



Law, Technology and Access to Justice

Roger Smith

Welcome. A round up of news from recent developments in Europe this edition but, alas, no coverage of global news. This will, hopefully, resume in the next edition with the recovery from unfortunate illness of Paul Ferrie, who produces it. The updating articles have been collected by Pieter van den Biggelaar, to whom much thanks. In all our countries, there is much interest in developments in the use of technology - and this is referred to in some of the reports below. One of the consequences has been a renewed interest in international developments - since, though law may be national, technology is, of course, international. I have recently written a further annual report on law, technology and access to justice for the Legal Education Foundation (LEF) based in England. This follows the one prepared last year which, in its turn, built on the joint study with Alan Paterson: *Face to Face Legal Services and their Alternatives*, available at http://www.strath.ac.uk/media/faculties/hass/law/cpls/Face_to_Face.pdf. The LEF papers can be viewed at <http://www.thelegaleducationfoundation.org/digital>.

The LEF is now assembling a website specifically to cover digital developments. This will include a blog which has just been soft launched. You can find it at <http://law-tech-a2j.org>. I commend it to anyone interested in the field. Here, as an exclusive, is the opening post which proposes the key themes for development during the year. If you have any comment - or, indeed more widely, any contribution for further additions of this newsletter do get in touch: rsmith@rogersmith.info.

So much is happening around the world that it can be difficult to get an overview of the most significant developments.

The US Legal Services Corporation had a go at this at its Technology Summit in 2013 and, at the time, its priorities were:

1. state-wide legal portals;
2. sophisticated document assembly programmes;
3. adapting to mobile technology;
4. applying business process analysis; and
5. developing expert systems.

These were proposed as (and are now actually) the priorities for a specific funding organisation based in the US at a specific time. They reflect unavoidably that domestic context. But, their formulation encourages consideration as to their relevance more globally. Some have become almost routinely absorbed. Who does not now adapt their provision so that it is responsively designed and can be used on a mobile platform?

Well, what would we propose as global priorities for this year? We need to note wider developments, such as the broad adaption to mobile, but be aware of the specific characteristics of those access to justice is impeded by their social and economic circumstances. The legal press, at least in the UK and US, is much concerned with the possibilities of expensive artificial intelligence systems such as IBM's Watson or Google's DeepMind. But, realistically, it will be some time before the cost of these cutting edge systems comes down to levels where they are useable by agencies in the poorer areas of our countries.

Look around the world and the five most important global trends to watch in 2016 seem to be:

1. the development of guided pathways for advice and information (led by the Dutch Rechtwijzer and demonstrated also in MyLawBC.com in British Columbia and by Relate in England in Wales);
2. the emergence of national brands using an internet presence to deliver low fee services often linked with unbundling to open up 'the latent legal market' of potential low income clients (led by a deregulated England and Wales);
3. exploration of automated document assembly (initially led by the US); experimentation with various forms of virtual legal practice (widespread);
4. the deployment of various forms of 'virtual legal practice', particularly perhaps using video Sype-type connections and
5. online dispute resolution (as in Dutch Rechtwijzer 2.0) and online dispute determination (led by British Columbia's civil resolution tribunal).

Anyway, those would be my five top priorities to watch. Let me know if you disagree.

New Developments in the Latvian Legal Aid System

Agris Batalauskis

The Latvian state ensured legal aid system is one of the youngest legal aid systems in Europe. It was only on June 1, 2005 that the State Ensured Legal Aid Law came into force. Its main goal is to promote the right of a natural person to a fair court protection by ensuring state-guaranteed financial support for the receipt of legal aid in civil and administrative disputes. To guarantee the successful provision of state ensured legal aid in civil and administrative cases, on January 1, 2006 a specific institution subordinated to the Ministry of Justice – Legal Aid Administration – was established.

