Comparative Research and Legal Aid Policy Making: the Dutch Quest for Best Practices

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1 Introduction

The Dutch Constitution requires that all persons shall have access to justice, whereas the granting of legal aid to persons of limited means shall be laid down by Act of Parliament.[2] As such, ever since 1994 access to justice for persons with limited financial means is regulated by the Legal Aid Act (*Wet op de Rechtsbijstand*), which replaced, after a reorganisation, the 1957 Legal Aid for Indigent Persons Act (*Wet Rechtsbijstand aan On- en Minvermogenden* or WROM). The Legal Aid Act opts for a contribution system where receivers of legal aid are required to pay, in a sliding scale, a certain amount of the legal expenses by themselves. Even though the Dutch statutory legal aid system traces its origins way back in the 1950s, it was during the heyday of the social services system in the 1970s that the foundation of the current system was laid.[3] The idea of state financed legal assistance came initially from the providers (mainly social lawyers) themselves, while legal provision was subsequently enacted for people of modest financial means to receive legal aid, thereby giving practical effect to their constitutional right. Eventually, when costs of the legal aid system rose sharply, thereby exceeding the budget of the Ministry of Justice, the government felt it necessary to make fundamental changes to the system. The main aims of the 1994 Legal Aid Act was clearer legislation, better control of legal aid expenditure, quality safeguards and measures to guarantee balance between supply and

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[2] Article 17 and 18 of the Dutch Constitution. See also National Report: the Netherlands 2009, note 3.

[3] M. Westerveld, "Is Sociale Rechtshulp van Gisteren?: Artikel 18 GW en de rechtshulpparadox", Amsterdam, Vossiuspers, UvA, 2008, p. 9. As a service to the reader all Dutch titles are translated in the bibliography.

demand.[4] Administrative and regulatory institutions, the Legal Aid Boards, were established for this purpose as independent administrative bodies whose function was to co-ordinate the implementation and achievement of the legal objectives.[5] Under the 1994 Legal Aid Act scheme, the main providers of legal aid are certified lawyers, who are specialised in giving legal advice to private persons and represent them in such various fields as criminal law, family law, labour, housing, social welfare and social security, consumer law, administrative law, asylum and immigration. In order to be able to handle cases within the legal aid framework lawyers must be registered at the Legal Aid Boards and therefore fulfil, *inter alia*, the quality requirements the boards have set.

At present, however, the sustainability of state financed legal aid system looks very grim. The newly appointed Minister of Finance has decided to reduce government budget on legal aid. The State Secretary for the Ministry of Justice, accordingly, announced her government's wish to cut 50 million Euro from the annual budget allocated to the state-funded legal aid. In order to achieve this financial purpose, the State Secretary put forward various proposals which, if adopted, would once more fundamentally change the existing Dutch legal aid system.

In line with the aforementioned contemporary developments, one can say that there is clearly a paradox in the system right now. On the one hand, the government is determined more than ever to reduce its costs on legal aid. Looking at the present global financial crisis, this determination to cut public costs will even further be strengthened, thereby making the sustainability of state-financed legal aid even more volatile. On the other hand, at the verge of this global crisis where thousands of people have either already lost their jobs or will very likely lose their jobs in the near future, there will probably be an explosion of legal disputes that involve people of low income to which they will require legal assistance. While, in addition, people have become more assertive and more rights- and court-oriented.

At present, there is a debate within Dutch society on how to lower the costs of legal aid services without compromising citizens' right access to justice. As we shall later see, much of the proposal put forward by

[4] F. Ohm, *Reforming Primary Legal Aid in the Netherlands,* paper prepared for the 2nd European Forum on Access to Justice, held on February 24-26, 2005 (unofficial publication).

[5] In December 2008 the former five regional Legal Aid Boards have merged into one Board at national level. See: National report: the Netherlands 2009, note 1.

the government has to do with shifting the focus from "in-litigation legal aid"- which gives more emphasis to citizens' dependence on lawyers and, primarily, for court cases- to "outside-litigation legal aid" where more emphasis is given to citizens' self-reliance for court cases and for problems outside court. The paper will address whether the proposals, aside from their financial motivations, have bases on any scholarly comparative research in the area of legal aid. Francis Regan stipulates that the focus of civil law countries with social democratic welfare system to in-litigation legal aid system is inherent to, *inter alia*, the way law is perceived in those countries and the role of governments vis-à-vis their citizens.[6] The Netherlands belong to states with civil law tradition and so far have, to a certain degree, a classical legal aid policy which reflects social democratic welfare state attitude. This rises the question what the recent developments in legal aid policy, which seem to reflect a shift in focus to "outside-litigation legal aid", exactly do entail for a comparative researcher who is poised to influence policymaking. By examining the relationship between the contemporary debate on legal aid policymaking in the Netherlands on the one hand, and scholarly comparative research in the area of legal aid on the other, we hope to shed some light on the direct and indirect ways in which comparative research can or might have an influence on the ongoing legal aid policymaking process.

