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Muhire, Heraclitos; Giansanti, Enrico; Schoultz, Isabel

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LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

ACCESS TO JUSTICE IN SWEDEN

by

HERACLITOS MUHIRE, ENRICO GIANANTI & ISABEL SCHOULTZ

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ACCESS TO JUSTICE IN SWEDEN

Heraclitos Muhire¹, Enrico Giansanti² & Isabel Schoultz³

1. GENERAL INFORMATION

“All public power in Sweden proceeds from the people.” This is the opening statement in the opening chapter of the first amendment of the Swedish constitution, the Instrument of Government (in Swedish, *Regeringsformen*). This phrase sets the benchmark for the description of the representative democracy that is Sweden. Although it is a monarchy, through the years the power of the monarch has decreased to the extent that it is merely symbolic in the present day.⁴

The power structure in Sweden is as follows: people elect representatives to the Swedish Parliament (*the Riksdag*) and to local government (municipal and county councils) from which legislative power emanates. With support from the Parliament, a Government is formed to perform executive tasks. The Government also has initiative power in suggesting legislation. Chapter 1 of the Instrument of Government also emphasises that all public power is exercised under the rule of law/in conformity with the law.⁵

According to the UNDP Human Development Report, Sweden has one of the highest Human Development Index scores in the world with a value of 0.933. This places the country at number 7 on a worldwide ranking.⁶ The index considers components such as life expectancy at birth, expected years of schooling, mean years of

¹ Heraclitos Muhire has a Bachelors in Criminology and is a second year Master student in Sociology of Law at Lund University. Muhire’s Research interests are Access to Justice and white-collar crime.

² Enrico Giansanti has a Bachelors of Laws in Law from the University of Leicester and he is currently a second year Master student in Sociology of Law at Lund University. Giansanti’s main research interests are Access to Justice for vulnerable groups, migration and white-collar crime.

³ Isabel Schoultz is Assistant Professor at the Sociology of Law Department, Lund University, Sweden. She has published academic papers on a variety of topics, including denials of corporate crime, state crime in street-level bureaucracy, legal aid in Sweden and access to justice in the European Court.

⁴ Riksdagen (2019), The Constitution. Available at: <https://riksdagen.se/en/how-the-riksdag-works/democracy/the-constitution/> (accessed on 2019-10-18 at 08:45).

⁵ The Constitution of Sweden - The Fundamental Laws and the Riksdag Act, 2016, p. 25-26. Available at: https://riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf?fbclid=IwAR0pW9YGnmPJCehi0DYKbv1C-6vVTgRoLg_tirTobL19kuG-VdG2PCcSS_EU (accessed on 2019-10-18 at 09:30).

⁶ United Nations (2019), Human Development Indices and Indicators. Available at: http://hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf (accessed on 2019-10-19 at 10:35).

schooling and gross national income per capita.⁷

The table below indicates the Swedish gross domestic product for the last ten years in billions of Swedish crowns (SEK) and US dollars (USD).⁸ N.B. the figures in SEK were extracted from Ekonomifakta (who extracted it from Statistics Sweden).⁹ In 2018, the gross national income per capita was 482 000 SEK (~50 500 US dollars).¹⁰

Chart 01. Swedish GDP for the last ten years in billions of Swedish crowns (SEK) and US dollars (USD).

	Billions SEK
2008	(417 billion USD) 3 988 billion SEK
2009	(399 billion USD) 3 819 billion SEK
2010	(424 billion USD) 4 055 billion SEK
2011	(437 billion USD) 4 179 billion SEK
2012	(434 billion USD) 4 153 billion SEK
2013	(439 billion USD) 4 198 billion SEK
2014	(451 billion USD) 4 313 billion SEK
2015	(471 billion USD) 4 504 billion SEK
2016	(482 billion USD) 4 613 billion SEK
2017	(494 billion USD) 4 724 billion SEK
2018	(506 billion USD) 4 834 billion SEK

Using the Gini coefficient, the OECD (the Organisation for Economic Co-operation and Development) determined the level of income inequality among countries in the organisation and in 2018 Sweden had one of the lowest levels of income inequality with a score of 0.28.¹¹ The Gini coefficient is based on the comparison of cumulative proportions of the population against cumulative proportions of income they receive, and it ranges between zero in the case of perfect equality and one in the case of perfect inequality.¹²

⁷ Ibid.

⁸ All amounts in Swedish Kronor are converted to US Dollars based on the exchange rate 2 December 2019: 1 US Dollar equals 9,56 Swedish Krona. All amounts in US Dollar are rounded up to the nearest hundred.

⁹ Ekonomifakta. Available at: <https://www.ekonomifakta.se/fakta/ekonomi/tillvaxt/bnp---sverige/?graph=/14515/1/2008-/> (accessed on 2019-10-21 at 14:35).

¹⁰ Statistiska Centralbyrån (SCB). National Accounts, quarterly and annual estimates. Available at: https://www.scb.se/en/finding-statistics/statistics-by-subject-area/national-accounts/national-accounts/national-accounts-quarterly-and-annual-estimates/#_Keyfigures (accessed on 2019-10-22 at 15:35).

¹¹ OECD. Income Inequality. Available at: <https://data.oecd.org/inequality/income-inequality.htm> (accessed on 2019-10-22 at 14:46).

¹² Ibid.

Sweden does however have a growing problem of people living in low-income households. From 2008 to 2016, people in Sweden who lived under the EU standard for low-income household increased from 13 to 16 percent. As of 2018, seven percent of the working population of Sweden has an income level below the EU's at-risk-of-poverty threshold.¹³

As we will observe later in this report, the form of government and the living conditions of the country's population play a crucial role in access to justice. The principles underpinning the rule of law grant people the possibility of just dispute resolution and criminal justice but they also light the path to securing human rights. Interconnected with the rule of law are the living conditions that, in practice, either impede or facilitate human rights and access to justice.

2. LEGAL SYSTEM

2.1. TYPE OF LEGAL SYSTEM

The Swedish legal system, albeit traditionally considered a civil law system, does not fit particularly well into the category of either civil or common law.¹⁴ It is not civil, as it does not have a one-piece codification such as Germany's *Bürgerliches Gesetzbuch* (BGB) or France's Code Napoleon. Sweden enacted the most recent general codification in 1734, parts of which are still valid law today.¹⁵ There are, however, codes (*balkar*) regarding specific topics, such as the Code of Judicial Procedure, the Environmental Code, the Penal Code and the Marriage Code. On the other hand, some areas of law, such as perfecting security interests in chattels (*sakrätt*), are mostly the realm of case law with little or no statutory provisions.¹⁶

However, Sweden does not fit particularly well within the common law designation either, in particular because of the perception of the role of the judiciary. The mixture of statutory and case law, the perceived role of the judges, and the degree of self-regulation fostered into the legal system, are features of the so-called Nordic

¹³ Statistiska Centralbyrån (SCB). Percentage of people in work and below the poverty threshold remains unchanged. Available at: <https://www.scb.se/en/finding-statistics/statistics-by-subject-area/living-conditions/living-conditions/living-conditions-surveys-ulfsilc/pong/statistical-news/living-conditions-surveys-lfsilc/> (accessed on 2019-10-22 at 11:37).

¹⁴ Carlson Laura (2012), *The Fundamentals of Swedish Law*. Studentlitteratur. 38 (Hereafter cited as Carlson, 2012).

¹⁵ Carlson, 2012, p. 38.

¹⁶ Ibid, p. 39.

legal family.¹⁷ The Nordic legal family is distinct from the Anglo-American, Germanic and Romanist legal families, and uses case law in a manner distinct from the Anglo-American systems.¹⁸ Although hybrid, the legal system in the Nordic countries partly falls within the civil law system because of the role of the courts. In theory, the courts simply determine the intent of the legislator, and do not make law. Consequently, the Swedish legal system is based on a separation of political function, but not a separation of political power.¹⁹

Another aspect that is unique to the Nordic legal family is the quasi-legislative power delegated to private organisations in the areas of labour and employment law with respect to social partners, i.e. employers and employee organisations. The basis for this absence of statutory regulation is that these organisations are seen as being closer to the problems and thus are perceived as having a better understanding of the issues and possible solutions.²⁰ Self-governance and self-regulation are strong aspects of this model and are found within landlord and tenant law, contract law, insurance law and corporate law.²¹

In the Swedish legal system, areas of law are first categorised as either public or private law as in the Roman law tradition. The former concerns issues between political power, the state, counties and municipalities, and the individual. The latter concerns issues between two private parties. A major distinction between the two is that public law is mandatory (*tvingande*), while private law is seen as having a gap-filling function (*dispositiv*) in most cases.²² However, some provisions in private law are mandatory even though, for consumer protection provisions for example, the parties are free to agree to the contrary. The party adversely affected by such an agreement has to use their rights under the mandatory law to have the agreement cancelled, therefore making these protections in private law more quasi-mandatory than mandatory.²³ The periphery between mandatory and gap-filling in specific cases can be somewhat grey as legislative acts concerning private law can have features of a solely public law nature. For instance, the Companies Act (*aktiebolagslag* 2005:551) and the

¹⁷ Ibid, p.39 The Nordic legal family comprises: Denmark, the Faroe Islands, Greenland, Finland, Åland, Iceland, Norway and Sweden.

¹⁸ Carlson, 2012, p. 39.

¹⁹ Ibid.

²⁰ Ibid, p. 39-40.

²¹ Ibid, p. 40.

²² Carlson, 2012, p. 40-41.

²³ Ibid.

