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INDIGENT CRIMINAL DEFENCE: QUALITATIVE REVIEW ON ECONOMICS VALUE

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ABSTRACT

This article reviews indigent criminal defence programs on an international level and generally concludes that societies want to protect legitimate society members', within the respective society's jurisdiction, fundamental property rights concerning criminal prosecution. While this conclusion was as the researchers expected, several unexpected and contrary observations were noted. Society wealth and a greater return on investments of public funds can dramatically shift a society's value of basic shared rights.

Keywords: *Indigent Defence, Values, Public Funds, Criminal Policy*

1. INTRODUCTION

This article's purpose is to extend generalized knowledge of property rights protection by comparing different established indigent criminal defence programs. Property protection rights form the foundation of entrepreneurial innovation and private organization motivation within capitalistic societies. Indigent defence programs protect poor individuals' basic freedoms to participate within established societies including *free will* consumption of products and services, comparing public funding of these programs would provide information on how a society values basic freedoms.

1.1 Scope

Some societies (e.g., The Netherlands, Canada, and England) take a holistic approach and couple criminal programs with publicly funded civil programs. Holistic programs are beyond the measured basic shared freedoms of this article. Likewise, this article does not properly address several significant components of indigent criminal defence programs, such as: program quality, specific program limitations (e.g., jailable offences, minimum detention times, definition of indigent person), the age of accountability, how programs are delivered, and the impact of legal expense insurance. Legal expense insurance covers the cost of civil and criminal matters and coverage is widely available within the European Union potentially attached to a home insurance policy (PILI, *et al.*, 2003).

Subjects were selected based upon an indigent defence program's complexity, information availability, and a program's geographic location. For this comparison, data was collected on publicly funded indigent criminal defence programs (i.e. governmental or quasi-governmental organizations). Adjustments were not made for travellers or other eligible non-residents.

1.2 Indigent Criminal Defence Defined

"If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in government to the utmost." (Aristotle). John F. Kennedy said "In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger. I do not shrink from this responsibility-I welcome it".

Adelman (1914, p. 494) states, "...it is just as important for the state to defend the accused as to prosecute him." This balance of justice is continued by Adelman's (1914, p. 494) subsequent statement "...to attempt to confirm the claims of those who are charged with crime that they are innocent, as to confirm the charges of their guilt." The definition of indigent criminal defence programs varies slightly with each governing organization. The core definition and overall mission is universal: A publicly funded organization rendering legal services to criminally accused individuals in need of resources (PILI, *et al.*, 2003).

Indigent defence programs may be delivered through a combination of contracted services, appointed lawyers, and salaried lawyers. State, county and local governments may share administration of indigent criminal defence programs or program administration may reside with a single organization. The administrative mission is to provide a necessary and essential balance of representation in criminal proceedings when individuals cannot properly protect their basic rights (Adelman, 1914; Emmelman, 1993; California Law Review, 1915; PILI, *et al.*, 2003). Lee (2004, p. 418) expressed this "...main goal as maximizing their clients' liberty interests."

Governmental organizations (representing societies) determine funding levels of indigent criminal defence programs, which become a society's measurable value of basic shared freedoms. Indigent criminal defence values will be on the lower end of a society's value system (Lee, 2004). Worldwide indigent defence programs are significantly different in values and program delivery (Snyder, 2003); International discussions concerning criminal programs exclude the United States because the U.S. imprisonment rate is greater, at least five times, than most comparable nations (Lee, 2004).

2. LITERATURE REVIEW

In 1914, Alderman began discussions concerning a critical need for protecting common shared rights with regards to accusations from government organizations.

Alderman's arguments focused on a need for a widespread indigent criminal defence component, a *public defender*, of a dual legal system. Alderman hints this need can be satisfied through publicly funded programs, thereby establishing a framework for future discussions concerning indigent criminal defence programs.

In 1915, the California Law Review wrote "...a defendant without money has very little chance to maintain his defence..." in support of legislative reforms establishing public funded indigent criminal defence programs (p. 314). Funding basic rights to counsel is essential in civilized societies. Investment in indigent criminal defence programs would foster resource efficiency in legal proceedings by reducing time spent on cases, appeals, and unnecessary court proceedings. Cost savings could be shifted towards economic growth and other social programs.

Reynolds (1922) compares indigent criminal defence verdicts and outcomes between salaried public defenders and private panel attorneys with respect to quality legal representation. Reynolds concludes that salaried public defenders provide communities better value than private panel attorneys. Validating this conclusion, Reynolds offers Louis Fabricant comments concerning indigent criminal defence operations within New York County where the New York County public defenders serve community needs through indigent legal services coupled with assisting all individuals who have basic legal questions.