The correct/appropriate characterisation of the Latvian legal aid system is that it is “a work in progress”. In the past couple of years, the system has continued to develop and has gone through some positive changes. To illustrate that, I would like to reflect on some of the recent developments in the Latvian legal aid system:

- The scope of the state ensured legal aid has been extended to difficult administrative cases in court. Research showed that despite the principle of objective examination in administrative procedure, which provides certain protection for persons in administrative cases, a large part of the administrative cases for persons are more difficult than civil cases, where/for which state ensured legal aid can be granted.
- Taking into account the European Union adopted laws and regulations in the field of asylum, as well as that this field right now is in the global spotlight, Latvia has significantly strengthened the rights of asylum-seekers when it comes to free legal aid, by making the free legal aid procedure more simple, practical and accessible.
- Important amendments to the Civil Procedure Law and State ensured legal aid law regarding the court costs (including the state fee, office fees and other costs related to the court) were made. The main aim of the amendments –is to ensure that a person who has been granted state ensured legal aid is exempted from the obligation to pay any court costs. Therefore, Latvia has taken important steps to ensure that every person who receives state ensured legal aid does not have any obstacles when it comes to his rights to access to court and access to justice.
- Changes were made in the state ensured legal aid cost recovery mechanism. In the Civil Procedure Law it is laid down that the losing party in court has to reimburse legal aid costs to the winning party, so the aim was to make sure that if the losing party is a person who has received state ensured legal aid, the legal aid costs of the opposite parties are covered by the state, by the state ensured legal aid budget. Therefore,

essentially in state ensured legal aid cases the party that receives state ensured legal aid does not bear any risks and the state has to pay the costs of the winning party in case the state ensured legal aid party loses his/her case. The costs the losing party has to reimburse are determined by court and included in the final judgment of the court. Of course it might be said that such regulations could stimulate persons who are eligible to receive state ensured legal aid to go to court also when they don't have a 'strong' case, but that's why the competent authority making the decision has a mechanism in place to check if there is grounds to go to court in the specific case (the person has to provide evidence). If the competent authority can't determine that, then legal aid providers (lawyers) in some cases, when preliminary legal aid in the form of consultation is granted, can be asked for an opinion, which then can be used as basis to make a decision about the further state ensured legal aid.

- Fees were raised for the state ensured legal aid providers. We have already had active discussions in Latvia for couple years about the adequate amount of remuneration for the lawyers who provide state ensured legal aid. Of course, one can't say that an adequate level of remuneration has been reached, but at least there has been a positive development (has happened), and that is very important if developments for further state ensured legal aid quality assurance system have been planned.
- Further developments of the state ensured legal aid quality assurance system have continued in many ways, including:
 - specialisation of legal aid providers;
 - monitoring of legal aid cases;
 - cooperation with the Bar Association;
 - mandatory further education for legal aid providers;
 - client satisfaction surveys;
 - detailed evaluation/audit of the signed legal aid contract;
 - seminars for legal aid providers and social workers;
 - cooperation with courts.

The procedures by which the state ensured legal aid is granted in civil and administrative disputes, do not apply to the provision of state ensured legal aid in criminal proceedings.

A state-ensured lawyer for the representation of a person and for the defence of a person in **criminal proceedings** is invited in the cases and according to the procedures specified in the Criminal Procedure Law. There are no restrictions regarding the volume of state ensured legal assistance in criminal cases.

The Portuguese Legal Aid System: an update

Carlos M. G. de Melo Marinho

1 The present system

The present Portuguese legal aid system is based a group of laws created in the middle of the first decade of the XXIst century with the goal of both materialising the commands coming from Article 20 of the Constitution and the demands emerging from the Council Directive 2003/8/EC. Such laws have not been changed in the last few years. The Constitution imposed, long time before the approval of the Directive, a principle of universality: all (including both natural persons and non-profit legal persons) should have access to the law and the courts in order to defend their rights and interests, independently from their economic situation (even if the legal persons couldn't for legal advice).

The rights to free legal information, legal advice, legal assistance, interpretation and accompaniment by a legal professional before any public authority are brought together so that, to achieve the constitutional objectives, the legislator granted two lines of aid:

(1). *Legal information* – which includes public and general information on the individual rights and duties and the legal system transmitted to the citizens in order to optimise the access to law, the courts and the judicial services; and

(2). *Legal protection*, which includes:

(2.1.) *Legal advice* – free legal advice from legal professionals which can involve extra-judicial steps and informal mechanisms of reconciliation;

(2.2.) *Legal aid*, that is:

(2.2.1.) Total or partial exemption from court fees and other charges relating to the proceedings;

(2.2.2.) Deferment of payment of court fees and other charges relating to the proceedings;

(2.2.3.) Appointment of a legal representative and payment of his fees or, alternatively, payment of fees to the legal representative chosen by the applicant.