Land Code (*jordabalk* 1970:994) encompass sections concerning criminal sanctions for violations of specific provisions of these laws.²⁴

2.2. THE SWEDISH JUSTICE SYSTEM

According to article two of chapter 11 of the Instrument of Government, the Courts have independent status in Sweden²⁵ and neither Parliament (*Riksdag*) nor the Government (*Regeringen*) or any government agency is to interfere in how courts rule on individual cases.²⁶ Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), effective as law in Sweden since November 1998, also guarantees the independence of the courts.²⁷ The courts fall under the administration of the Ministry of Justice and its agency, the National Courts Administration.²⁸

There are three types of courts in Sweden: the general courts, which include district courts, courts of appeal and the Supreme Court; the general administrative courts, namely, administrative courts, administrative courts of appeal and the Supreme Administrative Court; as well as the special courts, which decide disputes within special areas, for example the Labour Court.²⁹

There are two parallel court systems, the general courts and the administrative courts. The general courts include forty-eight district courts (*tingsrätt*),³⁰ six courts of appeal (*hovrätt*) and one Supreme Court (*Högsta domstolen*).³¹ The administrative courts include twelve administrative district courts (*förvaltningsrätt*, previously *länsrätt*), four administrative courts of appeal (*kammarrätt*) and one Supreme Administrative Court (*Högsta förvaltningsdomstolen*, previously *Regeringsrätten*).³²

²⁴ Ibid, p. 41.

²⁵ Ibid, p. 35.

²⁶ Government Offices of Sweden. *The Swedish Judicial System. A brief introduction to the Swedish judicial system, brochure revised in 26 June 2015*. Available at: <https://www.government.se/49ec0b/contentassets/9ebb0750780245aeb6d5c13c1ff5cf64/the-swedish-judicial-system.pdf> (Accessed on 2019-10-15 at 09:28), 19.

²⁷ Carlson, 2012, p. 35.

²⁸ Carlson, 2012, p. 35; Sveriges Domstolar. The Swedish Courts. Available at: <http://old.domstol.se/Funktioner/English/The-Swedish-courts/> (Accessed on 2019-10-15 at 09:55).

²⁹ Sveriges Domstolar. The Swedish Courts. Available at: <http://old.domstol.se/Funktioner/English/The-Swedish-courts/> (Accessed on 2019-10-15 at 09:55).

³⁰ Sveriges Domstolar. Statistics. Court statistics official statistics of Sweden 2018. Available at: http://old.domstol.se/upload/Lokala_webbplatser/Domstolsverket/Statistik/court_statistiks_2018.pdf (Accessed on 2019-10-16 at 10:25).

³¹ Carlson, 2012, p. 36.

³² Ibid.

The specialised courts have specific jurisdictions, such as the Labour Court (*Arbetsdomstolen*);³³ from 1 September 2016 the Patent and Market Court (*patent- och marknadsdomstolarna*),³⁴ and the Patent and Market Court of Appeal (*Patentbesvärsrätten och Marknadsdomstolen*)³⁵ came into being. Other specialised courts are the five land and environment courts (*Mark- och miljööverdomstol*) and the Land and Environment Court of Appeal (*Mark- och miljööverdomstolen*), the seven maritime courts (*sjörättsdomstol*), the three migration courts (*migrationsdomstol*) and the Higher Migration Court (*migrationsöverdomstol*).³⁶

Some of the specialised courts, such as the Patent and Market Court of Appeal, connect to the general or administrative systems, while others have no such connections. For instance, the Labour Court is normally the court of first instance as well as the sole appellate court in cases regarding employers and employee organisations with the Supreme Court having no general jurisdiction over its decisions. The Supreme Court, however, can technically allow a petition to set aside a judgment of the Labour Court (*resning*), but has yet to do so.³⁷

2.2.1. The General Courts

The general courts include the district court as the court of first instance, the court of appeal as the court of second instance and the Supreme Court as the court of third instance.³⁸

Chart 02. Cases handled (filed, determined and pending) by the general courts of first instance 2014-2018³⁹

	2014	2015	2016	2017	2018
Cases handled	175,538	170,408	171,706	180,248	190,226

³³ For more information in English about the Labour Court see its website at arbetsdomstolen.se.

³⁴ Sveriges Domstolar. Statistics. Court statistics official statistics of Sweden 2018. Available at: http://old.domstol.se/upload/Lokala_webbplatser/Domstolsverket/Statistik/court_statistics_2018.pdf (Accessed on 2019-10-16 at 10:25).

³⁵ Ibid.

³⁶ Carlson, 2012, p. 36.

³⁷ Ibid, p. 36.

³⁸ Sveriges Domstolar. Statistics. Court statistics official statistics of Sweden 2018. Available at: http://old.domstol.se/upload/Lokala_webbplatser/Domstolsverket/Statistik/court_statistics_2018.pdf (Accessed on 2019-10-16 at 10:25), p. 6.

³⁹ Ibid, table 1.1 and table 1.2.

2.2.2. *The Administrative Courts*

The administrative courts handle cases concerning disputes between individuals and public authorities and are organised under a three-tier system. The first court tier is the Administrative Court, the second is the Administrative Court of Appeal, and the third and highest is the Supreme Administrative Court. There are 12 administrative courts and four administrative courts of appeal. On 15 February 2010, the former 23 County Administrative Courts were reorganized into 12 Administrative Courts. At the administrative courts in Stockholm, Gothenburg, Malmö and Luleå, there are migration courts that hear alien and citizenship cases as the court of first instance, whilst the Migration Court of Appeal is attached to the Administrative Court of Appeal in Stockholm and is the highest instance for such cases.⁴⁰

Chart 03. Cases handled (filed, determined and pending) by the administrative courts of first instance 2014-2018⁴¹

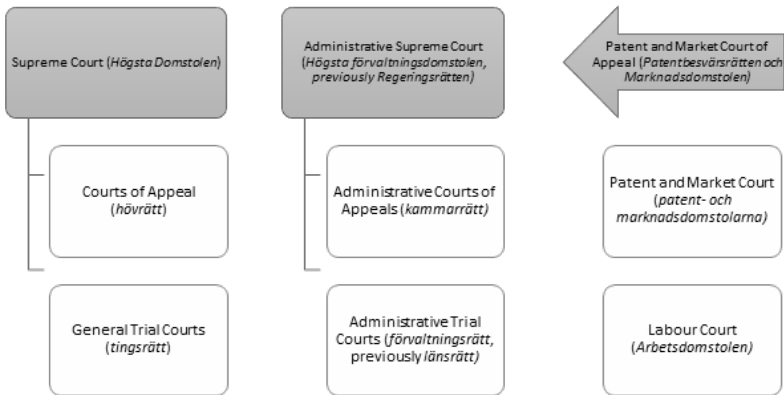
	2014	2015	2016	2017	2018
Cases handled	308,820	294,344	321,572	368,982	392,987
<i>of which Migration cases</i>	58,819	56,694	83,381	118,350	122,873
<i>of which compulsory care cases</i>	39,360	40,523	40,634	40,065	41,521

Migration cases have had the most significant increase between 2014 and 2018 most probably due to the so-called refugee crisis of 2015. The increase in migration cases handled in the administrative courts is important to note because the legal aid scheme for administrative cases is only available for either migration or compulsory care cases (see section 5.2 on Legislative framework for legal aid). For this purpose, it is interesting to note that the compulsory care cases handled during the same period remained constant.

⁴⁰ Ibid.

⁴¹ Ibid.

Chart 04. The Court Systems



2.3. PARALLEL JUSTICE STRUCTURES

There are different minorities in Sweden such as Muslims, Jews, Sikhs, Roma and Sami people. These groups use formal but unofficial structures for ceremonies such as weddings and for related dispute resolution. For instance, the Roma use their own tribunals (*Kris*) and other forms of alternative dispute resolution (*Divano*) for resolving issues concerning weddings and property disputes. However, both *Kris* and *Divano* practices are not recognised by the Swedish State as official law or legal structures. The Sami people are an exception in that they were indigenous to these lands before official borders were created, and in fact have had their own Parliament since 1993. The 31 members of the Sami Parliament Plenary Assembly are elected through general elections every fourth year. More than 8000 of Sweden's estimated 20 000-35 000 Sami are now registered in the Sami Parliament electoral register.⁴² The Sami Parliament exists as a way to recognise the indigenous status of the Sami and to ensure their participation in political life through representative participation. The Sami people, however, do not have a parallel justice system and therefore are subject to the Swedish courts and justice system for resolving disputes. As far as access to justice is concerned, Sweden has been criticised by various international organisations for its handling of minorities' rights (see section 2.7.1).

⁴² Samediggi (2019-03-14). *Background: The State and the Sami Parliament*. Available at: <https://www.sametinget.se/9688> (accessed on 2019-10-28 at 15:07).

2.4. THE STRUCTURE OF THE LEGAL PROFESSION

Any person can provide legal advice even without formal legal education.⁴³ However, most practicing lawyers have a law degree, which consists of a Master of Laws (*jurist kandidat*) LL.M., attained after four and a half years of studies. The Swedish Bar Association (*Sveriges advokatsamfund*) (SBA), which was founded in 1887, has approximately 5800⁴⁴ members, of which 25% are women.⁴⁵ In order for a lawyer to use the title of licensed attorney (*advokat*) they have to be in good standing with the SBA; it is a criminal offence to use the title *advokat* without being a member of the SBA.⁴⁶ The law requires certain legal advisors to be licensed attorneys, including bankruptcy trustees, public defenders and supervising legal counsel paid by the state to victims of crimes (*målsägandebitråde*). There are some exceptions to the requirements to be admitted to the SBA.⁴⁷ At the European Union law level, Council Directive 89/48/ECC recognises higher education diplomas attained on completion of professional education and training of at least three years duration. In addition, there is Directive 98/5/EC of the European Parliament and of the Council that facilitates the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was attained – the “Establishment Directive”.⁴⁸

Section 7.5.1 of The Code of Professional Conduct for Members of Swedish Bar Association states that “*Only an Advocate may be appointed to be a member or deputy member of the board or become*

⁴³ Carlson, 2012, p. 53.