Margulies (1989) reviews several prudent court cases to illustrate how resource deprivation can affect decisions within the American judicial system. Margulies stresses "unfair trial[s]" result in "system ineffectiveness" due to a lack of resources (pp. 724 and 711). Americans value indigent defence, but resources are not always available for investigations that could result in evidentiary findings, which might alter a case decision. In some cases funding is so scarce, defence lawyers must divide time between the numerous indigent defence cases and clients with the ability to pay. Margulies (1989), like the Harvard Law Review (2005), addresses the same theoretical and practical differences in the desire to fund indigent defence programs: the value is there while the funding is not.

Emmelman (1993) acknowledged many past research contributions concerning defence representation, focused on ethnographic research, which provided insight concerning influences like the quality of legal representation clients received affected indigent defence case outcomes. The public defender indigent defence design is a better form for delivering quality as this form reduces many ethnical dilemmas. One ethnical consideration is funding amounts available for legal representation; defendants having an ability to pay have the best representation.

Harvard Law Review (2005) provides an overview of how funding inadequacies within indigent defence programs jeopardize the quality of legal representation individuals might receive. Illustrating this point, Harvard Law Review (p. 1734) stated, "Even though the right to counsel still exists doctrinally, the inadequate funding of indigent defence threatens what remains of the right." In various indigent criminal defence programs, societies' value and program funding are not equal: theory and practice are in discord. Harvard Law Review stresses the need for further analysis based upon several court decisions identifying problems resulting from lack of funding and resource utilization, which can impact the rights of the accused.

Lee (2004) details the impact *Gideon v. Wainwright* had and continues to have on the American judicial systems and legislative systems. The main fault of quality issues and inadequate legal representation for indigent defence is a lack of funding. Without funding, indigent defence programs suffer. Indigent criminal defence programs "...remain dependent on the 'good will' of politicians, budget planners, and opinion leaders who neither share their vision nor recognize their value..." (pp. 389-390). Indigent criminal defence attorneys are economically valued significantly less than other legal professionals. Supporting this value, Lee (p. 375) cites Rhode's (2001) example "[i]n some states, teenagers selling sodas on the beach earn more than court-appointed counsel."

3. PARADIGM AND METHODOLOGY

This article takes an interpretive approach to examine indigent defence programs. First, societies were identified by government organization (e.g., Federal, State, regional, or county) and basic information on accused rights within criminal justice systems was collected. This provides a basis for a qualifying overview of each indigent defence program where societies were evaluated on the macroeconomic value placed on basic shared freedoms.

Privately funded indigent defence programs and volunteer programs were not considered as these programs primarily rely on individual values of freedom and not a society's collective values. Where societies couple indigent criminal defence programs with indigent civil programs or take a holistic legal and social approach, efforts were made to only evaluate indigent criminal defence programs while making note of these expanded services.

4. SOCIETIES: THE ACCUSED RIGHTS WITHIN

4.1 Indigent Defence Programs within the U.S.

Within the United States, indigent defence programs are administered by various societies, throughout multiple jurisdictions, with differing values and resources (Snyder, 2003). Early in American history, indigent defence programs were not widespread and were certainly not publicly funded, but funded through voluntary organizations, charities, and individual attorneys donating services (Alderman, 1914; Reynolds, 1922; Snyder, 2003). Reynolds (1922) illustrates the beginnings, circa 1916, of public funding values with an establishment of indigent criminal defence programs within large municipalities in California and New York. Prior to *Gideon v. Wainwright*, at least one hundred offices contributed to indigent defence programs (Snyder, 2003).

The case *Gideon v. Wainwright* (1963) had the greatest impact on the economic value of indigent defence programs (Lee, 2004). The case mandated that States support counsel to the accused indigents under certain circumstances, but the Court provided limited guidance for indigent defence. Program funding and the quality of legal representation have been debated by many academics in response to *Gideon v. Wainwright* (Harvard Law Review, 2005; Emmelman, 1993; Margulies, 1989; Snyder, 2003; Lee, 2004; California Law Review, 1915); thus, the values of American basic shared freedoms are in conflict among the States and in many cases, the county governments.

After *Gideon v. Wainwright*, poverty became a critical issue in American political thought. Lyndon Johnson's "War on Poverty" helped support economic programs moving towards equality and equal access for indigents (Snyder, 2003). Indigent defence, "Equal Access to Justice for All", was a key social

program aimed to reform thoughts, legislation and economic views for disadvantaged individuals and families. Johnson brought the debate on basic shared freedoms to the executive and legislative branches of the federal government.

