Dos And Don'ts In Legal Aid Policy

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On August 26, 1821, *Andrew Jackson* wrote a letter to *John Quincy Adams*. *Adams* at the time was Foreign Secretary of the USA, *Jackson* the military governor of Florida. Subsequently, they became the 6th and 7th President of the USA. In his letter, *Andrew Jackson* wrote: "The great can protect themselves, but the poor and humble require the arm and shield of the law."This is still true 180 years later and since the status quo of legal aid leaves much to be desired in the European Union - despite improvements of the past decades -, I welcome the CCBE recommendations on legal aid.

I have been invited to comment on the issue of legal aid from an academic point of view. Being under strict orders about the time I am allowed for my initial statement, I am not going to talk about the "Charter", the "Roadmap", the Stockholm Programme or the human rights' foundations of legal aid. Others have done or will do that in a more knowledgeable way. I will take a different approach: After being invited a couple of months ago, I wrote down a list of issues an academic who is interested in legal aid would probably address if asked to comment on legal aid policy. I am the German member of the International Legal Aid Group, a somewhat informal association of academics with an interest in legal aid, legal aid administrators and policy makers that meet every other year to discuss legal aid matters under Chatham House rules. What I will be presenting pretty much is 20 years of research and analysis of this group condensed into a ten minute presentation. By coincidence, my initial list had, like the CCBE recommendations, 10 points, but because of time constraints, I have cut that down to five.

1. To Be Able To Improve Legal Aid And Access To Justice, Understand Unmet Legal Needs.

The discussion about legal aid usually is dominated by the cost issue – how much money must governments spend on legal aid, what contributions can we expect from those who seek legal help? By narrowing down the discussion to the cost issue, we pretend to know something which we in fact do not know – what the legal needs of the population are. You don't buy a car without a driver's licence, and you don't jump from a plane without knowing how to operate the parachute. If we don't know what legal needs exist, it is rather futile to discuss

funding issues related to legal aid. Therefore I would urge the European institutions to be more aware of the issue of unmet legal needs - and not only to spent money on legal aid, but also on finding out what type of aid is exactly needed by whom, when, where and in what way. Groundbreaking research on legal needs of the population has been carried out in England & Wales since the 1990s, but despite some similar efforts in Finland, the Netherland, Scotland and Ireland, we must admit that realistically we know very little about unmet legal needs in the member states. From a legal aid policy point of view, providing a wad of money is always a good starting point, but effective legal aid policy requires an understanding about in what areas, to what extent and particularly for what reasons existing legal needs of the population are unmet. Overseas jurisdictions are much more advanced in that area than we are – for example, in New Zealand, there is the National Survey of Unmet Legal Needs, in Australia the NSW Legal Needs Survey.

2. Think About And Address Social Exclusion – And Don't Be Fooled By Numbers.

Providing funds, even identifying unmet legal needs does not make a good legal aid policy. Governments must address social exclusion. Just opening the treasure chest and pouring money into the system will help many, but most likely not those who are the most needy, the most vulnerable. If you just throw some meat into the lion's den, not every beast will get an equal share of what you make available. The quickest, strongest, cleverest, most demanding ones will get the biggest chunk, and the weaker, less agile, less smart ones will stand on the sidelines. It's all there, it just needs to be picked up is not a good enough legal aid policy. There needs to be a specific policy that addresses social exclusion, and therefore I want to stress the CCBE's recommendation #3 that specific attention must be given to vulnerable groups. Some will probably argue that, according to studies from the UK and Germany, the level of inactivity of those faced with a legal problem is less than 10 per cent – and you simply cannot make an omelette without breaking an egg. While this is true, don't be fooled by numbers: Less than 10 per cent inactivity still translates into millions of unaddressed legal problems. Is that something to worry about? I think it is, as my next point will show.