⁴⁴ Sveriges Advokatsamfund (1887). About us. Available at: <https://www.advokatsamfundet.se/Advokatsamfundet-engelska/About-us/> (Accessed on 2019-10-15 at 14:03).

⁴⁵ Ibid.

⁴⁶ Carlson, p. 54; to be admitted to the SBA, the applicant, under JP 8:2 (the ninth section of the eighth chapter of the Code of Judicial Procedure), must: 1. Be domiciled in Sweden or another state of the European Union, the European Economic Area or Switzerland; 2. Have passed the examinations prescribed to qualify for appointment as a judge, in Sweden it is the Master of Laws (*jurist kandidat*); 3. Have completed the practical and theoretical training of at least three years necessary to practice as a Member of the Bar Association; 4. Have gone through the course for and passed the bar examination as given by the Bar Association; 5. Have established a reputation as a person of integrity, and, be considered in general suitable to practice as a Member of the Bar Association – see also <https://www.advokatsamfundet.se/Advokatsamfundet-engelska/Membership-and-registration/>.

⁴⁷ The Swedish Code of Judicial Procedure (rättegångsbalk 1942:740). *Government Offices of Sweden*. Available at: https://www.government.se/49e41c/contentassets/a1be9e99a5c-64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf (accessed on 2019-10-22 at 10:58), chapter 8, sections 2 and 2a.

⁴⁸ Carlson, 2012, p. 54.

a shareholder or partner in a law firm company".⁴⁹ The board of the SBA can dispense of this rule where the managing director of a law firm organised as a limited liability company does not have to be an advocate as long as they have undertaken to observe the regulations applicable to the law practice including good advocate conduct. In such a case, the Managing Director may also sign on behalf of the company but only jointly with an advocate. However, no one is authorised to sign on behalf of a law firm company without the participation of one of its active advocates, except in the circumstances set forth in Chapter 8, section 36 of the Companies Act.⁵⁰ Notwithstanding the provisions in Section 7.5.1, a managing director who is not an advocate and who is granted an exemption by the SBA, may become a shareholder or a partner of such company provided such ownership may only cover less than ten percent of the capital and represent less than ten percent of the voting power. Furthermore, such ownership compels the managing director to transfer his shares or share to the other owners upon termination of the employment.⁵¹

The Council of Europe European Commission for the Efficiency of Justice (CEPEJ) report from 2018 indicated the number of lawyers per 100,000 inhabitants. In Sweden, the number was 58 in 2016, which can be compared to 69 in Finland and 147 in Norway.

The report highlighted a 4% increase in 2012-2014, a 5% increase in 2012-2016 and a 1% increase in 2014-2016 in the number of lawyers in Sweden.⁵² The number of lawyers in any given country may, or may not, be an indication to the level of litigiousness in the country. Thus, a higher number of lawyers may suggest a society where the use of law is more significant than a society with a lower number of lawyers. However, other factors may influence the number of lawyers without indicating a significant level of litigiousness in the general population, such for example, the presence of a significant legal and financial services market.⁵³

⁴⁹ The Code of Professional Conduct for Members of Swedish Bar Association. *7.5 Organisation of a Law Firm*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf (accessed on 2019-10-24 at 09:15).

⁵⁰ *Ibid*, section 7.5.2.

⁵¹ *Ibid*, section 7.5.3.

⁵² European Judicial Systems – Efficiency and quality of justice (2018). CEPEJ Studies No.26. Available at: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c> (Accessed on 2020-01-07 at 13:19), p. 172.

⁵³ Anna Barlow (2019), *The Machinery of Legal Aid*. Åbo Akademi University. Available at: https://www.doria.fi/bitstream/handle/10024/168020/barlow_anna.pdf?sequence=1&isAllowed=y (accessed on 2019-11-07), p. 288.

2.4.1. Legal representation in Court

The Swedish Code of Judicial Procedure (*Rättegångsbalken*, RB) states that a person who in light of the case and previous experience is “knowledgeable and conscientious” is eligible to perform legal representation. The “knowledgeable and conscientious” can refer to this person being knowledgeable about the law and, also, not having been committed of any serious criminal offence.⁵⁴ In addition to this, the person must not be a minor, a bankrupt or under legal custodianship (*förvaltare*) in the Children and Parents Code (*Föräldrabalken*), must speak Swedish and live in Sweden or the European Economic Area or Switzerland.⁵⁵ These provisions are in reference to civil cases and do not mandate legal representation. The Code of Judicial Procedure, chap. 21 also stipulates that a person may represent himself or herself in a criminal case but that a public defender may, under conditions we will see in section 5.7, be provided to represent their interests (CJP, chap. 21, section 3).⁵⁶

Paralegal or legal officer is a certificated title received after spending two years in a higher vocational education institution. In Sweden, paralegals perform administrative duties in courts, law firms and companies.⁵⁷ Paralegals can represent individuals in courts if they fulfil the requirements of “knowledgeability and conscientiousness” (see the section above on legal representation). The duties performed by paralegals at law firms or companies are, among others: keeping contact with clients, government agencies and courts, searching and presenting information on cases, constructing, examining and classifying contracts and other legal documents, writing judicial enquiries, accounting and keeping a diary/record on a case.⁵⁸

Paralegals at courts have the task of keeping contact with other courts, government agencies, legal representatives and different parties in cases. They can also work administratively preparing and processing criminal cases, civil cases, bankruptcy cases and others. In some instances, they are able to suggest verdicts in small (simple) cases, conduct simple judicial enquiries and act as recording clerks at

⁵⁴ Lawline, legal advice by lawyers and law students. Available at: <https://lawline.se/answers/krav-for-att-fa-representera-sig-sjalv-eller-annan-i-en-rattegang> (accessed on 2019-11-05) .

⁵⁵ Sveriges Riksdag. Rättegångsbalk (1942:740). Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rattegangsbalk-1942740_sfs-1942-740 (accessed on 2019-11-05).

⁵⁶ Ibid.

⁵⁷ Higher Vocational Education, Gothenburg. Available at: <https://yrigo.se/utbildningar/ekonomi-och-administration/paralegal/>. (accessed on 2019-11-05).

⁵⁸ Ibid.

hearing sessions.⁵⁹ There are no available statistics on paralegals as the professional title was established in Sweden fairly recently (education for paralegals began in 2006).⁶⁰

The affordability of the legal services that lawyers provide depends on the income of individuals seeking legal counsel and also on the nature of the case at hand. In criminal cases (if you are accused of committing a serious crime or if you are a victim of a crime), you are entitled to a public defender or a legal counsel for an injured party (see section 5.7). The charges for these legal services are met by the state. A public legal counsel is also afforded to those who face other mandatory interventions in their personal life by the state such as asylum cases and compulsory institutional care (see section 5).

2.4.2. Judges in Sweden

The Instrument of Government in the Swedish Constitution specifies that courts are independent of any state entity in their decision-making in individual cases.⁶¹ The Government, following proposals by the Judges' Proposals Board (*Domarnämnden*), appoints judges to permanent positions.⁶² Judges are required to have a bachelor's degree in law and many appointed judges have undergone specialised judicial training, such as serving at courts of appeal and administrative courts of appeal and district courts/administrative courts.⁶³

Judges may be dismissed from their position if due to gross negligence of duty (or criminal offence on duty) they are unfit to occupy their position. They may also be dismissed in cases of mandatory retirement age (currently 67 years) or impeding medical conditions. Judges may be transferred to equal positions if they are obliged to

⁵⁹ Higher Vocational Education Authority, certificate for paralegals. Available at: <https://www.myh.se/Documents/Verksamhetsomraden/Yrkesh%c3%b6gskolan/Utbildningsanordnare/Europass/Juridik/Paralegal%20Juridisk%20handl%3%a4ggare%20Utbnr%20201601860.pdf> (accessed on 2019-11-05).

⁶⁰ Ibid.

⁶¹ Swedish Government. The Swedish Judicial System. Available at: <https://www.regeringen.se/49e9fa/contentassets/24ef36d9206a41fb80d6b74030fd9ef6/the-swedish-judicial-system.pdf> (accessed on 2019-11-05).

⁶² Swedish Parliament. *Swedish Constitution*. Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kungorelse-1974152-om-beslutad-ny-regeringsform_sfs-1974-152 (accessed on 2019-11-06).

⁶³ Swedish Government. The Swedish Judicial System. Available at: <https://www.government.se/49ec0b/contentassets/9ebb0750780245aeb6d5c13c1ff5cf64/the-swedish-judicial-system.pdf> (accessed on 2020-01-09).

depart from their position due to organizational reasons.⁶⁴

The latest census on judges in Sweden showed the following: there were 1700 judges, 62 percent are women and 38 percent are men. The average age of women in the position is 42 and for men the average is 45.⁶⁵

3. PROCESS AND PROCEEDINGS: OVERVIEW

3.1. CRIMINAL PROCEDURE

In Sweden, the prosecution service is under the authority of the Swedish Prosecution Authority (*Åklagarmyndigheten*). It employs about 1,400 staff, 950 of whom are prosecutors while the rest are engaged with various support work.⁶⁶ The Swedish Prosecution Authority answers directly to the Ministry of Justice.⁶⁷ All prosecutors are independent in their decision-making, which means that a senior prosecutor cannot influence decisions a subordinate prosecutor might make in a case for which the subordinate is in charge.⁶⁸ Public prosecutors are recruited directly by the Swedish Prosecution Authority via their website.⁶⁹ Recruitment may be internal and/or external. To be eligible a candidate must have a law degree, have completed Swedish notary merit at a district court and be a Swedish citizen.⁷⁰ Candidates are assessed through structured interviews, a personality test and two performance tests.⁷¹ Part of the recruitment process includes background checks regarding criminal records, census records, family relationships, grades and exams.⁷² In Sweden, the earliest one can start

⁶⁴ Riksdagen. Instrument of Government. Available at: <https://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-instrument-of-government-2015.pdf/> Chapter. 11 Art. 7 (accessed on 2020-01-09).