Ronald Reagan (as Governor of California, then as President of the United States) was responsible for further indigent defence reforms and altering overall economic values from the federal government to state, county, and municipal government jurisdictions (Snyder, 2003; PILI, *et al.*, 2003). Economic values about indigent defence programs are significantly and drastically different within regional and geographic locations, with some societies providing very minimal economic support (Snyder, 2003; Economist, 1998). Since Reagan's presidency, several organizations (e.g., Washington Legal Foundation) seek erosion of economic values concerning indigent defence (Snyder, 2003). Snyder (2003, p. 7) contends erosion of indigent defence economic values may be a direct result from benefiting populations failing to express concerns, as "...poor people are a hard constituency to organize..." The Economist (1998, p. 21) quoted Bright as saying "We have a wealth-based system of justice...For the wealthy, it's gold-plated. For the average poor person, it's like being herded to the slaughterhouse."

According to Lee (2004), indigent defence programs handle more than eighty percent of criminal proceedings, and about twenty-eight percent of the adult population has a criminal record. The death penalty for federal crimes can be enforced, even in States where the death penalty has been abolished.

4.2 Societies outside the U.S.

Canada maintains legal aid programs for indigents needing assistance in criminal and civil matters (Taylor-Butts, 2001). Like the United States, Canadian criminal justice systems are distinctly different, varying by the ten provincial and two territorial governments. Overall, individuals facing incarceration or drastic changes in lifestyles caused by legal prosecution may be eligible for services offered by legal aid programs. In 1976, the Canadian Parliament abolished the death penalty (Cohen & Longtin, 1993).

People's Republic of China maintains several self-directed areas and thirty-one provinces under a unitary socialist system of government (Guo, *et al.*, 1993). The criminal justice system changed with each new dynasty until 1949, when the current form of government was established. Since 1949, several revisions in the legal system have occurred. Anyone accused of a crime within China has the right to legal counsel or assistance with legal matters. When an individual has no representation, the court shall appoint representation; however, it is not known if public funds are available for representation.

The Republic of Colombia is a blend of centralized and decentralized government organizations providing services (Vásquez, *et al.*, 2002). Columbia's criminal justice system has been influenced by several European judicial philosophies but Spain's influence has dominated. Thirty-two provinces form the legal division where the *Defensoría del Pueblo* (Office of the People's Defender) provides indigent defence and civil protections. The death penalty was allowed and abolished several times and currently is abolished.

Costa Rica governing systems have been heavily influenced by Spain (Rico, 2002). Since 1970, the *Departamento de Defensores Públicos* has provided indigent criminal defence. Costa Rica primarily depends on law students or other qualified individuals to support indigent defence. In 1877, the death penalty was abolished.

England and Wales, Driven by the *Access to Justice Act 1999*, operate a national mixed indigent criminal defence program overseen by the Legal Services Commission (Ogden, 2004; Carter, 2006). Since the original establishment of the indigent criminal defence system in 1945, the system has been influenced by American State indigent criminal defence systems, Canadian, and European systems (Ogden, 2004). Rooted in fifth century legal processes, the current system continues to evolve through significant policy changes (Phillips, Cox & Pease, 1993). According to Lord Carter (2006, p. 3), in "...England and Wales, we spend more on legal aid per capita than anywhere else in the world." In fact, no limit is imposed upon the criminal defence budget (PILI, *et al.*, 2003). The death penalty was abolished around 1965 (Phillips, Cox & Pease, 1993).

The Federal Republic of Germany is composed of sixteen separate districts, *Länder*, whose criminal justice systems, since 1871, have been driven by national policy making decisions such as the federal

Penal and Criminal Codes (Aronowitz, 1993a; PILI, *et al.*, 2003). Districts must provide indigent defence when individuals may be deprived of property, personal rights, or accused of serious crimes (Aronowitz, 1993a). These defence rights extend to anyone, regardless of citizenship, legally present within Germany (PILI, *et al.*, 2003). Courts make determinations of who is eligible for public legal assistance and if recipients will contribute fees. Districts provide legal representation through salaried attorneys (Aronowitz, 1993a). German law sets all legal fees providers may charge (PILI, *et al.*, 2003). Germany is a major consumer of legal expenses insurances. The death penalty was abolished in 1949 (Aronowitz, 1993a). Israel borrowed heavily from the U.K.'s criminal justice system when establishing Israeli legal systems (Weisman, 1993). Codification for providing indigent defence occurred in 1973; and in 1992, major reforms relating to providing indigent defence occurred (Israel Bar, 2007; PILI, *et al.*, 2003). The Ministry of Justice's Legal Aid Bureau, operating within several legal districts, coordinates with other programs (e.g., *Sahar Mitzvah*) to provide indigent defence (Israel Bar, 2007; Weisman, 1993). Many programs for indigent defence rely on attorneys providing free services or the National Insurance Institute (Israel Bar, 2007). Established in 1995, the Office of Public Defender is a mixed system where indigents may obtain legal services up to a maximum financial allowance (PILI, *et al.*, 2003). Controlling costs within this mixed system is extremely difficult because costs are directly driven by law enforcement. To assist with increased costs, recipients of publicly funded legal aid may be required to contribute funds (PILI, *et al.*, 2003). The death penalty is allowed (Weisman, 1993).