3. Don't Fall Into The Economic Trap. See Legal Aid As A Bargain, Not As A Liability.

It does not take a prophet to predict that CCBE recommendation #2 – "to set up a specific EU budget line for legal aid" – will be met with little enthusiasm by those who keep the public purse. As we all know, it has become popular to analyze legal services from a micro- or macro-economic perspective. When we talk about legal aid, sooner or later questions such as "is

it really desirable that for certain legal problems access to justice should be granted?" will be asked – and there is a good chance that we will fall into the economic trap again at some point when we just look at the value of a claim and the associated costs without taking a holistic approach. I am suggesting that legal aid gives governments a lot of value for money if they see and understand the bigger picture. Legal problems have added effects that go far beyond their economic dimension that is usually taken into account. Empirical research from England & Wales and from Canada shows that legal problems often lead to illnesses, stress symptoms, a loss of confidence, listlessness, problems at the work-place and have a negative effect on earning-power. In studies people faced with a legal problem have said that the legal problem had made it difficult for them to lead a normal life, that they became ill, got into trouble at work, were faced with marriage problems. A quick and comprehensive solution of a legal problem is therefore of paramount importance for society because added effects can make a legal problem much more costly in the long run than a quick solution enabled by a generous legal aid scheme costs – money you save on legal aid can easily result in much more costly expenditure for health, housing, unemployment benefits because the legal problem was not solved swiftly and convincingly.

4. Understand That Legal Problems Come In Clusters – Because Life Is More Complicated Than Law

A common complaint is that legal aid schemes are exploited by "repeat customers" – and therefore access to legal aid funds should be restricted. In some cases the complaint holds some water – every system based on benefits is prone to exploitation. However, we must accept that those who need legal aid are typically not exploiting the system, but are forced to come back again and again – because they are most often not faced with just a "legal problem", but with a more general problem in their life from which numerous legal problems, so-called "problem-clusters" can arise. Fascinating empirical research in that area has been carried out in England and Canada recently that shows what typical legal problems are clustered together.

5. The Sooner The Better - Identify The Trigger Problem

Recommendation #4 suggests that legal aid by a lawyer should be available for all areas of law and at all stages of the proceedings. I am pleased to hear that the CCBE is sceptical about what has become known – and somewhat popular - as prioritization of legal aid, i.e. the definition of areas of law or types of claims that are worthy of legal aid and others that are not. I

am not sure if we should move in a direction that de facto creates some sort of first, second and third tier law. I cannot elaborate on that further as I would like to make another point in the context of recommendation #4. It refers to legal aid at "all stages of the proceedings". Legal aid schemes often focus on funding court proceedings – and they are designed as a "stand-alone" product that is part of the legal world. Little consideration is given to out of court work, particularly advice work, and to seeing the legal problem as part of a bigger picture, as a result of a life crisis. Closely interwoven with the issue of problem clusters ~~that I have just mentioned~~ is therefore what has been identified by researchers as the "trigger problem" – which may or may not be a legal problem. If you are able to address the trigger problem at the earliest possible stage, the legal fall-out can be contained to some extent. Or as the saying goes: "After the horse has left the barn it's too late to close the door." The problem with a lot of legal aid schemes is that they are not about closing the barn door, but about catching the galloping horse at the far end of the ranch. To contain costs, it is therefore useful to focus more on what is called the "trigger problem", on advice work, on early intervention. The issue of trigger problems also highlights the usefulness of a multi-disciplinary approach in many cases, the close cooperation of legal aid lawyers with other professionals and an effective system of signposting and referrals. Concepts such as the Community Legal Service in England & Wales try to address this.

6. Outreach – Be Proactive, Not Reactive

You can only intervene at the earliest possible stage if those who need help are aware of the availability of help. The CCBE's reminder in recommendation# 7 that easy and broad access to information how to receive legal aid is a very useful reminder that awareness for the availability of legal aid must be increased. Sometimes one gets the impression that legal aid is only offered in principle with the hope that the less people take up the offer, the cheaper it gets for the public purse. I am convinced that spreading information on legal aid is only one element of a broader outreach agenda. Well-designed and implemented outreach programs are an integral part of advanced legal aid schemes. It is necessary not to wait until someone with a legal problem gets up and actively looks for help – simply because many of those who are most in need of help lack the intellectual resources to do so, are frightened off by the prospect of seeing a lawyer in a law firm, of applying for help in a court house or of speaking to someone in a language they have difficulties to master. Sometimes problems are even more trivial – someone would need to travel over a long distance even to be able to make contact because he lives in a remote region. Legal aid schemes therefore must have an element of outreach.