⁶⁵ Statistiska Centralbyrån (SCB). Yrkesregistret med yrkesstatistik 2017. Available at: https://www.scb.se/contentassets/1fe7f957920f4eaf97bddcc0270553f2/am0208_2017a01_sm_am33sm1901.pdf (accessed on 2019-11-06 at 10:11).

⁶⁶ Swedish Prosecution Authority (*Åklagarmyndigheten*). About us Available at: <https://www.aklagare.se/en/about-us/> (accessed on 2019-10-21 at 10:45).

⁶⁷ European Justice (2017-02-20). Legal professions – Sweden. Available at: https://e-justice.europa.eu/content_legal_professions-29-se-en.do?member=1 (accessed on 2019-10-21 at 11:46).

⁶⁸ Ibid.

⁶⁹ Swedish Prosecution Authority (*Åklagarmyndigheten*). Career. Available at: <https://www.aklagare.se/en/career/> (accessed on 2019-10-21 at 10:50).

⁷⁰ Swedish Prosecution Authority (*Åklagarmyndigheten*). Ny som jurist <https://www.aklagare.se/karriar/rekrytering/ny-som-jurist1/> (accessed on 2019-10-21 at 11:12).

⁷¹ Swedish Prosecution Authority (*Åklagarmyndigheten*). Rekrytering av åklagare. Available at: <https://www.aklagare.se/karriar/rekrytering/rekrytering-av-aklagare/> (accessed on 2019-10-21 at 11:00).

⁷² Ibid.

earning state retirement pension is 61 and there is no upper limit. One has the right to work until the age of 67, however, one can work for longer if there is agreement with one's employer, and one continues to earn pension rights.⁷³

3.1.1. *The Criminal Investigation Process*

The Code of Judicial Procedure (*rättegångsbalk 1942:740*) regulates procedural law in the Swedish legal system.⁷⁴ The authority responsible for a criminal investigation depends on the severity of the crime committed. If it is a minor offence then the police conduct the investigation from start to finish. If the matter investigated is of a serious nature, then the prosecutor is responsible for conducting the investigation.

Once a crime has come to the attention of the police, a criminal investigation (*brottsutredning*), also known as a preliminary investigation (*förundersökning*), starts. The objective of a preliminary investigation is to ascertain whether there is a suspect and whether there is sufficient evidence to initiate prosecution.⁷⁵ Once the preliminary investigation is concluded, the prosecutor evaluates whether there is sufficient evidence to bring a court case against the suspect.⁷⁶ The prosecutor makes decisions concerning arrest.⁷⁷ In cases where there are statutory grounds to arrest a person, and in urgent cases, the police may make an arrest.⁷⁸ The arrested person must be interviewed as soon as possible. Immediately after interview, the prosecutor must decide whether the person should be detained or not. If the person is not detained, they must be released immediately.⁷⁹ If a person is arrested or detained by the order of a prosecutor, he or she is normally placed in police custody at the nearest police station. However, if a person is arrested or detained by order of a court, he or she is normally placed in a detention centre under the authority of the Swedish Prison

⁷³ European Commission. *Employment, Social Affairs & Inclusion. Policies and Activities*. Available at: <https://ec.europa.eu/social/main.jsp?catId=1130&langId=en&intPageId=4814> (accessed on 2019-10-22 at 10:18).

⁷⁴ The Swedish Code of Judicial Procedure (*rättegångsbalk 1942:740*).

⁷⁵ Swedish Prosecution Authority. Preliminary Investigation. Available at: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/preliminary-investigation/> (accessed on 2019-10-22 at 13:56).

⁷⁶ Ibid.

⁷⁷ The Swedish Code of Judicial Procedure (*rättegångsbalk 1942:740*, chapter 24, section 6).

⁷⁸ Ibid, chapter 24, section 7.

⁷⁹ Polisen. Arrest and Detention. Available at: <https://polisen.se/en/laws-and-regulations/arrest-and-detention/> (accessed on 2019-10-22 at 11:20); chapter 24, sections 7–8.

and Probation Service.⁸⁰

A prosecutor may issue an order for detention for a person awaiting a detention hearing in the court. Section 13 of chapter 24 of the Swedish Code of Judicial Procedure also states that “The detention hearing may never be held later than four days after the suspect was apprehended or the arrest order was executed”.⁸¹ A prosecutor may also detain a person if doing so is of great importance for the investigation, in which case they must submit a request for a detention order to the court no later than 12 o’clock on the third day after the decision to detain.⁸² The prosecutor’s decision to arrest and detain requires that the person be suspected, with probable cause, of an offence carrying a potential penalty of at least one year’s imprisonment.⁸³ The court can issue a detention order if the offence is punishable by at least two years’ imprisonment. When a court has issued a detention order, the prosecutor must institute criminal proceeding within 14 days.⁸⁴ However, the court can extend this period.⁸⁵

Section one of chapter 24 of the Swedish Code of Judicial Procedure provides that any person suspected on probable cause of an offence punishable by imprisonment of one year or more may be detained. This can happen if, in view of the nature of the offence, the suspect’s circumstances, or any other factor, there is a reasonable risk that he or she will flee or evade the proceedings, obstruct the investigation, or continue his or her criminal activity.⁸⁶ Furthermore, section two in chapter 24 of the Swedish Code of Judicial Procedure provides that any person suspected on probable cause may be detained regardless of the nature of the offence provided that his or her identity is unknown, he or she does not reside in Sweden and there is a reasonable risk that he or she will avoid proceedings by fleeing the country.⁸⁷

The police have to file charges within six hours against people detained for disturbing public order or who are considered dangerous,

⁸⁰ Ibid.

⁸¹ The Swedish Code of Judicial Procedure (rättegångsbalk 1942:740, chapter 24, section 13, p. 136.

⁸² Ibid, chapter 24, section 12.

⁸³ Swedish Prosecution Authority. Coercive Measures. Available at: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/preliminary-investigation/coercive-measures/> (accessed on 2019-10-23 at 09:40).

⁸⁴ Polisen. Arrest and Detention. Available at: <https://polisen.se/en/laws-and-regulations/arrest-and-detention/> (accessed on 2019-10-22 at 11:20).

⁸⁵ Ibid.

⁸⁶ The Swedish Code of Judicial Procedure (rättegångsbalk 1942:740, chapter 24, section 1.

⁸⁷ Ibid, chapter 24, section 2.

and within 12 hours against those detained on other grounds. The police may hold a person for six hours for questioning or as long as 12 hours, without a court order, if deemed necessary for the investigation. After questioning, authorities must either arrest or release an individual, based on the level of suspicion. If a suspect is arrested, the prosecutor has 24 hours (or three days in exceptional circumstances) to request continued detention. Authorities must charge an arrested suspect within 48 hours and begin initial prosecution within two weeks unless there are extenuating circumstances.⁸⁸ Swedish law does not place a time limit on pre-trial detention. However, if the prosecutor has not brought charges within 14 days a new pre-trial detention hearing must take place. The length of time that it takes to conduct a preliminary investigation largely depends on the nature of the crime being investigated. In a case of drunk driving the preliminary investigation can often be completed within half a day. However, a serious financial crime may take several years before the preliminary investigation is completed.⁸⁹

Criminal hearings are generally open to the public. However, if sensitive information or information that is protected by confidentiality is presented, or when the interests of the investigation must be protected, the court can make a decision behind closed doors, or ‘in camera’.⁹⁰ The defendant is normally expected to attend the hearing. However, under certain circumstances he or she can be excused, such as if there is disruption to public modes of communication, sudden illness or unforeseen circumstances. Additionally, the suspect is not bound to attend the hearing if the case can be disposed of without his or her presence. Section 15a in chapter 46 of the Swedish Code of Judicial Procedure provides that the case may be adjudicated in absentia if the sanction is no more than a fine, a maximum of three months’ imprisonment, a conditional sentence, or probation, or such sanctions jointly. Also, if the defendant has fled or is in hiding or if his or her mental condition render their presence unnecessary.⁹¹

⁸⁸ RefWorld. 2016 Country Reports on Human Rights Practices – Sweden. Available at: <https://www.refworld.org/topic,50fbce582,50fbce5ee,58ec89c113,0,,SWE.html> (accessed on 2019-10-23 at 15:40).

⁸⁹ Swedish Prosecution Authority. Preliminary Investigation. Available at: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/preliminary-investigation/> (accessed on 2019-10-22 at 13:56).

⁹⁰ Sveriges Domstolar. The Swedish Courts. *Behind Closed Doors*. Available at: <http://old.domstol.se/Funktioner/English/Legal-proceedings/Trials-in-criminal-cases/Behind-closed-doors/> (accessed on 2019-10-24 at 14:13).

⁹¹ The Swedish Code of Judicial Procedure (rättegångsbalk 1942:740, chapter 46, section 15).