2 The Dutch Dilemma and the Introduction of the Chain Theory

At a certain point in time, the Netherlands was thought to have the best legal aid system in the world.[7] Still today, the country enjoys a well-established and relatively comprehensive system. Nonetheless, the ideological enthusiasm of the legal aid movement has declined somewhat in that, from a business perspective, providing legal aid is considered part of state policy. The system contains, as we stated above, one fundamental flaw: the financial viability of the system has been and still is a recurrent and as yet unresolved issue.

Against this background, a group of academics, professionals, government employees and social workers from more than 60 different institutions, lead by the Tilburg Institute for the Interdisciplinary Study

[6] F. Regan, "Why Do Legal Aid Services vary Between Societies?: Re-examining the Impact of Welfare State and Legal Families" in: Regan, Paterson and Fleming, "The Transformation of Legal Aid", Oxford University Press, New York, 1999, pp. 179-204.
[7] This observation was made by E. Clinton Bamberger jr., professor at the University of Maryland (USA) at the presentation of the Report of the Committee on Legal Aid, chaired by mr. Polak in 1988. Rechtshulp (*Magazine of Social Legal Aid)* 1988/10.

of Contact Law and Conflict System (hereafter jointly referred as the "TISCO group"), took the task of looking for alternative legal aid policy that guarantees for cost and goal effective access to justice. They have created an interactive forum and discussed alternative issues for months. The main objective of the interactive forum was to come up with alternative legal aid policy proposals and test these proposals based on three criteria, i.e. the quality of the outcome of a legal dispute at hand, the quality of the procedure, and costs (including legal aid and procedural costs).[8] The TISCO group used five main strategies as a starting point, which is based upon the report on access to justice issued by the UN High Level Commission for Legal Empowerment of the Poor.[9] The group tried to adapt these strategies to the existing policy on access to justice, and from there attempts to decrease the costs of legal aid services while at the same time increasing the quality of the services provided. These strategies include:

1- Enhancing self-problem-solving potentials of persons and institutions
2- Broadening the scope of legal aid services
3- Optimizing harmonization between various chains of a legal dispute
4- Reducing transaction and procedural costs, and
5- More access to norms and criteria. [10]

Based on these strategies, the TISCO group, chaired by J.M. Barendrecht, developed the so called chain theory.[11] In accordance with this theory, a legal dispute has various chains at various stages and providing a cost and goal effective legal aid should be best supplied at the most suitable chain as far as possible and not necessarily in court of law. Challenged by Westerveld, who claims the chain theory leans too much on the concept of (re)conciliation, Barendrecht divides the existing theories on legal aid services into

[8] J.M. Barendrecht & C.M.C. van Zeeland, "Kitty's ketens: meer voor minder rond rechtsbijstand. Voorstellen ontwikkeld in een interactief traject met 120 sleutelpersonen uit het veld", Generic, 2008. See also http://toegangtothetrecht.uvt.nl/index.php

[9] Available at http://www.undp.org/legalempowerment/docs/ReportVolumeII/making_the_law_work_II.pdf

[10] Barendrecht & Van Zeeland (2008), p. 12.

[11] J.M. Barendrecht, C.M.C. van Zeeland & P. Sluijter, "Duurzame rechtsbijstand, legal empowerment en microrecht, Nederlands Juristenblad 2008, p. 2687-2694.

three: the conciliation theory, the one on one legal aid theory, and, of course, the chain theory.[12]

The conciliation theory implies that legal disputes can and should be solved by the parties themselves or with the assistance of a mediator. This theory approaches legal disputes as an issue of emotion, cognitional limitation and communication problems. Such conflicts necessitate a psychologically approached problem-solving mechanism where active listening, reframing, asking questions that are directed at identifying practical desires, wishes and worries of parties at dispute. A legal dispute is thus, according to this theory, best solved through creative and mutual process. Taking a strict judicial discourse leads, on the other hand, to polarization and formalization. Barendrecht identifies two major problems with regard to this theory: it overlooks the context (setting) where conciliation (negotiation) takes place, and it pays little attention to the quality of the ultimate outcome. A weaker party may be heard more, and he would get respect and understanding from his counterparty, yet he might end up getting very little from the actual outcome of the conciliation.