The internet – or "e-management" that is mentioned in recommendation# 8 can serve a useful purpose in that context. Its usefulness should, however, not conceal the issue that particularly in the legal aid world there are limits how many prospective clients can be reached via e-communication. Not all potential legal aid clients have smart-phones, net-books or even access to internet cafes (let alone the knowledge to surf the internet).

7. Do Not Bet On The Wrong Horse - "Privatizing" Access To Justice Is Not The Way Forward

One trend in Europe in the past decade has been what I describe as "privatizing access to justice". Governments have tried to reduce expenditure for legal aid with the hope that alternative funding mechanisms can take the place of legal aid. Instead of the public purse, increasingly the individual or her lawyer is expected to guarantee access to justice – the individual by taking out self-funded legal expenses insurance, the lawyer by entering into speculative funding agreements, more commonly known as "no win no fee" agreements. If disputes are covered by legal expenses insurance or by a "no win no fee"-agreement, there is reduced need for legal aid. So is it a good idea – and a realistic policy - to put the eggs in that basket? I don't think so - and that is the reason why I am somewhat worried about the suggested legal aid reforms presented in England & Wales the other week. They see legal expenses insurance as some sort of white knight. I am from Germany, and Germany is by far the largest legal expenses insurance market in the world. In Germany, coverage of the population is declining. While a couple of years ago, almost 50 per cent of the population were covered by rather comprehensive policies, we are now nearer 40 per cent. When asked, people agree that LEI is a very useful insurance and they would like to have it. However, when push comes to shove, LEI is, generally speaking, the first insurance to go. No other type of insurance in Germany has lost more market share on the insurance market over the past decade than LEI – despite the general consensus how useful it is. So why is that? In a post-welfare state world, governments privatize ever more risks of daily life. State-run health schemes are cut back, state pensions are slashed, generous care for the elderly in an ageing society is no longer offered, state benefits are cut back. Because the government is no longer willing – and in a fiscal position – to foot the bill, the population is expected to take care of itself when it comes to all those risks of daily life – health, retirement, care, unemployment etc. As every Euro can only be spent once, this leads to prioritization – for most people, health, retirement or care are more worrying issues than access to justice, and they will not spend money on legal expenses insurance if the alternative is not to be able to take out additional health insurance. Therefore, it is

naïve for governments to believe that legal expenses insurance will be the solution – if at the same time governments burden the individuals with ever more cut-backs in other areas.

8. Be Prepared For The Hourglass Society – Legal Aid Will Not Get Cheaper

The problem just described is exacerbated by the fact that the time is past when the middle class - those who can afford a lawyer - was constantly growing. In the past, social structures resembled an onion – in the future it will be more akin to an hourglass with a shrinking middle class in which the few rich are getting richer, the middle class is shrinking and the poor are getting relatively poorer. For legal aid, a reduction in the middle class and downward polarization of social stratification creates new challenges as more people will become eligible for legal aid by today's standards. This can result in a downward spiral if governments tighten eligibility criteria every time a new shipload of former middle class citizens has become eligible for legal aid. Cutting out more and more people from legal aid and thus from access to justice will create problems for society as the acceptance of laws and legal institutions in a society depends on participation, i.e. the chance to seek protection by the law and to challenge decisions. While in times of austerity it is a popular demand to cut back legal aid spending, we must accept that demand for legal aid will increase despite all efforts to contain costs and we will reach a breaking point at which we will have to decide if we are serious about access to justice for all – or if access to justice is only available for those better off and just a lip service for the rest.

