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## **The Cost of Legal Aid**

*By Elizabeth Lyons*

### ***Abstract***

I first became aware of the British's struggle with their Legal Aid system while interning with a nonprofit organization in London that conducted research on Legal Aid with the goal of improving individuals' access to justice. The British have supported Legal Aid for over sixty years; however, during this time it has reached an unsustainable level its current budget being two billion pounds. Since the government simply cannot afford a program this large, it has fallen prey to periodic budget cuts within the past few decades. Many British individuals are concerned that the quality of the services will diminish as a result of decreased funding.

A large number of Europeans consider it essential that the state provide quality legal aid services to insure that all individuals have equal access to justice. Since legal aid is viewed as a necessary governmental service, it is very important to Europeans to determine the way in which the system best operates. In my paper, I will attempt to determine why the British system in particular is so expensive, compared to other European nations that provide a similar service for a fraction of the cost.

### ***Legal Aid in the European Context***

Many European countries provide a legal aid service for individuals who would otherwise be unable to afford an attorney. Most European legal aid programs are a part of the welfare states created in the 1950s to protect citizens from suffering that occurred during the Great Depression. Many of the common policies included in these plans were health care,

subsidized housing, and employment benefits. Legal Aid was included in these policies because Europeans believed that access to an attorney was necessary to guarantee equality before the law (Hynes 2008). Furthermore, lawmakers were concerned that the consequences of mistakes made by individuals trying to represent themselves in court would actually cost society more than the price of legal aid.

These programs are similar to the office of the American public defender in that the state ensures an attorney to individuals who cannot afford one. However, legal aid in Europe is usually extended to civil procedures and utilizes private practice attorneys as opposed to solely state-employed lawyers. As a result of the large scope and privatization of these programs, many legal aid programs have become very expensive to operate.

In my paper, I will try to determine why it is that the British legal aid system is so much more expensive than any other European country's program. By comparing the United Kingdom's legal aid program with those of other nations, I hope to discover what independent variable makes the British system so unique.

### *Legal Aid in the United Kingdom*

Although most legal aid programs in Western Europe cost the government a relatively large amount to operate, none of the programs are nearly as expensive as the British program. The British spend more than twice as much as any other European country. Legal aid in Britain has a total budget of over three billion Euros, and accounts for almost twenty percent of the entire legal and judicial budget. Even when adjusted for population and GDP, the Legal Aid system in the United Kingdom dwarfs all others (CEPEJ 2008).

The size of the program is clearly related in part to the number of citizens who have access to it for almost any legal service. Any British citizen who has less than 630 pounds of disposable income a month meets the financial requirements to receive legal aid. This means that about half of the population potentially qualifies for legal aid services assuming their case passes the “merits test.” This is an evaluation done by the legal services commission to determine “whether a privately paying client of moderate means would be prepared to spend his or her own money taking on the case” (Gray, Rickman, & Fenn, 1999)

### *Legal Aid in France*

Like the British program, the French Legal Aid system was also created in the 1950s as part of a larger welfare plan established to protect the legal rights of the nation’s citizens (Herzog & Herzog 466). The modern French system covers roughly the same legal services as the United Kingdom’s system and also limits its participants based on a similar evaluation of their resources and the merits of the case. The monthly income an individual who is benefiting from Legal Aid can receive is a maximum of 830 Euros. This requirement means that like the British, almost half of all French households are eligible for legal aid (Lariviere 739).

### *Differences between British and French Legal Aid*

Despite having comparable population sizes and GDPs, as well as qualifications for receiving aid, the French Legal Aid budget is much smaller than Great Britain’s budget. France spends only 300 million Euros on its Legal Aid compared to over three billion Euros in Great Britain. These amounts equate to French legal aid making up for about .02% of their entire national budget compared to the British’s .20% (CEPEJ 2008). Although these are small figures

compared to the entire state budget, there is clearly a big difference in legal aid spending in between the two countries.