The one-on-one theory opts, on the other hand, for individual legal assistance, where one qualified lawyer, paralegal or even a law student assists an individual in a legal dispute. This classical form of legal aid used to be a paradigm in West Europe and has enhanced access to justice to a great deal. One of the main problems associated with this approach is, thought, that it is expensive, both for the government and the individual. Besides, if a lawyer is not the position to bring the case before a court, he may not be able to place enough pressure on behalf of his client against the counterparty. In other words, a lawyer without immediate access to court has little means to guarantee legal positions and interests of his client. As such, similar to the conciliation theory, this theory overlooks the quality of the ultimate outcome of the dispute.

Barendrecht therefore chooses for the chain theory, thereby implicitly rejecting the suggestion that conciliation -or reconciliation- forms the key element, if not the backbone of the chain theory.[13] The chain theory requires that the best legal aid policy should first be able to give the disputing parties a central place in solving their legal problem, and at the same time seek what the market and the government can

[12] M. Westerveld, "De leemte in de conciliatietheorie". J. M. Barendrecht, "Welke rechtsbescherming werkt het beste tegen macht?", Recht der Werkelijkheid, 2009, forthcoming.
[13] M. Westerveld (2009), see note 12 supra.

do to facilitate the solution. In such a way, the chain theory tries to adopt a multilateral approach to a legal dispute. By giving parties to a dispute central place, the theory opts primarily for legal empowerment and "micro right". Online support for the most standard legal disputes in an early stage of negotiation, for instance, will not only help the parties to become more aware of what they can and can not do, but also it facilitates a speedy closure of the legal dispute at hand if the parties eventually decide to bring their case before a court. In such a way, the proponents of the chain theory claim that the theory has a potential to both lower the costs of legal aid while at the same time enhancing the quality of legal aid service provided. [14]

In order to get a better understanding of the chain theory and its consequences -and as the proof of the pudding is in the eating- we shall take a closer look at the proposals which are for a large part inspired by this theory. In the following sections we will consider some of the proposals forwarded as adopted by the TISCO group in its finalized position paper. Since the main objective of our paper is to assess the use of comparative research in solving contemporary legal aid dilemma's in that whether policymakers can learn (or have already learned) from "best" practices elsewhere, we will also briefly discuss whether there are similar experiences abroad that might have served either as a basis for each of the proposals or referred to further justify the proposals put forward by the TISCO group.

2.1 Enhancing problem-solving capacities of persons through public legal education

The proposal

One of the suggestions advocated by the TISCO group is to enhance an individual's capacity by providing information on how to solve the most common legal problems and thereby empowering him to deal with the issue by himself at the earliest stage as possible. This can be achieved by making the knowledge and information in that regard easily accessible to all persons. It should include information on common legal problems that persons face in their day to day lives, the most common procedural issues, how to solve these common legal disputes, and the costs attached to various processes. This information should be made available by ways of folders, on the internet, through Legal Services Counters,[15] and in places where standard problems are

[14] Barendrecht, Van Zeeland & Sluiter, 2008.

[15] For more information about the Legal Services Counters See National report: the Netherlands, 2009.

primarily dealt with (such as police stations, medical centers, trade union offices, and law firms).

The TISCO group concluded that this proposal has various advantages: first, it enhances individual legal empowerment and thereby increases self-reliance while dealing with a common legal dispute. Second, it gives people more insight on the legal issue they are facing and thereby put them in a better position to decide to what extent they want to proceed with the dispute. Third, it helps them to be in control of their dispute and makes the interaction between them and legal aid providers easier and more fruitful (result oriented). More so, the proposal fosters people with a potential to evaluate the quality of the legal aid service they receive. According to the TISCO group, this proposal, if adopted, will decrease the costs of legal aid at least by 3%, i.e. about 24 million Euros (that is the case if 2% of the people solve their problems themselves and 2% of the people solve their problems in an earlier stage).[16]

Comparative experience (success stories abroad)

As far as comparative research is concerned, the TISCO group looked into best self-empowerment practices abroad in order to justify the effects of the above suggestion on enhancement of individual problem solving capacities. It specifically looked into the research commenced by the English Task Force on Public Legal Education on the advantages of raising people's awareness, knowledge and understanding of rights and legal issues. [17]