9. Make Sure That Quality Matters – Legal Aid Clients Deserve The Best Lawyers, Not The Cheapest

The CCBE proposal urges the European Institutions to support specific training for lawyers who provide services in the framework of legal aid. This demand has my full support as it is about quality: Quality is an issue that has become more prominent in policy discussions about legal aid over the past couple of years. In a segmented market such as the modern legal services market, legal aid work is now longer evenly distributed among the members of the profession, but few lawyers do a lot of legal aid work and a lot of lawyers do not or very little legal aid work. Legal aid work therefore must support a lawyer as he has little chance to cross-subsidize his legal aid work with income from other private or from corporate clients. If legal aid work is not adequately remunerated, quality will inevitably suffer as lawyers cannot afford to sacrifice time or money for CLE or for skills training needed to serve clients with special needs. Quality of legal aid services depends to a great extent on adequate remunera-

tion – not only because a disparity in income from legal aid work and from other cases means that for many lawyers legal aid work is only a stepping stone before moving on to pastures new.

10. Don't Mix Up Cause And Effect – You Get The Legal Aid Bill You Deserve

While the chicken or the egg causality dilemma is yet to be solved, things are much clearer in the legal aid context: First there is the legal problem and then there is the need for legal aid. Legal problems increase in times of economic trouble, but while interestingly we accept higher expenditure for unemployment as something inevitable, we worry about the cost of legal aid in such times. While governments – they are those who complain about the costs – cannot be made responsible for an economic crisis, they are responsible for bad laws. Bad laws make expensive legal aid cases – a good example for this equation is a really poor quality reform of unemployment benefits in Germany that has triggered thousands of court cases – resulting in calls to cut back legal aid rather than to work on a better law. Generally, it seems to be a good idea to look first at the areas of law that cause a lot of legal aid cases and to think about why these cases end up in the legal aid system – instead of putting bad laws on life-support by cutting back legal aid.

About the author

Dr. Matthias Kilian was born in 1969 and today lives in Cologne, Germany.

He is Director of the Soldan Institute For Law Practice Management, Essen, a research institute focused on socio-legal and empirical studies on the German legal profession. His recent current work in this capacity includes research projects on young lawyers, lawyers' remuneration, mediation by lawyers, the public perception of lawyers, access to justice, lawyer specialization and on the female Bar.

Dr. Kilian is a Senior Research Fellow of the Institute Of Employment And Business Law and a Senior Lecturer at the University of Cologne. He has held several research posts at the University Of Cologne since 1995, with his work focusing on business law, procedure and the legal profession. His teaching at the University Of Cologne includes business and company law, professional responsibility and lawyers' skills. He was awarded a Ph.D. on a comparative study of speculative funding by lawyers in 2003.

He is a fully-qualified attorney (Rechtsanwalt) and member of the Cologne bar association. He has practised as the founding partner of the Cologne office of a mid-sized multi-disciplinary law firm, a position he vacated at the end of 2006 to focus on his academic work. As a lawyer, he specializes in advising and representing other professionals.

Dr. Kilian is a member of the Documentation Centre of The Law of The Legal Profession In Europe, a joint research unit of the German Bar Association, the German Federal Bar, the Federal Chamber Of Notaries and the Institute of The Law Of The Legal Profession which is based in Cologne, and the member for Germany of the International Legal Aid Group (ILAG).

He has published widely in the field of his research work, among others, works on transnational legal practice, legal ethics, European law, procedure, ADR and family law. His most recent books include works on the regulation of lawyers for practitioners and student lawyers, a book on lawyers' fees, a handbook on law practice and its management which he co-edited, and a work on the basics of lawyering/skills. He is also the co-editor of the bi-annual Statistical Yearbook of the German legal profession.

Dr. Kilian is one of the four editorial board members of the BRAK-Mitteilungen, the journal of the German Federal Bar and also member of the editorial board of AGS, a monthly law journal on law practice management and legal fees. He is the book review editor of the Anwaltsblatt, the monthly law journal published by the German Bar Association, and the European correspondent of the law journal legal ethics. He is also a member of the Legal Services Committee of the German Bar Association.