### *Possible Explanations*

A nation's public policy is usually very complex and influenced by multiple issues and values within the country. However, these factors can usually be categorized as relating to the state's political history, political culture, or government structure. Thus, in determining the specific factors that may affect the formation of legal aid, I will consider what aspects of history, culture, and government could have a possible affect on the operation of a legal aid program.

I think it is unlikely that political history had much of an effect on the development of legal aid in the United Kingdom compared to France, because both programs were developed immediately after World War II in response to memories of the Great Depression and a fear of communism. Since the two programs have such a similar historical development, it is unlikely that the historical origin created such a drastic difference between the two. Political history since 1950 could be relevant to this discussion if one of the two countries had made significant changes to its welfare state during that time period. However, since France currently spends about 28% of its GDP on its welfare state compared to 23% by the United Kingdom, this theory would support either the conclusion that France spends more money on legal aid or that the United Kingdom's budget cuts beginning under Margaret Thatcher would have had a major impact on the program. Since France's program is significantly smaller and Britain's program grew despite massive budget cuts, it is very unlikely that political history accounts for differences in spending.

Political culture could be a factor affecting legal aid if the British considered legal aid more essential to serving justice than other countries and, as a consequence, made it available to more of its citizens, thus increasing the cost. However, the qualifications for legal aid in the two countries are almost identical and cover the same proportion of the population. Furthermore, according to a 2006 Eurobarometer study on “The Role of the European Union in Justice, Freedom, and Security Policy Areas,” which asked European citizens to rank legal issues of importance, only 19% of British citizens stated that quality of justice should be among the top three priorities of the European Union, compared to 31% of French citizens. Although this survey does not provide conclusive evidence concerning individuals’ opinions of legal aid, it suggests that the British are not particularly distinct in their enthusiasm for quality of justice compared to other European nations. Thus, British political culture does not seem to be influencing the differences in legal aid costs.

Finally, I must consider how differences in government structures may affect the cost of legal aid. I have already established that the two areas controlled by the legislature: the structure of the program, and the fiscal policy of the particular government are not the causes.

The British and French are each historically responsible for the creation of two of the most widely used legal systems in the world: common law and code law and each country still uses its respective system today. These judicial structures are also referred to as adversarial and inquisitorial systems. There are many differences between adversarial and inquisitorial systems, one of the most important being how evidence is collected and presented. In an adversarial system, the two parties present evidence to support their argument to an impartial judge. This requires extensive preparation and research on the part of attorneys (Damaska 1997). In contrast,

in an inquisitorial system, the judge is active in the search for facts and the truth in the case (Froeb & Kohayashi 2000).

French civil procedure is particularly distinct in that most of the evidence, ninety-eight percent, is actually presented in written form (Lariviere 1997). This evidence is simply a submission of the facts of the case, from which the judge will determine whether s/he needs more information (Deffains & Doriat 2000). Thus, attorneys in an inquisitorial system are required to do much less discovery before the trial. Furthermore, the inquisitorial method allows the judge to direct the case exactly where s/he wants and thus avoiding spending time in court presenting irrelevant evidence. An example of this difference in the judge's role in an inquisitorial trial is that the judge is permitted to question a witness directly. Because both the discovery and trial time are shorter, inquisitorial litigation costs are generally less than those in an adversarial system.

The aspects that make the British adversarial system unique have been criticized even within Britain. In 1997, Lord Harry Woolf, a member of the House of Lords, conducted a Parliamentary study on the problems facing the United Kingdom's legal system. Woolf's Final Report outlines fifty problems in the entire court system and makes nearly forty-five recommendations for improvements. Since then, some of changes have been made however, most of what Lord Woolf discusses is still applicable because, as he admits, it derives from the nature of the adversarial system. In fact, one of Woolf's main recommendations for improving the system is that there be "hands-on judicial intervention . . . [and] a fixed timetable and standard procedure, will be used wherever possible" (Woolf 1997)

Of Woolf's conclusions, the ones related to legal aid can be summarized thusly: there is too much discovery, attorneys cost too much, and the cost of litigation is the greatest problem

facing the British judicial system. The scale of discovery contributes to the cost because attorneys in an adversarial system are required to investigate every aspect of the case, since they have no guidance from the judge as to what is important evidence. This, however, leads to excessive work that raises legal fees since most attorneys are paid on an hourly basis. Woolf demonstrates this phenomenon in a survey of over two hundred British cases that claim damages less than 1,000 pounds. He found that the average cost of litigation was 836 pounds (Woolf 1997). These results clearly show a high litigation cost compared to the value of the case.