In England and Wales, a reform of the legal aid system took place in 2000, when the Legal Aid Act 1988 was replaced by new regulations in the Access to Justice Act 1999.[18] In the current legal aid scheme, applicants have to pay a contribution when legal aid is granted. One of the main features within this system which varies it from the Dutch system is the high degree of cooperation between the Legal Services Commission, that is the executive body which is responsible for the development and administration of both the civil and criminal legal aid schemes, and the legal aid suppliers local networks, the so called 'partnerships'. As such, legal aid service in England and Wales is broader and has various forms, one of them being empowering people

[16] Barendrecht & Van Zeeland (2008), p.93. One should bear in mind that the report was drafted at the request of the Secretary of State with the explicit order to find ways to diminish the legal aid budget (by 50 million euro).
[17] See www.pleas.org.uk
[18] J.M. Barendrecht & C.M.C. van Zeeland, *Gefinancierde Rechtsbijstand Vergeleken*, Universiteit van Tilbrug, (2003).

so that they may develop legal capability by improving the skills needed to anticipate and avoid problems.[19] It also "helps people to recognize when they may need support, what sort of advice is available, and how to go about getting it".[20] To this end, The Public Legal Education and Support Task Force was set up in January 2006 to develop proposals for how to promote and improve public legal education. According to the Task Force, "public legal education projects come in all shapes and sizes – they could be a campaign, an information pack, a training course, classroom teaching, a theatre production, a TV program, a mentoring scheme, a website, or many other activities". [21] Moreover, the scheme has "a key role in helping citizens to better understand everyday life issues, make better decisions and anticipate and avoid problems. Capable citizens are better equipped to take the sort of preventive action that avoids escalation and crises. Earlier settlement of disputes, especially before formal stages are reached, is less consuming of resources overall."[22] Not only does the scheme lower costs, according to the Task Force, but also it enhances social justice by building community cohesion and mutual trust between groups through raising awareness on perceptions of fairness and equality.

Until now, the Task Force admitted, it has been difficult to commence thorough independent evaluations of public legal education projects. There are scattered small scale evaluations that might be helpful to some, but they are hardly accessible to others, mostly due to a lack of financial resources. As an argument in favor of some optimism in this respect, the Task Force refers to an evaluation made in Canada on a very similar scheme which, to certain extent, shows a success story in that people are more aware of their (anticipated) legal problems and disputes are often solved at the earliest stage possible.[23]

2.2 Motivating mediation (ADR)

<u>The proposal</u>

Another proposal put forward by the TISCO group is the possibility of (semi-) mandatory referral of a case to a mediator. To that end, the

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[19] See http://www.plenet.org.uk/tools-and-guidance

[20] Barendrecht & Van Zeeland (2008), p. 90.

[21] Report *"Creating capable citizens: the role of public legal education"* July 2007. Available at http://www.pleas.org.uk/uploads/PLEAS%20Task%20Force%20Report.pdf

[22] See Summary PLEAS report, available at http://www.pleas.org.uk/uploads/PLEAS%20Task%20Force%20Report%20Summary.pdf

[23] See http://www.plenet.org.uk/data/files/evaluating-pla-canadian-resource-29.pdf

law should contain incentives to bring one's case to a mediator instead of a judge. This incentive could be a material sanction, where a judge denies honoring the refusing party's submission for a material claim, or it could be a procedural sanction, where the refusing party shall be ordered to pay process costs. More so, a refusing party may be required to pay a higher amount of contribution to legal aid services he might eventually obtain. [24]

Comparative experience

The authors of the position paper refer to the experience of England and Wales, and Australia as far as motivating mediation through financial sanctions is concerned. In England and Wales the landmark cases which set out the standards for issuing financial sanctions against a refusing party are *Halsey -v- Milton Keynes General NHS Trust* and *Steel -v- Joy and Halliday.* In both cases the Court of Appeal has developed some general guidelines as follows: [25]

Standards for issuing financial sanctions against a refusing party
• *The court does not have power to order reluctant litigants to mediate. Its role is to encourage, not compel parties to enter into mediation. Any other rule would impose an unacceptable obstruction to the right of access to court (art 6 ECRM).* • *All those involved in litigation should routinely consider with their clients whether their disputes are suitable for ADR.* • *Although most cases are suitable for ADR, there should not be a presumption in favor of mediation.* • *If a party refuses to mediate, at a subsequent trial, the court can displace the normal costs rules and order that party to pay costs despite it winning at trial. That will only occur if the successful party acted unreasonably in refusing ADR. The burden of proof that this has been the case lies with the unsuccessful party.* • *If the case is mediated, the parties are entitled to adopt whatever position they want and if the case does not settle, the court is not entitled to examine why that happened (preserving the confidentiality of mediation).*