Legal aid may be granted for the resolution of any type of legal dispute or litigation and does not depend on any previous assessment of the purpose and complexity of the action, its merit or the type of proceedings. The application forms may be obtained, free of charge, from any Social Security office open to the public or, by electronic means, on its website. The completed forms must be accompanied by any documents that can show the insufficiency of financial means and be submitted at any Social Security office open to the public. The final decision on the application is

served to the applicant in written form by the Social Security office. In the case of such notification not taking place within a period of 30 days, legal aid will be deemed to have been tacitly granted.

If the legal aid certificate covers the appointment of a legal representative, notification of that decision will also be sent to the Bar Association or the Solicitors Association, which will have a time limit of 10 days, with effect from the date of that notification, to make such appointment. This appointment will be notified to the applicant and to the legal representative. When the application is delivered during a legal action, the moment of the notification will also determine the moment of the recommencement of a legal time delay. If the legal aid covers total or partial exemption or deferment of the payment of court fees and other charges relating to the proceedings, the applicant must submit a document to the lawsuit showing that the legal aid has been granted. Legal aid continues to apply for the purposes of an appeal, irrespective of any decision on the merits of the case. Once granted, it may be withdrawn before the end of the proceedings if the applicant acquires sufficient economic means, if it is proven by new documents that the reasons for the granting no longer apply or if the documents that served as a basis for the decision are declared to be false by a *res judicata* decision. The administrative decision can be subject to judicial review by means of an application sent to the Social Security office responsible for that decision. For these effects, the District Court where the Social Security Service is located is competent to take the final decision. If the application has been presented during the pending of an action, the jurisdiction belongs to the court before which the action was brought.

2. The changes

The constitutional goals have remained the same but the ways to achieve them have changed deeply in the last decades.

To the perspective of a judge, like myself, who started his career applying a law approved in the year 1970 that recognised legal aid only as a special “benefit” given to the citizens and who had to decide, every day, questions connected with such “benefit”, evaluating its grounds for concession among all the other judicial tasks, the major changes is that judges don't decide any more such questions (except in the context of the less common judicial review requested against a decision), and new actors (administrative authorities, i.e., social security bodies), new criteria (standing on the use of forms, mathematical formulae and objective indicators) and automatisms have appeared. To the less attentive, this could raise the notion that legal aid had become a question external to the courts and to the strict functioning of the Justice administration. However, this would be an absolutely wrong perception. Legal aid remains at the core of the functioning of the Justice systems of all the EU Member States, even as a prerequisite or as an element that gives coherence to the ‘building’, and Portugal is no exception.

The stability of the national legal rules in this area don't mean immobility or absence of evolution since this decisive technical domain is permanently growing through case-law. Even the Constitutional Court is called to give its important contribution for the enlightening and development of concepts – e.g., it declared, with general obligatory strength, in 2014¹, that it was unconstitutional a rule of the Judicial Costs Regulation interpreted as imposing the previous payment of court fees as a condition to appeal from the administrative decision that denies the concession of legal aid.

3. The influence of the Council Directive 2003/8/EC

The legislative effort materialised in the production of the COUNCIL DIRECTIVE 2003/8/EC was justified by the objective of 'maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured' in order to guarantee the proper functioning of the internal market². It attempted to ensure that to no one is denied real access to justice (that is, effective, generating concrete solutions, searching the pacification of the conflicts) because of its economic debility or due to the cross-border nature of the dispute. In internal terms, the Directive had the special relevance of reminding and underlining the need to consider this matter not so much as a special benefit or protection provided by Member States but as an effective right emerging from the EU citizenship that plays a key role in ensuring real access to Justice within the borders of a common space. In subjective terms, it was less ambitious than the national legislation already existent since it stated that only natural persons may benefit from the legal aid system created by the Directive. In objective terms, it didn't contemplate criminal matters, thus reducing the scope of the national rules but there was coincidence of insights in the domain of the definition of the ambit of coverage since, in the Directive, legal advice, pre-litigation assistance and counselling were included.