3.1.2. Critiques of the Criminal Investigation Process

When it comes to due process in criminal investigations and access to justice, Sweden has been criticised by the UN and NGOs for among other things indefinite detention practices. In 2016, the Council of Europe's Committee for the Prevention of Torture (CPT) criticised Sweden for police use of excessive force when apprehending a suspect i.e. excessive use of pepper spray, truncheon blows, violent pushing of the apprehended person to the ground, tight handcuffing, and lifting a detainee by the handcuffs.⁹² Sweden was additionally criticised regarding prison and detention centre conditions where some inmates, particularly foreign nationals, complained of being locked in their cells for up to 23 hours per day, three days in a row, for unofficial collective punishment following fights between two or more inmates.⁹³ In two remand prisons, the CPT also noted that most cells had no in-cell sanitation and some inmates complained about delays in using toilet facilities.⁹⁴ In 2016, Sweden was criticised for indefinite pre-trial detention.⁹⁵ It was noted that in Sweden there is no legislation putting a limit to pre-trial detention and it was shown that in extreme cases there were pre-trial detention instances spanning 1,400 days with over 1,000 days in isolation.⁹⁶ In 2015, the Working Group on Arbitrary Detention (WGAD)⁹⁷ criticised Sweden, and the UK, for arbitrarily detaining Julian Assange. Furthermore, a report by Civil Rights Defenders on immigration detention and pre-trial detention found numerous shortcomings in the Swedish system.⁹⁸ These shortcomings were mostly in regards to detained victims whereby there were inadequate measures to inform them of their rights, to identify them and to investigate crimes committed while in detention.⁹⁹ Similarly, staff were not adequately trained to identify victims and

⁹² RefWorld. 2016 Country Reports on Human Rights Practices – Sweden. Available at: <https://www.refworld.org/topic,50ffbce582,50ffbce5ee,58ec89c113,0,,SWE.html> (accessed on 2019-10-23 at 15:40).

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ FairTrialsOrg. Isolated before trial: Pre-trial detention in Sweden. Available at: <https://www.fairtrials.org/node/857> (accessed on 2019-11-07 at 13:51).

⁹⁶ Ibid.

⁹⁷ United Nations Human Rights Office of the High Commissioner. *Working Group on Arbitrary Detention*. Available at: <https://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx> (accessed on 2019-10-28 at 11:19).

⁹⁸ Civil Rights Defenders (2019). Immigration Detention and Pre-Trial Detention. Available at: <https://crd.org/wp-content/uploads/2019/07/desk-research-Sweden-2019-01-08-final.pdf> (accessed on 2019-11-07 at 13:29).

⁹⁹ Ibid.

to document injuries sustained while in detention. Limited access to interpreters was also highlighted as an issue. Moreover, there was a consensus among lawyers that such detainees are a low priority in the justice system.¹⁰⁰

3.2 CIVIL PROCEDURE

The Code of Judicial Procedure (CJP) (*Rättegångsbalken*), stipulates the provisions of civil procedure.¹⁰¹ The following is the procedure for civil cases at first instance or district courts (*tingsrätt*):

A plaintiff files a claim (*stämningsansökan*) at the court where they reside. The contents of the claim, according to the Code of Judicial Procedure (chap. 42, section 2), are (i) a clearly stated claim (ii) a description of the circumstances on which the claim is based (iii) a statement of evidence (iv) an indication of the circumstances that give the court jurisdiction over the matter.¹⁰²

The next step is for the court to inform the respondent of the filed claim (including claim, circumstances and evidence) and request a defence (*svaromål*) (CJP, chap.42, section 5). The defence from the respondent must contain: (i) possible procedural impediments (e.g. the case has already been determined or the plaintiff does not possess the right to litigate) (ii) whether the respondent concedes or contests the claim (iii) if the respondent contests the claim, on what grounds they contest, a statement regarding the plaintiff's stated circumstances and the respondent's own statement of circumstances and (iv) the respondent's statement of evidence.¹⁰³

The procedure continues with one or several verbal preparatory hearings (*förberedelse*) or through exchange of documents (*skriftväxling*) to map out the claims, circumstances and evidence of both parties and determine the disagreement and the scope of any necessary investigation.¹⁰⁴ After concluding preparatory hearings, the

¹⁰⁰ Civil Rights Defenders (2019). Immigration Detention and Pre-Trial Detention. Available at: <https://crd.org/wp-content/uploads/2019/07/desk-research-Sweden-2019-01-08-final.pdf> (accessed on 2019-11-07 at 13:29).

¹⁰¹ Swedish Parliament *Code of Judicial Procedure*. Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rattegangsbalk-1942740_sfs-1942-740 (accessed on 2019-11-07 at 11:27).

¹⁰² Swedish Courts, document of filing claim. Available at: <https://www.domstol.se/globalassets/filer/gemensamt-innehall/blanketter/tvist/ansokan-om-stamning---dv-161.pdf> (accessed on 2019-10-21 at 13:23); Calleman, C. *et al.* (2015) *Juridik : civilrätt, straffrätt, processrätt*. Sanoma utbildning, p. 580-581 (hereafter cited as Calleman, 2015).

¹⁰³ Calleman 2015, p. 581.

¹⁰⁴ *Ibid.*

court can, if there are grounds for this, work to convince the concerned parties to arrive at a settlement out of court (*förlikning*) or solution by compromise (*samförstånds lösning*).¹⁰⁵ To avoid stalling tactics, e.g. by repeatedly presenting new claims and evidence, the court can set a time limit for parties to decide definitely what claims and evidence they want to invoke (CJP, chap. 42, section 15). This is called preclusion (*preklusion*). After the deadline set by the court, the court admits new claims and arguments only under exceptional circumstances (CJP, chap. 42, section 15).

At the conclusion of the preparatory hearings, it is time for the main hearing (*huvudförhandling*) where the court is presided over by one (in small claims cases) or three legally trained judges (CJP, chap.1, section 3a). At this point, both parties state their claims, present their statements of circumstances (or arguments) as well as presenting evidence, and have the opportunity to examine witnesses before their closing arguments.¹⁰⁶ A main hearing may take place immediately after the (verbal) preparatory hearing with the consent of both parties, unless the matter is obvious, in which case the main hearing can take place without both parties' consent (Code of Judicial Procedure, chap. 42, section 20).

The court then delivers its verdict. If the action is one which is amenable to out-of-court settlement (*dispositivt mål*), such as breach of contract, the decision of the court must be based solely on the pleaded claims and the arguments presented in court (Code of Judicial Procedure, chap. 17, section 3). In an action not amenable to settlement out-of-court (*indispositivt mål*), such as a child custody case, the court is not obligated to only consider claims and arguments presented by the parties¹⁰⁷ but may consider other circumstances and arguments relevant to the case.

A dissatisfied party can appeal to the court of appeal (*hovrätt*), within three weeks of the date of the verdict (CJP, chap. 50, section 1). For the court of appeal to adjudicate the case, leave to appeal (*prövningstillstånd*) is required (CJP, chap. 49, section 12). The court of appeal will grant leave to appeal where: (i) the court of appeal has reason to doubt the correctness of the district court's verdict; (ii) the correctness of the decision cannot be determined without an appeal; (iii) if it is important for the adjudication process that the case is tried by a higher court instance; or (iv) if there are exceptional reasons for

¹⁰⁵ Calleman 2015, p. 582.

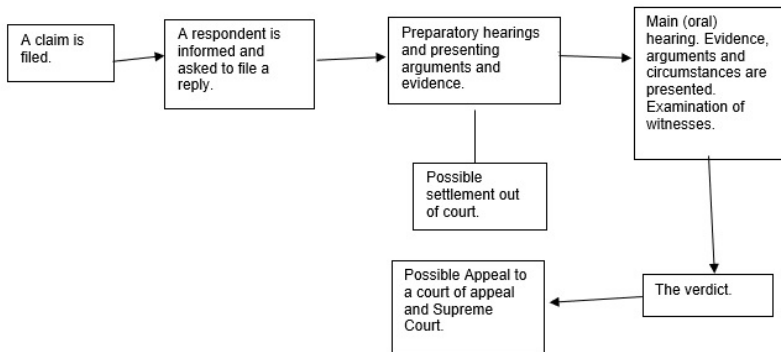
¹⁰⁶ Ibid.

¹⁰⁷ Calleman, 2015, p. 583.

the court of appeal to try the case (e.g. if the district court is suspected to have committed a serious mistake) (CJP, chap. 49, section 14).¹⁰⁸ An appeal to the Supreme Court (*Högsta domstolen*) can only be considered (i) if it is important for the adjudication process that the case is tried by the Supreme Court and (ii) if there are exceptional reasons such as if there are grounds for a new trial or grave procedural errors have been committed or the verdict of the court of appeal is due to obvious gross negligence/grave mistake (CJP, chap. 54, section 10).¹⁰⁹

Below is a chart for the proceedings in a civil case:

Chart 05. Civil Case Proceedings



The court should always work for a fast resolution of the case, which is often the reason for the court to discuss with the litigating parties ways to reach a settlement out of court during the preparatory phase of the civil case. A judge may help parties to negotiate the terms of a settlement (*förlikning*) or alternatively a special mediator (*särskild medlare*) (CJP, chap. 42, section 17) may be hired by the court to mediate the settlement, with the consent of both parties.¹¹⁰

A special mediator is, in regards to the court, an independent (often) lawyer appointed by agreement of both parties and the court with the task of settling the differences between the parties and finding a satisfactory agreement for both parties during a limited period. The costs of the mediator are borne by the litigating parties.¹¹¹

¹⁰⁸ Swedish Parliament *Code of Judicial Procedure*. Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rattgangsbalk-1942740_sfs-1942-740 (accessed on 2019-11-07 at 11:27).

¹⁰⁹ Calleman, 2015, p. 584.

¹¹⁰ Swedish Court, civil procedure. Available at: <https://www.domstol.se/amnen/tvist/sa-gar-en-tvist-till/hantera-en-tvist/> (accessed 2019-10-24).

¹¹¹ Ibid.

If the parties still cannot settle the case with help of the special mediator, the court continues the processing of the case. If the parties reach a settlement with the help of the mediator, the court revokes the claim and closes the case.¹¹²

Special mediation is different from mediation (*medling*), which occurs where one or several parties, with the help of a third party (a mediator), negotiate an agreement with conditions with which parties must comply. Parties may seek enforceability from the court, i.e. that terms agreed upon may be enforced by the court (Swedish Act on Mediation, chap. 7-12).