According to the English experience, thus, not all refusals to mediation give rise to financial sanctions. Rather, it depends on the circumstance of each case as to whether a judge may issue such sanction against the refusing party. To that end, a judge may evaluate, inter alia, the nature of the dispute, the merits of the case, whether other settlement methods have been attempted, whether the costs of mediation would be disproportionately high, procedural delay, and whether the mediation had a reasonable prospect of success.[26]

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[24] For comparative analysis: P.A. Wackie Eysten, "De afstraffende kostenveroordeling". Tijdschrift voor Arbitrage 2004, p. 168 e.v.

[25] See case commentary by Paul Huges available at http://www.adr.civiljusticecouncil.gov.uk/updocs/client0/paulhughesword.doc

[26] Barendrecht & Van Zeeland (2008), p. 238.

Mediation in England and Wales has been so successful. In 2007 the National Audit Office published a Review of Legal Aid and Mediation for people involved in family breakdown.[27] The report stated that "mediation is generally cheaper, quicker and less acrimonious than court proceedings and research shows it secures better outcomes….Confrontation in court cannot always be avoided but… mediation should be pursued wherever possible, to the benefit of disputing individuals and the taxpayer."[28]

2.3 Legal expenses insurance

The proposal

Another proposal with the impact of fundamentally changing the Dutch legal aid system is the privatization of certain aspects of legal aid services by introducing a legal aid expenses insurance system.[29] According to the proposal, criminal and asylum cases should continue to enjoy public funding, while a considerable amount of civil and administrative disputes will find coverage under an expenses insurance policy for persons who do not pass the means test. Logically, this suggests that the income level for qualification of publicly funded legal aid will be lowered, and only people who pass the means test due to their (extremely) low financial incomes may be considered for state financed legal aid. This element is indeed part and parcel of the proposal and the introduction of this element will help the government to save, according to the TISCO group, about € 18 million annually.

Comparative experience

This proposition seems to be based on the Swedish system. [30] The Swedish legal aid system primarily opts for privately funded insurance, where citizens are expected to take a legal expenses insurance policy alongside their health insurance. This is due to that fact that in 1996, the relevant law which regulates access to justice, i.e. the *Rättshjälpslagen,* was reformed in such a way as to make legal

[27] National Audit Office Review of Legal Aid and Mediation for people involved in family breakdown March 2007, available at http://www.nao.org.uk/publications/0607/legal_aid_for_family_breakdown.aspx.
[28] L. Parkinson, "Family mediation in England and Wales", available at www.rln.lt/download.php/fileid/227
[29] This proposal was inserted at the explicit request of the Dutch Parliament. Among the participants of the TISCO group it scored very low.
[30] There has been an earlier comparative research by two of the leading members of the TISCO group on the Swedish system which this section is based upon. See: J. M. Barendrecht & C.M.C. van Zeeland, *Gefinancierde Rechtsbijstand Vergeleken*, Universiteit van Tilburg, (2003).

insurance policy a mandatory undertaking for citizens. And ever since the reform, the Swedish citizens can no longer depend on publicly funded legal aid and are instead obliged to take out a private legal expenses insurance policy.
There are some exceptions to this exclusion of state financed legal aid, such as criminal law cases[31] and some cases of assigned counsel (mandatory psychiatric admission, counsel for children where custody and other matters that are involved, and counsel for distribution of matrimonial property).

Under the present scheme almost the entire Swedish population (97%) has a legal expenses insurance policy. Besides the mandatory nature of the 1996 *Rättshjälpslagen*, this landslide coverage of legal expenses insurance policy has historical roots which is typical to the Swedish society: ever since the sixties of the last century, legal expenses are included in insurance policies which are often taken out by families.