The EU law text introduced a similar approach – in face of the Portuguese legislation – on the definition of thresholds under the light of various objective factors such as income, capital or family situation, thus allowing a prior knowledge of the requirements for the grant of legal aid and introducing an objective element for the assessment of the financial resources that make an applicant eligible. This solution allows the development of prior formulae and calculation simulations which makes it possible to determine previously and with certainty the conditions applicable to a specific request, as contained in the Portuguese solution. Nonetheless, the EU system brought a hybrid solution – objective but still sensible to the specificities of the case – which not only take into account a set of fixed thresholds but also certain circumstances which clearly may evidence the

¹ Case N° 538/2014, in Official Journal N° 182/2014, Serie I of 2014-09-22.

² See No. (1) of the preamble.

impossibility of meeting the costs of proceedings. This mechanism introduced a noteworthy 'safety valve', providing consistency to the system and nourishing the hope that effective access to justice will be made available to all citizens. It was an important subsidy to the national model.

A field where the Portuguese approach doesn't accompany the EU insight is the one that refers the possibility of rejecting applications for legal aid 'in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed'³ since a similar regime was revoked at August 2007. This faculty of refusal entails a mechanism of prejudgement with jurisdictional nature that seems difficult to reconcile with administrative systems where the faculty to dismiss an application based on the merits of the case is also vested in non-judicial authorities responsible for providing legal aid since this could, eventually, allow the internal compression of the wide and all-embracing goals of granting universal access to Justice

There was coincidence of views in the domain of the principle of the availability of legal in all stages of the proceedings (particularly if an appeal takes place and including any subsequent enforcement of a judgement). This option ensures that the citizens with less resources are not abandoned in an intermediate phase of a process for recognising and making effective their rights. The only and sole requirement to put this into practice is that 'the conditions relating to the financial resources and the substance of the dispute remain fulfilled'⁴. However, 'Member States may make provision for the re-examination of the application at any stage in the proceedings'⁵.

The principle coming from the Directive according to which the legal aid may be granted in full or in part⁶ was for a long time before assumed by the Portuguese ruling. This means that applicants who do not qualify for a total exemption of costs incurred may have to satisfy part of the expenses of the proceeding. So, it can be demanded from the applicant a proportionate payment according with his income, that is, a contribution suited to his effective capacity of personally sustaining the expenses incurred in the pre-trial stage of the procedure and during the preparation and handling of the proceedings.

Another imposition coming from the Directive that already characterised the Portuguese system by virtue of constitutional demands was the need of full availability of information and reasoned decisions. This means that it must be ensured that the applicant is fully informed of the processing

³ See No. (17) of the Preamble and Article 6(1).

⁴ See No. 20 of the Preamble and Article 9.

⁵ Article 9(4) of the Directive.

⁶ See Articles 5(1) and 3(4).

of the application and that where 'applications are totally or partially rejected, the reasons for rejection shall be given'⁷. This helps to set up an obligatory, formal and coherent mechanism of judicial review of the decision which has a merely administrative nature⁸ as presently occurs in Portugal.

Finnish Legal Aid – what's going on

Muilo Merja

Finnish legal aid system is a mixed model system where legal aid is being provided by both private lawyers (solicitors and licensed legal counsels) and public legal aid attorneys of state Legal Aid Offices. Legal aid is primarily intended for those who do not have insurance for legal expenses and cannot afford to buy legal services by themselves.

In Finland, the strategic aim is to enhance overall economic functionality of legal aid (cost-effectiveness). Due to societal development, the aim is also to provide effortless access to legal aid for all citizens through different channels (on-line counselling, telephone, remote services, negotiations on the spot etc). The vision for the future is to provide every natural person a possibility to obtain necessary legal aid at the earliest stage of his/her process in adequate time, regardless of his/hers economic status.

As a concrete example of putting the strategy into action, a new law has been proposed to the Parliament to enhance administration of legal aid (Government proposal 26/2016). The administration of all judicial actors - courts, prosecutors, civil law enforcement - is being reformed in Finland. Administration of Legal Aid Offices is also being reformed. Consequently, Finland shall have six Legal Aid Bureaus lead by district directors. The districts will be responsible for the administration of local Legal Aid Offices. The aim is to make administration and management of legal aid offices more professional. Centralised administration brings savings and enables more intensive development of local legal aid offices. On the other hand, the reform enables local offices to focus on the substance. The reform should come into force 1st of October 2016.