Italian criminal justice systems are deeply rooted in Roman and Canonic law with influences in French law (Marongiu & Biddau, 1993). Since 1950, criminally accused individuals, regardless of category or brutality, have basic protection rights with respect to self, property, and livelihood. Private panel attorneys providing indigent defence are compensated by the government. The *Ministro di Grazia e Giustizia*, Minister of Justice, administers the indigent defence system. The death penalty can only be imposed in cases of war.

Japan established a new government in 1947 under U.S. influence (Moriyama, 1993). This new centralized federal government reflected influences from German, British, and American systems while retaining traditional aspects of Japanese society. Traditionally, parties resolve most conflicts before considering the court system. Individuals enjoy constitutionally protected property rights; and indigent individuals charged in criminal matters can receive public funded legal defence. The death penalty, hanging, is allowed for several offences.

South Africa has a nationally administered criminal justice system based on Roman-Dutch laws (Scharf & Cochrane, 1993). Unlike many European and American systems where distinctions exist between cases involving civil and criminal laws, South African customary laws can encompass both civil and criminal laws. However, a value shift has resulted in customary law courts being replaced with judicial courts and adoption of a new Constitution around 1995 (Scharf & Cochrane, 1993; PILI, *et al.*, 2003). Accused individuals have a right to legal representation under certain conditions; but, access to public funded legal programs is not guaranteed (Scharf & Cochrane, 1993; PILI, *et al.*, 2003). After applying a periodic changing formula to determine which applicants may potentially receive public funded legal assistance, a case by case decision is rendered where an applicant's alleged crime and circumstances are scrutinized against several probabilities (e.g., a favourable outcome, an admission of guilt, traffic violations) (PILI, *et al.*, 2003). The death penalty exists within South Africa (Scharf & Cochrane, 1993).

5. DISCUSSION/CONCLUSION

Based upon the societies examined, a generalised conclusion is that *societies want to protect legitimate society members', within the respective society's jurisdiction, fundamental property rights concerning criminal prosecution.* This may be illustrated by the presence of indigent criminal defence programs.

Most indigent programs are nonexistent during oppressive government establishments. But, as a society moves towards a free market economy, property protection becomes an essential element of this new free market economy and causes a paradigm shift within a society's government. This shift incorporates individual rights against liberty deprivation without fair legal consultations and court decisions. Possibly, the first rights involve questions concerning capital punishment and conditions that capital punishment is

permissible. Where an accused lacks resources to provide a basic and fair legal defence, the society, under certain conditions, provides public funds to ensure an individual's rights are not denied erroneously. First, societies use private attorneys to develop a system to protect essential liberties. As societies grow in size and wealth, private attorney systems become inefficient and expensive to continue without change considering a society's return on investment. As resources are not infinite, a society enhances indigent criminal defence programs by adding salaried or contracted attorneys to handle some cases. This enhancement may initially save significant public funds; but, as these mixed systems of indigent defence continue, a society looks at greater investment opportunities (e.g., crime prevention, military activity, public utilities, national infrastructure, education, and medical care) to increase wealth and prosperity.

A society could revert indigent defence programs back to private practice systems or place greater limitations on program variables. Variables include which accused individuals receive program assistance, how services are delivered, minimum levels of legal expertise to defend an accused indigent person (i.e., law student versus a professionally trained lawyer), and the penalties that trigger an opportunity for an accused to receive public assistance (e.g., death penalty, imprisonment, fines). In most cases, altering a criminal indigent defence program begins an erosion of a society's overall value of an accused individual's basic property rights.

Since market systems are fundamentally rooted in private property ownership and an owner's decision concerning property use, protection of these accused rights are elementary to a market based economy. Basic protection rights might be considered part of a society's fixed costs of doing business. To build upon this article's contributions, additional society evaluations of criminal indigent defence programs can be completed. For societies having indigent criminal defence programs, financial resource allocation over time could be compared under multiple methods to triangulate a stronger conclusion.

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