It seems clear that the Swedish legal expenses insurance system can be offered at low costs for the Swedish government as well as the citizens. Nonetheless, in order to get a good impression of the scheme and its potential for other countries, further research is needed as to the quality of the legal aid services and - perhaps - the amount of insurance exclusion the system generates.[32]

3 Policy in the Making: Official Government Position

In October 2008, the State Secretary for the Ministry of Justice disclosed her proposals regarding the organization and financing of legal aid that aimed, in the first place, to decrease the government's legal aid budget by € 50 million in the year 2009. In her letter to the Chairman of the Dutch Parliament she stated that her proposals are directly based on the suggestions made by the TISCO group in its position paper as discussed above. The essence of the proposal is that, unlike the traditional access to justice perception where legal aid policy emphasizes more on access to lawyers and judges, the new Dutch legal aid policy should give more focus on access to the solution of a problem. Individuals should be encouraged to take more responsibility and solve their problems themselves through legal empowerment. The

[31] The defendant may, depending on the outcome (conviction or acquittal) be required to pay a certain amount by himself.
[32] Questions like these fall under the scope of the PhD research project mentioned in foot note 1 infra.

role of state financed lawyer only comes into place when a dispute is of complex in nature, or if a case has immense social or financial interest in that it warrants government intervention. Rather, the government should focus in enhancing the capabilities of its citizens through various legal empowerment mechanisms. In almost all legal scopes, according to the State Secretary, there is a possibility to solve a dispute based upon interests of the parties rather than based strictly on the law, for the interests of the parties often extend beyond the formal legal rights. Nonetheless, for parties who find themselves in a vulnerable and weaker position vis-à-vis their counterparties in a dispute, a judge plays essentially a complementary role in guaranteeing their right to legal protection. [33]

The concrete proposals forwarded by the State Secretary include all above discussed three items suggested by the TISCO group, i.e.

- enhancing problem-solving capacities through public legal education
- motivating mediation and other ADR mechanisms, and
- raising the income level for the qualification of state financed legal aid in order to stimulate people to buy a legal expenses insurance policy.

Other proposals, also based on the suggestions made by the TISCO group, include limitation of appointment of legal counsel in penal law, and making a divorce plan mandatory.

During a parliamentary commission's debate last December, where the State Secretary had to defend her proposals, the majority of parliamentarians seemed to concur with the positions put forward by the government, albeit most also express concerns whether the plan would in long term compromise the right of access to justice by shifting the focus to outside litigation legal aid.[34] The most unpopular part of the proposal was the one which calls for what was called the privatization of the state financed legal aid scheme through the introduction of stimuli to buy a legal expenses insurance policy. First, there seemed to be enormous concern on the proportionality between the aimed budget cut (€ 12 million only through introducing legal expenses insurance) and the amount of premium people would need to pay in case they undertake legal expenses insurance. Second, there was a fear that many people would- due to financial constraints-

[33] Letter of the State Secretary for the Ministry of Justice, 24 October 2008, ref. 5570942/08.
[34] Tweede Kamer der Staten-Generaal, Verslag van een Algemeen Overleg, 17 december 2008, nr. 31 753, 's-Gravenhage, 2009.

refrain from taking an insurance policy and this be uninsured since the state financed legal aid system had shut them out as well.[35] Third, there was an issue on the quality of legal aid provided by insurance companies as commercial institutions mainly preoccupied in making profits, and the potential abuse of the system by these institutions (e.g. by refusing certain people insurance policy, or by deciding preemptively which cases are worthy pursuing).

In conclusion, one can say that, with the exception of the introduction of legal expenses insurance, it seems very likely at this juncture that the proposals put forward by the State Secretary will be adopted. When this is the case the Netherlands will witness a substantial shift in its classical legal aid policy as it once knew. Whether that change will improve the right of access to justice by not compromising the quality of legal aid services is beyond the scope of this paper, and certainly requires further research. But there are two further reaching observations which can be made at this point. The first is that there is a direct link between the comparative research commenced by the authors of the final TISCO position paper and the proposals put forward by the Dutch government. The second observation had to do with the shift that has taken place within Dutch legal aid policy. As it has already been stated above, Regan suggests that in societies with social democratic welfare states and civil law origins, legal aid generally gives more emphasis to citizens' dependence on lawyers and, primarily, for court cases (in-litigation legal aid). Meanwhile, societies with liberal welfare states and common law origins generally give more emphasis to citizens' self-reliance for court cases and for problems outside court (outside litigation legal aid).[36] This rises the question what the shift in Dutch legal aid policy from inside to outside litigation implies for the nature of its welfare state. This question also falls beyond the scope of this paper. [37]

[35] Ibid. This fear is fed by the experience with the privatised national health care system. Shortly after this operation (in 2007) the phenomenon of so called 'insurance hoppers' popped up, that is people who go from one insurance company to another, due to their unwillingness (or incapability) to pay the prescribed premium. For health care, however, insurance companies have a legal obligation to accept people as an insured person, even with a large unpaid debt of past premiums. In this respect the scheme differs from the proposed scheme on legal services which gives no restrictions to insurers in their policy of acceptance or exclusion.