The advantage of a settlement and of special mediation is that they considerably reduce the strain on the court system of small claims matters. The costs of arranging main hearings can be avoided and there is reduction of processing time for cases. Another advantage, especially in special mediation, is that the procedural rigour of main hearings can be replaced with negotiation on terms of settlement in private between the two litigants (main hearings are otherwise public).¹¹³ The costs of legal representatives can be reduced if the process of litigating can avoid extended preparatory and main hearings and be limited to meeting in private with a special mediator or legal representatives on a few occasions.

The main disadvantage of out-of-court settlement and special mediation might be an unequal financial positions between litigants. One party might be able to present a team of specialised lawyers and be able to negotiate terms that benefit them because they can afford the legal fees of highly skilled lawyers while their counterpart is perhaps reliant on legal aid and thus might not be entirely free to choose their own legal representatives. The alternative is choosing to litigate in court, which comes with the risk of losing the case and thus being forced to pay one's own legal fees and those of the opponent (CJP, chap. 18, section 1).¹¹⁴

The goal of Swedish civil procedural law is delivering correct and just resolutions of conflicts. The justice system should meet this objective using procedures that are as simple, fast and inexpensive as possible. The rule of law is dependent on procedural law following

¹¹² Ibid.

¹¹³ Swedish Court, special mediation. Available at: <https://www.domstol.se/amnen/tvist/sa-gar-en-tvist-till/sarskild-medling/> (accessed on 2019-10-29) .

¹¹⁴ Wejedal, S. (2017) *Rätten till biträde : om biträdeskostnaders hantering vid svenska domstolar*, p. 66. Department of Law, School of Business, Economics and Law at University of Gothenburg (Juridiska institutionens skriftserie / Handelshögskolan vid Göteborgs universitet: 24). (hereafter cited as Wejedal, 2017).

this main structure.

In practice, civil (as well as criminal) proceedings follow several principles that together make Swedish proceedings rule of law compliant. The adversarial principle (*kontradiktoriska principen*) secures the right of litigants to be heard by the court and the right of access to all relevant documents in the case (in order for parties to counter arguments and evidence).¹¹⁵

The principle of immediateness (*omedelbarhetsprincipen*) ensures that the court only delivers verdicts based on the facts presented in the main hearing (cases amenable to out-of-court settlement).¹¹⁶

The principle of concentrated proceedings (*koncentration-sprincipen*) means the main hearing should proceed without unnecessary interruptions until the case is ready to be determined. Cases that do not need more than three days to determine have a window of one week to be determined. In cases that require more than three days, the court must have main hearings three times a week until it determines the case (CJP, chap. 43, section 11).¹¹⁷

The principle of oral presentation (*muntlighetsprincipen*) requires the main hearing to be presented orally. Parties may present arguments in writing only if the court finds the written argument to facilitate the understanding of the argument or if it otherwise is reasonable in context (CJP, chap. 43, section 5).¹¹⁸

The principle of free appraisal of evidence (*principen om fri bevissprövning*) means that the court is not bound by any law on the assessment of evidence. The court is free to value the presented evidence and decide what has been proven, as long as they provide the reason for the assessment in their verdict (CJP chap. 35, section 1).¹¹⁹

Lastly, the principle of public access to official records (*offentlighetsprincipen*) requires the court to make proceedings in the court open to public access, unless the nature and/or circumstances of the case require the hearings to occur behind closed doors (CJP chap. 5, section 1) (regulated in the Public Access to Information and Secrecy Act).¹²⁰

In addition to these principles, the Swedish courts as a public authority can be subject to critique by the Parliamentary Ombudsmen

¹¹⁵ Calleman, 2015, p. 578.

¹¹⁶ Carlson, 2012, p. 132.

¹¹⁷ Ibid, p. 131.

¹¹⁸ Calleman, 2015 p. 578.

¹¹⁹ Ibid, p. 579.

¹²⁰ Ibid.

whose tasks are to “ensure that public authorities and their staff comply with the laws and other statutes governing their actions”.¹²¹ The Parliamentary Ombudsmen can issue criticism to courts that they deem to endanger the rule of law (see above), e.g. as a result of slow and deficient processing of cases.¹²² The Ombudsmen conduct inquiries (due to someone filing a complaint against an authority) and deliver decisions in the form of critical findings and suggestions of compliance.¹²³

3.3. ALTERNATIVE DISPUTE RESOLUTION (ADR)

The Swedish Government Official Report of 2007¹²⁴ concerning alternative dispute resolution (special mediation and settlement out-of-court, see section 3.2) states that these measures are to create a structure of dispute resolution outside of the justice system in order to offer solutions that are better suited to the parties in individual cases and to the nature of those cases. The courts, the Swedish National Board for Consumer Complaints (*Allmänna Reklamationsnämnden*), arbitration tribunals, and various organizations that offer mediation can be governed by rules and regulation that are not suited to all civil cases; making it possible to resort to alternative and simpler methods of dispute resolution also leads to the reduction of case overload for these government bodies.¹²⁵

The main issue with the court working to encourage people to engage in alternative dispute resolution is that it requires people to consult legal counsel and potential mediators, of whom there are insufficient numbers considering that there are increasing numbers of people ineligible for legal aid in Sweden (legal expenses insurance does not cover legal advice and minor legal assistance).¹²⁶ Furthermore, insurance does not apply to criminal cases or disputes that may be examined by administrative authorities, specialist courts, or

¹²¹ Parliamentary Ombudsmem. *Justitieombudsmän*. Available at: <https://www.jo.se/en/> (accessed on 2019-11-22).

¹²² Parliamentary Ombudsmem. *Justitieombudsmän*. Decision on slow and deficient court processing. Available at: <https://www.jo.se/en/?caseNumber=7032-2018#a7032-2018> (accessed on 2019-11-21)

¹²³ Parliamentary Ombudsmen. Decisions. Available at: <https://www.jo.se/en/Decisions/> (accessed on 2019-10-28).

¹²⁴ SOU, 2007, Alternativ tvistlösning 2007:26. Stockholm:Fritzes.

¹²⁵ The Swedish Government. SOU 2007:26. Available at: <https://www.regeringen.se/49bb8f/contentassets/b86ea0de3076407d9cbdc46e7cf7990c/alternativ-tvistlosning-sou-200726> (accessed on 2019-11-04 at 10:03), p. 23.

¹²⁶ Schoultz, I. (2018) *Legal Aid in Sweden*. Springer International Publishing, p. 58.

the administrative courts.¹²⁷

Chapter 18, section 8a in CJP does address the danger of this unequal position and partially remedies it by waiving the rule of repayment for pre-trial judicial costs (costs of legal consultation) in small claims cases. In small claims cases, the losing party is not obligated to repay an amount exceeding the equivalent to one hour of legal consultation (regulated in the Legal Aid Act).

In earlier legislation and drafts to legislation, it was reasoned that the court would have the weaker party's interest in mind during small claims cases, making the presence of legal counsel unnecessary. Ensuing criticism from legal experts did however point out that the benevolence of judges could not replace legal counsel and their advice to clients (for example, a legal counsel can assess whether the individual should initiate legal proceedings in the first place). In addition to this, the waived costs did not change the fact that weaker parties (e.g. in consumer vs. company cases), still were at a disadvantage against companies with the resources to appoint legal counsel.¹²⁸

3.4. SIMPLIFICATION OF LAW AND BY-PASSING LEGAL PROCESSES

In sections 3.2 and 3.3, we discussed alternative dispute resolution methods as a way of simplifying or bypassing conventional legal proceedings in Sweden.

In conclusion, a court sponsored out-of-court settlement process between litigants with equal legal representation (state funded legal aid would however need improvement in this respect) appears to be a good solution to simplify legal processes and make them less expensive for all parties involved. This alternative resolution would fortify access to the legal system for financially or otherwise socially vulnerable groups and reduce the costs of the court system. This option would also provide a forum where litigants can negotiate terms of engagement and settlements on a relatively equal footing.

4. ACCESS TO JUSTICE, EQUAL ACCESS TO COURT AND FAIR TRIAL

In the Constitution of Sweden (Regeringsformens 1 kapitel 9§), it is stated that courts and administrative authorities must take into account everyone's equality before the law as well as comply with

¹²⁷ Swedish National Courts Administration, 2009.

¹²⁸ Wejedal, 2017, p. 138-139.

objectivity and impartiality. The ECHR establishes the principle of access to justice through the right to a fair trial in Articles 6 and 13 and the EU does the same through Article 47 of the EU Charter of Fundamental Rights. The Department of Justice holds the overall responsibility for access to justice in Sweden. Our understanding is that there is strong political commitment to access to justice, equal access to court and fair trial in Sweden.

Sweden ranks among the highest countries in the world in The World Justice Project's Rule of Law Index. In 2019, Sweden was ranked number four after Denmark, Norway and Finland. The Rule of Law Index measures eight factors of rule of law: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.¹²⁹ In addition, according to European Social Survey (ESS), Swedes have high trust in the police and courts in general, and seem to believe that the justice system is legitimate. Even those who had high rates of contact with the police in Sweden had high levels of satisfaction with the police. However, results for the question about how fair the courts are to majority versus minority race/ethnic groups, shows that Swedes believe individuals from different ethnic groups are treated differently in this criminal justice system; they believe someone from a minority group would be more likely to be found guilty.¹³⁰

Research on discrimination within the justice system in Sweden is scarce but has shown for example that people from minority backgrounds are disadvantaged in their contacts with the Swedish justice system¹³¹ and that Afro-Swedes, Muslims and Roma experience racial/ethnic profiling by the police.¹³² In the following section on the legal aid system, we will discuss strengths and limitations of access to justice, including access to justice for different groups in society. In the later sections of this report, we will discuss several limitations to access to justice and the possibilities for individuals to have 'access to justice' in practice.

¹²⁹ The World Justice Project, <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf> Accessed 2019-10-31.