French citizens generally do not pay as much as their British counterparts for legal assistance. This is in large part because the system as a whole is “one of the cheapest in the world” (Hulbert). The cost of litigation in France is better managed since judges in this inquisitorial system directly dictate the direction of discovery and presentation of the evidence. Since attorneys usually charge their clients on an hourly rate, this system of confining the scope of research in the case is more cost efficient.

It is very difficult to place a specific average value on litigation costs in different countries. However, in a study done by the Dutch Judicial Council on Western European judicial systems, different countries were ranked as to the cost of litigation in that country compared to others with similar scales of economy. Countries were categorized at three levels of cost. The United Kingdom was the only country to be ranked in the first, most expensive category. It was followed by other inquisitorial systems such as France and Belgium in the second, intermediate level. Although the Dutch Judicial Council is not able to give specific statistics as to the differences between the legal costs, it seems likely that there is some connection between the British legal system being the only European country categorized as



having an “expensive” cost of litigation and the most expensive Legal Aid program (Dutch Judicial System 2004).

Although Francisco Parisi also cannot provide specific data on litigation costs in his study, “Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared” he is able to measure the effect of greater judicial participation on the costs of litigation. This research confirms that there is a negative relationship between judicial participation and litigation costs. Parisi specifically concludes that this is, in part, because the evidence is more likely to be determined irrelevant by the judge and never presented in court. Attorneys that are guided by less judicial participation are more likely to do extensive discovery. Thus, the less a judge guides attorneys in the research, the higher the litigation costs (Parisi 2002).

The general problem of a high trial cost in the adversarial system compared to the inquisitorial is likely to be carried over into the respective Legal Aid programs. Statistics regarding the comparative costs per case in each country appear to confirm the extension of the trend. Specifically, Britain pays an average of 1136 Euros per legal aid case compared to 335 Euros paid by France (CEPEJ 2008). This difference occurs despite having very similar Legal Aid structures and restrictions.

To test my hypothesis that the cost of legal aid is affected by the legal system of a particular country, I will compare two other European nations that also differ in their respective legal systems. However, these countries should be relatively similar in their political history and culture. The only other nation in Europe to have inherited the British common law legal aid system is Ireland. Thus, it should be expected to have a more costly legal aid program than other countries that rely on code law in their court system. Belgium will serve as the example of a nation operated based on code law since its system is so similar to the French and the nature of

its legal aid program is comparable to the other three countries. Furthermore, Belgium arguably shares some similarities with Ireland since they are both small nations that have spent much of the modern era being dominated by a larger foreign power.

### ***Ireland's Adversarial System***

Ireland's legal system is derived directly from the British as a result of their colonial relationship. Like the British courts, evidence in Irish cases is presented by the two opposing sides to an impartial judge who renders a verdict based on the information presented. Ireland's legal aid system also requires a financial and merit test similar to Great Britain's to determine whether an applicant can receive legal aid benefits. The maximum disposable income an individual can receive is 7,350 Euro per year, which is equivalent to 612.50 Euro a month.

Although the Irish legal system is not as old as the British, it is still quite large and extensive. The Irish have a total legal aid budget of 63,600,000 Euros, which is quite large for their population of about 4.25 million. Legal aid makes up about .04% of their entire budget per capita GDP (CEPEJ 2008). In their essay, "What's Wrong With Legal Aid? Lessons from Outside The UK," John Flood and Avis Whyte observe that "in Ireland legal aid has grown by 70 per cent from 1999 to 2004 . . . ." Flood and Whyte later express the concern that although the Irish system is not currently as large as the British system, it is moving in that direction. Regardless, the legal aid system in Ireland is currently the third largest in Europe.