[36] Regan, 1999. Noot 10 supra.

[37] Both issues will be addressed through the PhD project mentioned in note 1 infra.

4 Proposal Debates: Opponents of the Chain Theory

After the publication of the TISCO report and relevant explanations thereof, various actors have either supported or opposed the proposals. In connection with this, it seems worthy noting at this juncture some of the reservations which were expressed, and attempt to see whether there is a valid argument against either the proposals or the underlying chain theory. In the subsequent sections we will address two related opinions which might be labeled as the position of social legal aid and that of the second tier legal aid providers, or better yet: the Bar Association.[38]

4.1 The Social Legal Aid Chair

Since about a year ago, the Dutch Legal Aid Board has created a Chair on Social Legal Aid within the law faculty of the University of Amsterdam. Mies Westerveld, a long time social lawyer and academic, is appointed as first chair holder. The main tasks of the chair include motivating young lawyers and law students to become actively involved in social legal aid services, and to initiate academic research on timely and practical issues of access to justice and legal aid. Social legal aid traces its origins back to the access to justice movement of the 1970's and has as such something to do with the budget problems on state financed legal aid but also -and perhaps even more so- with income and other inequalities (such as ethnic or race related) which may cause an inequality to obtain justice. Seen from the perspective of social legal aid, an approach which could be summarized as "give a man a fish and you feed him for a day, but teach a man to fish and you feed him for a lifetime" has one fundamental flaw in it: it ignores existing social inequalities and it has too little attention for the fact that the ocean, apart from appetizing fish, also contains sharks who are out to get the ill equipped or badly informed fisherman. In her inauguration speech, Westerveld referred - as an illustration why social legal aid is still an actual theme - to an article in the newspaper about the economic migration wave from new EU Member States. According to this article the 'new' migrant workers are in danger of being exploited by mala fide employers, landlords, service providers and the like. [39] The same is true to other groups, such as asylum seekers, or for that matter born and bred Dutch residents who are under educated or even illiterate. A theory which leans too much on social justice as a

[38] The phrase second tier (or also: pillar) is used to distinguish this service provision from that in the Legal Services Counters.

[39] "De koppelbaas is terug! Toestroom Midden- en Oosteuropese arbeiders leidt tot misstanden. NRC-Handelsblad June 10 2008.

self help kit will leave the vulnerable groups in society in the cold, something which is especially true in the midst of an economic downturn. [40]

4.2 The Bar Association

Another reaction on the reform proposals of the State Secretary came from three scholars who are all also still practicing lawyers. As such we label their views-perhaps unfairly- as representing the position of the Bar Association. According to these authors (hereafter: Bannier et al.) the proposals forwarded by the TISCO group emphasize most on access "to law" and to justice, while law is seen as consumption commodity instead of a value system which, needless to say, basically is. This value system is in perpetual development and takes place, *inter alia*, in court rooms where judges are often confronted with new perspectives and conflict of interest that are put forward by the litigants through their lawyers. The moment justice seekers are forced, though financial sanctions or otherwise, to seek the solution of their legal problem extra judicially (out side a court room thus), they are in a way being excluded from participating in this continuous development of law making. This exclusion in turn entails that the values and interest of persons with low financial means who can not afford a lawyer to bring their case before the court are no longer taken into account during the development of law through judges, thus leading to further exclusion.

On meditation, Bannier et al. argue that the proposal which requires Legal Service Counters to refer a dispute, as far as possible, first to a mediator instead of a lawyer contradicts with the criteria of impartiality and neutrality, two of the most essential conditions of the legal profession, which will make obtaining an independent advice more difficult to get. More so, mediation has a devastating effect as far as rights of an individual are concerned, because if individuals are forced to solve their problems through mediation without acquiring sufficient information on the legal consequences thereof, they are in a way surrendering their formal as well as procedural rights. In mediation process, for instance, there is no fair trail, while at the same time there is no institutional guarantee for equality of the parties before the law. A party who is too weak for his opponent should hope for the mediator's mercy, otherwise he will most probably feel compelled to accord to unfavorable terms. Similarly, there is no judicial control for mediation and since mediation is suppose to be a confidential process,

[40] M. Westerveld, 2008.

there is no opportunity for the weaker party to challenge and annul the agreement by invoking absence of consensus ad idem. In this way, the more powerful party in a legal dispute can easily circumvent the legal protection endowed upon weaker party.