¹³⁰ https://www.europeansocialsurvey.org/docs/findings/ESS5_toplines_issue_1_trust_in_justice.pdf (accessed on 2019-12-12).

¹³¹ David Shannon & Nina Törnqvist (2008) Lost in Translation. Discrimination in the Swedish Criminal Justice Process Exemplified Using the Court-Room Experiences of Justice System Professionals, *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 9:sup1, 59-79.

¹³² Schclarek Mulinari, L. (2017). Slumpvis utvald: ras-/etnisk profilering i Sverige. Stockholm: Civil Right Defenders.

5. LEGAL AID SYSTEM¹³³

5.1. HISTORY OF LEGAL AID

The first Swedish law on the right to an attorney when suspected of a crime and held in detention was introduced in 1906, which is considered relatively late from a European perspective.¹³⁴ This law was replaced in 1919 with a law concerning the appointment of legal assistance for those held in remand prison. At the same time, in 1919 Sweden passed the first legislation providing free legal aid in civil cases to poor people¹³⁵ and also included provisions concerning free legal aid in criminal cases (when not being detained). The Law on Free Trial (Lagen om fri rättegång, 1919:367) was in use between 1920 and 1973, but during these years, it was subject to several restrictions because it was deemed too costly. Thus, the law has been described as relatively restrictive.¹³⁶

In 1942, the reform of The Swedish Code of Judicial Procedure (Rättegångsbalken), replaced the law from 1919 on the right to legal assistance for those held in remand prison and introduced today's system of public defense counsel. In contrast to the previous law, the individual's income would no longer be assigned any significance.¹³⁷ As Wejedal points out, it was not until then that the right of public defense counsel was fully implemented in the law.¹³⁸

At the end of the 1960s, the discussion on legal aid was influenced by Scandinavian welfare ideology.¹³⁹ However, prior to 1973 there was no statutorily unified system of civil legal aid in Sweden.¹⁴⁰ The purpose of the Legal Aid Act (1972:429) that came into force in 1973 was to equalize access to legal services by enabling everyone to obtain legal assistance in any case where legal aid was needed.¹⁴¹ The legal aid of that time was part of the generous welfare programs

¹³³ The presentation of the history of legal aid, as well as, the section on Civil legal aid are based on the work by Schoultz I. (2018) Legal aid in Sweden, p. 43-76 in *Outsourcing Legal Aid in the Nordic Welfare States*, edited by O. Halvorsen Rønning and O. Hammerslev. Cham: Springer International Publishing.

¹³⁴ Wejedal, 2017, p. 342.

¹³⁵ Johnsen, J. T. (1994). Nordic Legal Aid. *Maryland Journal of Contemporary Legal Issues*, 5 (2), p. 301-331.

¹³⁶ Wejedal, 2017, p. 278-281.

¹³⁷ Ibid, p.282.

¹³⁸ Ibid, p. 344.

¹³⁹ Johnsen (1994).

¹⁴⁰ Muther, P. S. (1975). The Reform of Legal Aid in Sweden. *International Lawyer*, 9 (3), p. 475-498.

¹⁴¹ Ibid.

developed in the early 1970s, and included assistance for most legal problems including advice and minor assistance. It was also open to most of the population.¹⁴²

The Swedish legal aid scheme up until the middle of 1990s has been described as “probably the most generous and comprehensive scheme internationally”.¹⁴³ Legal expenses insurance was integrated into household insurance policies in response to pressure from the labour movement in the 1960s. It was designed to fill gaps in public legal aid by providing legal aid to middle-income earners who might be excluded from public legal aid because of their income, and to cover costs that were not covered by public legal aid, such as costs awarded by the court in unsuccessful civil cases.¹⁴⁴ At this time, legal expenses insurance was not widely used, and most Swedes relied on public legal aid.¹⁴⁵ In addition to the regulation of criminal legal aid and civil legal aid, in 1988 provisions on counsel for injured parties were incorporated into a special law for victims of sexual assaults, and later on expanded to other categories of crimes (Lag om målsägandebiträde, LMB).

In the current Legal Aid Act (1996:1619), which came into force in December 1997, the Swedish government introduced a reform to legal aid policy in an effort to cut public spending, and by extension to change the way Swedes responded to common legal problems. One of the goals of the legal aid reform was to achieve major cost savings, since Sweden was undergoing the worst recession since the 1930s.¹⁴⁶ The more limited resources were mainly to be allocated to those in most need of legal aid.¹⁴⁷ The reform did not affect all forms of legal aid: assistance in criminal cases and to victims was maintained. Other welfare policies were not changed as much as legal aid policies.¹⁴⁸ The overarching change in the reform was to make the legal aid scheme secondary to legal expenses cover provided by

¹⁴² Kilian, M., & Regan, F. (2004). Legal expenses insurance and legal aid – two sides of the same coin? The experience from Germany and Sweden. *International Journal of the Legal Profession*, 11 (3), p. 233–255.

¹⁴³ Ibid, p. 247.

¹⁴⁴ Regan, F. (2003). The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance. *Journal of Law & Society*, 30 (1), p. 49–65 (hereafter cited as Regan, 2003).

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Swedish National Courts Administration (2009). Översyn av rättshjälpslagen - ett regeeringsuppdrag Jönköping: Domstolsverket. Available at: http://www.rattshjalp.se/Publikationer/Rapporter/dV-rapport_2009-2_webb.pdf (accessed on 2019-12-12 at 11:40) (hereafter cited as Swedish National Courts Administration, 2009).

¹⁴⁸ Regan, 2003.

individuals' household insurance. This means that the claimant in a dispute should first turn to their insurance company; anyone with legal expenses insurance covering the case in question would not receive legal aid.¹⁴⁹ However, the reform did not, as Regan points out, include a requirement on insurance companies to expand the cover they were offering. The reform presupposed that insurance companies would continue to offer legal expenses insurance to existing policyholders in the future. Despite major changes in the legal aid scheme, the reform caused little public protest, apart from that voiced by the Swedish Bar Association.¹⁵⁰ The reform also separated legal aid from other forms of legal assistance, such as public defenders, public counsel, and counsel for injured parties.¹⁵¹

Another aim of the legal aid reform was to make the legal aid fee vary according to the income of the applicant; it was to be calculated in relation to the costs of legal counsel and paid regularly to the appointed counsel.¹⁵² The new law also included other changes to the entitlement criteria for legal aid. Among other things, up to two hours' counselling had to precede an application for legal aid. The annual income limit for entitlement to legal aid was reduced from 26 000 USD to 22,000 USD (249,000 to 210,000 SEK). Even so, more than 80% of the population were entitled to legal aid, on the basis of their income.¹⁵³ In 1999 the income limit for entitlement to legal aid was raised to 27,200 USD (260,000 SEK).¹⁵⁴

The 1997 Legal Aid Act also introduced a requirement that there must be special grounds for legal aid to be granted in cases relating to divorce and related issues, to child maintenance, to business owners as regards business activities, and to cases handled abroad.¹⁵⁵ Many family law disputes no longer qualified for legal aid in the new legal aid scheme and an alternative form of dispute resolution was introduced. The allowance for employing counsel was also limited to a maximum of 100 hours, with very limited opportunity for increase.¹⁵⁶

In the middle of the 1990s, prior to the reform of legal aid, Sweden

¹⁴⁹ Swedish National Courts Administration, 2009.

¹⁵⁰ Regan, 2003.

¹⁵¹ Renfors, C., Sverne Arvill, E., & Sverne, E. (2012). *Rättshjälplagen och annan lagstiftning om rättsligt bistånd : en kommentar*. Stockholm: Norstedts juridik. (hereafter cited as Renfors et al., 2012)

¹⁵² Swedish National Courts Administration, 2009.

¹⁵³ SOU, (2014). *Rättvisans pris: betänkande (SOU 2014:86)*. Stockholm: Fritze. (hereafter cited as SOU, 2014).

¹⁵⁴ Swedish National Courts Administration, 2009.

¹⁵⁵ *Ibid.*, p. 18.

¹⁵⁶ *Ibid.*

had more than one hundred publicly employed lawyers working in twenty-eight bureaux at the county level.¹⁵⁷ The state-financed legal aid bureaux were closed down in 1999 on the grounds that the state should no longer engage in the practice of law.¹⁵⁸

As regards the welfare state, the 1997 reform of the Legal Aid Act singled out legal services from other welfare reforms in the retreat from quasi-universal and comprehensive coverage, as well as the shift from public to private protection.¹⁵⁹ The current legal aid law is fundamentally different from the previous law in that, from being tax-funded legal aid in the previous law, it has become mainly privately funded through insurance premiums.

5.2. LEGISLATIVE FRAMEWORK FOR LEGAL AID

In civil cases, Sweden has a combination of public and private cover for legal expenses. Legal expenses insurance (Rättsskydd) is part of household insurance policies, and it can pay part of the costs of legal representation in certain types of case under litigation (for more information on the legal expenses insurance see 5.11). Those without household insurance, or whose insurance does not cover the particular case, can, in certain circumstances, be entitled to publicly funded legal aid (Rättshjälp). The right to state funded legal aid counsel in civil matters (Rättshjälpsbiträde) is regulated in the Legal Aid Act (Rättshjälpslag 7 §). The right to public defense counsel (Offentlig försvarare) in criminal cases, is on the contrary regulated in the Swedish Code of Judicial Procedure (RB 21 kap. 3 a § 2 st.). Victims of crime may be appointed a counsel for an injured party (målsägandebitråde), according to the Act concerning Counsel for an injured party (LMB 1 §). In addition, a public counsel (offentligt biträde) can be appointed in certain cases within administrative law, mainly concerning compulsory care and immigration law. In general terms, the right to the different forms of legal aid is based on an assessment of the need for legal counsel. The right to publicly funded legal aid is based on an income ceiling, but the other three can be granted regardless of income. Legal aid in civil and criminal cases will be further discussed below, as to some extent will the right to public counsel and counsel for injured parties.