Due to increased amounts of asylum seekers, Finland is also renewing its Aliens Act and in relation to this, its Legal Aid Act. The Parliament is working actively with the Government proposal (32/2016). The aim of the reform is to intensify and speed up the legal processing of asylum seekers. Legal processes in courts will also be simplified as in certain cases appeal times shall be shortened and composition of administrative courts eased. Regarding legal aid, it has been

⁷ As defined in Article 15(1) and (2) of the Directive.

⁸ Article 15(3) and (4).

proposed that legal aid attorneys shall not be present in asylum interviews unless exceptional reasons demand otherwise. On the other hand lawyers with a basic law degree are no longer entitled to represent asylum seekers. The right is reserved to solicitors, licensed legal counsels and public legal attorneys. The reward system for assisting asylum seekers will also be changed from hour-based to case-based. Finally, in order to create savings, increased efforts are being made in order to direct asylum seekers to use the services of state Legal Aid Offices instead of private practitioners.

Rechtwijzer: Update from the University of Twente

By: Marian van Dijk

With a team of psychologists of the University of Twente's department of Psychology of Conflict, Risk and Safety, we are looking at individual experiences in legal conflicts, to better understand legal aid user's interactions with innovative legal aid. Over the past three years, we have studied the needs of legal aid users in asymmetric conflicts, the effects of Rechtwijzer 1.0 in divorce conflicts, and examined effects of framing of online interventions in asymmetric conflicts.

We are now in the final stages of the project, having finished data collection. Our first study has been published in *Negotiation and Conflict Management Research*.⁹ We found that in asymmetric conflicts, needs for help from legal aid providers were higher than in symmetric conflicts. We found this for two types of asymmetry: asymmetry of dependence and asymmetry of conflict experience. To better understand the needs of legal aid users, we found it was important to understand how individuals viewed themselves relative to the other party, rather than only how they experienced the conflict themselves. Asymmetry of dependence was related to both needs for conflict-related help, as well as emotional help. Conflict experience predicted the need for emotional help, but only for respondents with weak social networks. We recommend that legal aid professionals are aware of the asymmetries that clients experience. This is especially important for vulnerable clients who might require emotional help from legal aid professionals to be better able to deal with their conflicts.

We have also completed data collection on the longitudinal study of divorce conflicts. Around 50% of those going through divorce completed all three measurement points in the survey, resulting in a

⁹ van Dijk, M. A. J., Giebels, E. and Zeibel, S. (2016), Building Strength or Lending an Ear in Legal Conflicts: Dependence and Conflict Asymmetry as Distinct Predictors of Needs for Support. *Negotiation and Conflict Management Research*, 9: 3–21. doi: 10.1111/ncmr.12066

valuable dataset on the development of divorce conflicts. We are currently analysing the process of psychological distress throughout the process as well as the effect of Rechtwijzer 1.0.

Finally, we ran an experiment, testing the effect of online interventions in online conflicts. We simulated conflicts in an online market place and then offered one of three different types of help. We simulated both power symmetry and power asymmetry between the conflict parties. We then either offered advice, or focused on giving emotional support as a comparison condition. The advice was framed as legal advice or as peer support. We are now comparing which types of help were most beneficial in terms of conflict behaviour as well as to respondents' experiences of control or empowerment.

We have also explored the possibility to develop this experimental framework further, in cooperation with scientists from the department of human media interaction at our university. Using digital agents and simulation, it would be possible to build a strong experimental environment in which new legal aid interventions could be tested in a controlled and realistic way.

Legal aid in Belgium : a work in progress

Steven Gibens

Talking about a Belgian legal aid system facing the sixth state reform of 2014 is a rather difficult challenge. Legal aid on the first line is done by advocates, comprehending giving legal information. A first, rather small legal advice and referral system, is now the jurisdiction of the French and Dutch Communities. It no longer belongs to the federal state. The Flemish Minister for Welfare, Public Health and Family Jo Vandeurzen (CS&V Christian Democrats) seems to situate the first line legal aid within general welfare. In his policy statement of October 16th 2015, the Minister has chosen a strong embedding of the first line legal aid within a general welfare approach.