With regard to the legal expenses insurance, Bannier et al. stipulate that the premium people with low incomes will have to pay to insurance companies is much higher than the contribution they have to make under the present legal aid system. Furthermore there are doubts as to the quality of the legal aid service guaranteed under such a scheme since insurers, as any market oriented institution, will be in a position to decide which lawyer will handle which case, not according to specialization or experience, but rather according to the costs of their lawyers. Another problem with the proposed insurance system is in its potential viscous circle effect. The system will create a society where persons with legal expense insurance policy will more often than the case is now be tempted to use legal assistance which would eventually lead to more legal disputes. This would in turn lead others to take insurance through which a viscous circle is created where the amount of legal disputes will increase exponentially.

Another argument against the legal expenses insurance scheme as an alternative for state financed legal aid concerns the task of a lawyer or the legal profession within a society. In a modern democratic state where the rule of law exists, the essential task of a lawyer is to guarantee the legal position of his client by giving him advice and by representing him in his legal disputes. In doing so the lawyer forms a counterforce on behalf of his client against the government or other more powerful institutions. A lawyer, working as an employee for an insurance company, is naturally more inclined to overlook the best interests of his client for he is required to take heed of the financial interests of his profit-oriented organization. More so, the trust factor of the relationship, another crucial element of the legal profession, requires confidentiality and the privilege of non disclosure. These important features are generally absent in cases of insurance lawyers where more often than not contact between the two is made in writing or over the phone.

The proposed scheme is, conclude Bannier et al., problematic in view of relevant provisions on access to justice in two respects: so far as it motivates people with financial sanctions to seek extra judicial solutions to their legal disputes without guaranteeing fundamental principles of justice; and so far as it compels people to depend on

insurance companies where most likely their rights would be compromised with the financial interest of these companies.[41]

5 Conclusion

The paper tried to assess the relationship between comparative research and legal aid policymaking in the contemporary debates within Dutch society. We believe the Netherlands is an interesting case in this regard, as in its present course of changing legal aid policy, comparative research has played an important role in looking for best practice abroad. If there is anything this case illustrates it is the necessity of taking a closer look, specifically by gathering more empirical data, when labeling experiences elsewhere as "best practice". We have seen, for instance, in England no thorough evaluation has been made so far with regard to the success of public legal aid education schemes. For a comparative researcher who aims to influence policy making, availability of such a thorough evaluation is imperative. In this junction, it is important to clearly specify what the criterion is for a legal aid policy to be qualified as successful and worthy adopting in one's own country. Is this the case merely because the system provides "a" solution for a legal problem or "an" answer to a legal question? Or should one also look at the nature of the provided solution or answer, even if the justice seeker himself is or seems to be content with the outcome? The chain theory seems to suggest the former. Perhaps this is a misinterpretation from our part, but if this would be the case, the issue is as far as we are concerned open for debate.

According to the legal profession, as stipulated by Bannier et al., the proposals which are grounded on the chain theory will endanger the main task of the lawyer as guardian of the rule of law in a democratic society by compromising his neutrality, impartiality and the requirement that a lawyer must at times prioritize the interests of his client. More so, the theory encourages citizens to involuntarily surrender legal rights endowed upon them. One should keep in mind though that the legal profession is a stakeholder in the legal aid policymaking process, with a certain protective, perhaps financially driven, view on the matter.

[41] F. Bannier, T. Prakken & R. Verkijk, "Rechtshulp is meer dan probleemoplossing: over de voorgestelde bezuinigingen in de gefinancierde rechtshulp", Nederlands Juristenblad, 2008, pp. 2678-2684.

From the perspective of social legal aid, the approach of legal empowerment as a way out of most legal conflicts overlooks the fact that law and social justice are no consumer's goods of a transparent quality and nature. It ignores the fact that in most disputes the amount of 'justice' that goes to one party does so at the expense of the other one. And it is apathetic to the fact that though all people are equal, that some are more equal than others. From this perspective, EU member states that wish to live up to the obligation of article 6 ECRM –more specifically the rule to guarantee equality of arms- cannot do so without a well informed, easily accessible and impartial squad of legal aid providers.

Barendrecht, on the other hand, clearly has a point when questioning the financial viability of a one-on-one legal aid system in the present day complex and judicially-assertive society. This entails that, sooner or later, a compromise must be found between the financial viability of a legal aid system and the amount of justice the system can and will provide. The search for such a 'next best optimum' is perhaps the major challenge for state legal aid policy in the next ten to twenty years.

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