### ***Belgium's Inquisitorial System***

The Belgians modeled their legal system off of the French courts; in fact, the two are so similar that even the breakdown in the court levels is almost exactly identical in the two

countries. Furthermore, recent French changes to the constitutional court were almost identically replicated in Belgium. With regard to legal aid, Belgium only requires that applicants have a monthly income below 666 Euros, and there is no merit test. This difference is in some ways balanced by Belgium's extremely large mediation program that helps resolve many cases without going to court. Parties can suspend the statute of limitations by proposing nonbinding mediation multiple times. Furthermore, the case is not required to go to court if it is not resolved in mediation; the only requirement is that the claim is based upon a violation of one's rights (Demeyere 91-92). Legal Aid is provided regardless of whether the benefactor is the plaintiff or defendant. Naturally, this creates a large number of outstanding cases; however it does not necessarily cause a backlog in the Belgian system since many never intend to go to court.

### *Legal Aid Costs in Ireland and Belgium*

Even with such a generous mediation program available to Legal Aid recipients, Belgium only allocates .01% of their budget per capita per GDP to Legal Aid. This corresponds to just over 43 million Euros per year (CEPEJ 2008). Although Belgium resolves more cases in mediation without the cost of going to court it actually spends more per case than France, averaging 352 Euros per case (CEPEJ 2008). Thus, it appears that the mediation program alone does not account for the Belgian's lower operating costs compared to Britain and Ireland.

This evidence supports the conclusion that the cost of a country's Legal Aid program is influenced in large part by the type of legal system in which it operates. Despite some differences in the structure of Irish and Belgian legal aid and alternative resolution programs, the Irish program is still much larger and more expensive. These findings support the conclusion

that the cost of a legal aid program is largely determined by the legal system within which it operates.

### ***Policy Implications***

It is very difficult to determine an accurate means of measuring how effective a particular court system is in administering justice in the civil sector. There is generally no objective standard for measuring the accuracy of a verdict. Probably the best standard against which the civil courts should be measured is the perception and approval rating of the judicial system within its own society. It is important for courts to be trusted by the citizens it presides over, because such confidence is necessary to ensure that the court's decisions are respected. If the court's rulings are not following, it ceases to be an effective branch of government.

A European Values survey calculated the confidence in the Justice Systems within various countries. Respondents were asked to characterize their confidence in the judicial system using one of the phrases: "a great deal" "quite a lot" "not very much" and "none at all." Not surprisingly, the majority of the respondents in any country fell into the second or third categories. However, among the four countries I studied, an average of 10.3% of those surveyed stated that they had a great deal of confidence in the judicial system. The British and Irish respondents were above average, with 15% reporting a great deal of confidence. Only around 7% of French and Belgian citizens who were surveyed had the same level of confidence (European Values Study 1999).

At the other end of the spectrum, an average 12.8% of those surveyed said that they had no confidence at all in their judicial system. Belgium and France were both above the average,

with 17.3% and 14.1% respectively. In comparison, about 8% of British and Irish respondents had no trust at all in the judicial system (European Values Study 1999).

I believe that these statistics are particularly important in discussions about governmental effectiveness of a particular country. I believe that it is somewhat disconcerting that nearly 1/5 of Belgians have absolutely no trust in their legal system. Furthermore, over half (56.3%) have a negative opinion of the judicial system. While the numbers are not quite as large in France, 48% of respondents had a negative opinion of their judicial system (European Values Study 1999). The judicial systems of France and Belgium are certainly cost-efficient compared to Great Britain and Ireland. Furthermore, there are many factors outside the scope of this paper that may affect citizens' perceptions of their legal system that are not related to code or common law. However, if close to half or more of citizens have a negative opinion of their nation's court system, as in France and Belgium, there must be more research into these systems before one can advocate for their replication.

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