The Commissions for legal aid and the Flemish Bar are preparing a situational report of their activities on the supply side. Subsequently, an action plan will be designed to optimise legal aid on the first line. The aim is to increase accessibility. In order to achieve this, the minister explicitly states that the opportunities for online legal aid should be explored. Legal Services on the front line must also correspond to clear quality standards. Social welfare partners such as General Welfare Centres (Centra Algemeen Welzijnswerk) that are a not-for profit organisations subsidized by the Flemish Government, local Public Centers for Social Welfare (Openbare Centra voor Maatschappelijk Welzijn), official local welfare bodies and the organisations that represent the most vulnerable users will be involved in that process. A qualitative accessible legal aid supposes, according to the minister, a close cooperation between lawyers and social workers. The Minister will therefore consider how the first line legal aid should be positioned within general welfare. This

will probably have an effect on the general frontline services, exercised by non-legals within the Houses of Justice. According to recent research, this general first line services within the former Justice department, has been dismantled in favour of the advocates. The minister of Youth, Houses of Justice and the promotion of Brussels of the French speaking community, Rachid Madrane (PS, Socialist Party) and responsible for legal aid declared in his budget project 2016 before his parliament that he will continue the existing organization of legal aid on the first line.

Second line legal aid for people who cannot afford an advocate to represent them before court remains the authority of the federal state. In his policy statement of 17th of November 2014, the Minister of Justice has announced a reform of the system, by reducing the legal aid budget by 10 per cent and especially the fee nomenclature. Minister of Justice Koen Geens (CD&V Christian Democrats) is planning to double client contributions and is maintaining the closed budget envelope. The Flemish Law Society and its French counterpart have elaborated a well-balanced nomenclature, taking into account an hourly rate of 75 €. Instead the minister has adopted this nomenclature within the system of the closed budget which means that some legal areas such as immigration law will be underpaid. Advocates are not willing to accept this move and protested last year on the 1st June and new protest actions were set up – e.g. 27th April 2016 - as the minister will soon submit the bill into parliament. According to the advocates, it is yet another step to impede access to justice since legal costs have been augmented in 2007 and a VAT of 21% on advocates' fee has been introduced in 2014. And recently court fees have been adjusted and in some cases the fees have been more than doubled.

Access to justice in Belgium has become even more complicated. New policy actions are at stake. Whether these, especially on the second line, will be in favour of the citizen who is seeking justice, is doubtful. Nevertheless, there are some positive changes: a more integrated first line legal aid in Flanders that will be developed. A good legal aid system supposes preventive actions. Furthermore the collaboration between lawyers, advocates and social welfare organisations may be an important step towards reaching and helping vulnerable people in time before their 'justiciable problems' escalate.

A short note on France

Jérôme Cayol

In France, the system of legal aid, is decentralised and the decision to provide legal aid is made by legal aid councils located at each Court. The distribution of the money to the lawyers is made by the national Bar Council and by the local Bar association. There is no merit test for the claim which is

only rejected by the legal aid Council if there is a manifest inadmissibility or a manifest ungroundness. All fields of law are covered by legal aid. Normally, the legal aid Council will verify the criteria of eligibility and will nominate a private lawyer who will be in charge of the file and who will start litigation.

In 2013, a controversial 35 euros tax on litigants was cancelled and a lot of people hoped that the legal aid system will be modified. Since a couple of years, legal aid has been reviewed and the majority of the reports called for substantial changes in the system. Some reports said that the budget should be doubled. However, the reform which just took place has not such an ambition. The financial sources have been modified and the financial eligibility threshold has been increased.

New funding sources for legal aid replace the old legal aid contribution suppressed in 2014.

It includes : - a fraction of insurance cotisations,

- a fraction of the tax paid by each person convicted by a criminal decision,
- a fraction of the tax due by the bailiffs.

The financial eligibility threshold have been increased up to 1.000 € for full legal aid and up to 1.500 € for partial legal aid. The funds management has been entrusted to the National Bar Council. The amount of the unit value which had not reviewed for a couple of years has been slightly increased. The French legal aid system which is mainly based on the work of the legal profession was not fundamentally changed.

For more information about the work of the *International Legal Aid Group*, please visit our website which can be found at <http://www.internationallegalaidgroup.org>.