.

The exploration in this thesis of legal aid in the Nordic countries, the Republic of Ireland and the jurisdictions of the UK has been enlightening. The research questions have been answered, with some surprising results. In addition, and maybe most importantly, the study has revealed a real need for more, and more coordinated, research in the field if legal aid systems are to

be fully understood. Without such research, learning between jurisdictions is difficult and assumptions about other schemes are often flawed. The proposed analytical framework for legal aid might provide a suitable vehicle for a more comprehensive understanding of legal aid.

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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

Legal aid is one of the central mechanisms for achieving access to justice, but its internal workings are little understood. This study extends the range of legal aid research by applying a public law perspective in considering the legal basis for legal aid schemes and the internal mechanisms according to which they operate. By using a comparative methodology, it highlights the variety and complexity of legal aid structures in North-West Europe: the UK, the Republic of Ireland and the Nordic countries.

Taking key aspects of legal aid systems in turn, the research examines decision-making structures, scope and merits criteria, both for civil legal aid and for criminal legal aid and public defender schemes, across nine jurisdictions. Detailed comparison is made between the different schemes, which are evaluated against each other and against the external benchmark of international human rights obligations. The study enhances an understanding of how legal aid works, how well it works and how it could be improved, and concludes with a suggested framework for further research.