¹⁵⁷ Johnsen (1994), p. 309.

¹⁵⁸ Departementsserien, 1992, De allmänna advokatbyråerna : principförslag om avveckling av det statliga engagemanget (Ds 1992:51). Stockholm: Allmänna förl.

¹⁵⁹ Regan, 2003.

5.3. INSTITUTIONAL FRAMEWORK FOR LEGAL AID

The Court, according to the Code of Judicial Procedure, appoints a public defender in criminal cases if the crime of which the subject is reasonably suspected carries a sentence of no less than six months in prison and the suspect requests a public defence lawyer. The suspect can make a request for a public defender to the person in charge of the investigation (usually a prosecutor but potentially also a police officer) or directly to the district court where the case is prosecuted (see section 5.7).

In order to obtain civil legal aid it is necessary to apply to the Legal Aid Authority, which provides legal aid under the Legal Aid Act, or directly to the court if the case is already before the court (which is the most common situation, see section 5.8.3).

The Legal Aid Authority is a national authority, with eight staff members working on legal aid decisions and handling payment of legal aid costs. In addition, the Legal Aid Authority handles the demands when someone is found guilty of a crime or loses a dispute and is obliged to pay part of the state's costs.

How legal aid is delivered in Sweden is further explained in section 5.7 (criminal legal aid) and 5.8 (civil legal aid).

5.4. LEGAL AID BUDGET

The legal aid budget differentiates between public defenders, public counsel, counsel for injured parties and counsel under the Legal Aid Act. The costs of public defenders in criminal cases is the largest allocation and amounted to 154 million USD (1 475 million SEK) in 2018. Public counsel in administrative cases involving individual freedom and personal integrity (involuntary care and immigration), amounted to 54 million USD (515 million SEK) and counsel for injured parties to 39 million USD (369 million SEK). The same year, legal aid under the Legal Aid Act cost the state 26 million USD (248 million SEK).¹⁶⁰ Thus, the budget for legal aid in civil cases is the smallest of the four types. Altogether, in Sweden, the total costs for legal aid (including the four forms mentioned above) was approximately 273 million USD, which represents slightly more than 27 USD per capita during 2018.

¹⁶⁰ Swedish National Courts Administration (2018). Available at: https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/arsredovisning/arsredovisning_2018_sverigesdomstolar.pdf (accessed 2019-11-04 at 14:35).

5.5. LEGAL AID PROVIDERS

Johnsen differentiates between *judicare* which is legal aid delivered by private lawyers and salaried legal aid provided by public employees.¹⁶¹ Salaried legal aid no longer exists in Sweden (see 5.1); citizens are only offered *judicare*. In other words, all lawyers providing legal aid are in private practice.

Any person can provide legal advice even without formal legal education.¹⁶² However, in Sweden, only lawyers with the title '*advokat*' (referring to members of the Swedish Bar Association, see section 2) can be appointed as the public defender in a criminal court case (Code of Judicial Procedure, chap. 21, section 5).¹⁶³ Regarding non-criminal legal aid the requirements are less restrictive. According to section 26 of the Legal Aid Act, the legal aid counsel appointed can be a lawyer, an associate in a law firm or any other appropriate person. In other words, no formal qualifications are required. As Barlow points out that means that, in theory, a legally unqualified person can provide legal aid services, if the person is considered suitable.¹⁶⁴ However, the Legal Aid Authority or the court assesses legal counsel who are not lawyers or associates of a law firm for their suitability as representatives.¹⁶⁵

The legal representative's remuneration is based on an hourly rate adopted by the government. In 2018 this was 144 USD (1,380 SEK) (excluding VAT) for those approved for Swedish F-tax (entrepreneurs who pay their own preliminary tax and social security contributions) and 110 USD (1050 SEK) (excluding VAT) for those not approved for F-tax. In criminal court cases, the amount is double on weekends, for example when a client is held in custody.¹⁶⁶ The hourly rate represents the minimum amount that a lawyer will charge per hour in ordinary cases not covered by legal aid. In other words, three times the rate would hardly raise an eyebrow in business law.

¹⁶¹ Johnsen (1994).

¹⁶² Carlson, 2012, p. 53.

¹⁶³ Barlow, A., 2019. The machinery of legal aid: a critical comparison, from a public law perspective, of the United Kingdom, the Republic of Ireland and the Nordic countries. Åbo Akademi University. Available at: https://www.doria.fi/bitstream/handle/10024/168020/barlow_anna.pdf?sequence=1&isAllowed=y (accessed on 2019-11-07 at 12:03) (hereafter cited as Barlow, 2019).

¹⁶⁴ Ibid.

¹⁶⁵ Legal Aid Authority (2018). Juridiska ombud - vem är vad? Available at: <http://www.rattshjalpsmyndigheten.se/Vad-ar-rattshjalp/Juridiska-ombud---vem-ar-vad/> (accessed on 2019-11-04 at 10:53).

¹⁶⁶ Swedish National Courts Administration. Available at: http://www.rattshjalp.se/Publikationer/Rattshjalp_och_taxor/rattshjalp_och_taxor_2019.pdf (accessed on 2019-11-04 at 14:23).

5.6. QUALITY ASSURANCE

Decisions taken by the Legal Aid Authority can be appealed to the Legal Aid Board (Legal Aid Act 44§). The Board consists of five members: a chairman who is a judge, two lawyers and two other members, all appointed by the government (Legal Aid Act 48 §). The decisions taken by the Legal Aid Board cannot be appealed (Legal Aid Act 44§). Decisions on civil legal aid taken by the court can be appealed to a higher court (Legal Aid Act 44§). Decisions on civil legal aid can be appealed by the applicant as well as the Chancellor of Justice (Justitieombudsmannen) (Legal Aid Act 45 §).

The Chancellor of Justice, has an external oversight where the overall responsible is to monitor that the legal aid system is not used in a way that has not been intended. This includes ensuring that legal aid is not granted when it should not be done and that the compensation of public funds to lawyers, including public defender in criminal cases, does not exceed what is reasonable.¹⁶⁷ When Barlow compared the oversight of legal aid within the Nordic countries as well as with UK and Republic of Ireland, Sweden was described as having “the most finely tuned checks and balances”.¹⁶⁸

However, when it comes to mechanisms for monitoring the quality of work by legal aid providers, this is limited to proactive monitoring by the Bar Association’s Disciplinary Committee. They only deal with complaints against their own members. In addition to the disciplinary supervision, the Swedish Bar Association also supervises its members in a proactive manner, regarding a number of areas, e.g. issues of organization, information security, client funds, professional indemnity insurance, conflict of interests, continuing professional education, anti-money laundering, issues of inside information, pricing and information on legal services. This is done in order to strengthen the legitimacy of the Bar’s supervision, to enhance the support to members, to protect continued independence and self-regulation, and to fulfil obligations under Swedish law. The supervision can be initiated both on special reasons and on random grounds and be carried out either by a written procedure or by predetermined firm visits (dawn raids do not occur). 175 law firms were scrutinized in 2016-2018, which means that 4 875 lawyers (2 944 advocates and 1 931 associate lawyers) has been supervised.¹⁶⁹

¹⁶⁷ Justitieombudsmannen 2019 <https://www.jk.se/om-oss/> accessed 2019-11-05.

¹⁶⁸ Barlow, 2019, p. 151.

¹⁶⁹ The information was provided by Enar Essle at the Swedish Bar Association on 2020-01-09.

Public defenders always have to be lawyers with the title ‘*advokat*’ (referring to members of the Swedish Bar Association) (see section 2 and 5.7) and will then be under the monitoring of the Swedish Bar association. Non-criminal legal aid, public legal aid counsel and public counsel, however, do not have to be members of the bar association (see section 5.5). For non-bar members there is no official disciplinary committee. However, the Legal Aid Authority do some monitoring of legal aid providers who are associated with a law firm. The Legal Aid Authority take references before the counsel is appointed as well as later if they get indications that the legal aid is not provided does not work well.¹⁷⁰

5.7 CRIMINAL LEGAL AID

5.7.1. *Scope of Criminal Legal Aid*

When a suspect is notified of the allegations that he/she faces and is arrested, he/she is entitled to a public defence lawyer (*offentlig försvarare*) (CJP, chap. 21, section 3a). The suspect may appoint a lawyer of his/her choice (CJP, chap. 21, section 3).

According to CJP, chap. 18, section 18, if the preliminary investigation leads to suspicion *on reasonable grounds* (*skäligen misstänkt*) of an individual, he/she and his/her defence lawyer must be notified of this when being interrogated.

However, Wejedal¹⁷¹ points out that only persons suspected on reasonable grounds are entitled to public defence lawyers (state funded) during the preliminary investigation. This means that the police, without the presence of a defence lawyer (because the person is not entitled), can interrogate a person (even young suspects) on a lower degree of suspicion. This, according to Wejedal, “increases the risk of potentially wrongful convictions, based on false confessions and/or self-incriminating statements made under the early stages of interrogation without access to a defence lawyer”.¹⁷²

The defendant is entitled to be represented by a public defence lawyer during the entire main hearing/trial and if the defendant is convicted, the representation by the public defence lawyer continues

¹⁷⁰ The information was provided by Ylva Boström-Berglund at the Legal Aid Authority on 2020-01-27.

¹⁷¹ Wejedal, S. (2019) *Legal Aid – Sweden in Background Papers Bilateral Human Rights Dialogue between Cambodia and Sweden*. Raoul Wallenberg Institute of Human Rights and Humanitarian Law, p. 20 (hereafter cited as Wejedal, 2019).

¹⁷² *Ibid.*

in the event that the defendant wishes to appeal to a higher court (CJP, chap. 21, section 8). CJP, chap. 21, section 3b stipulates that a “previous defendant” is entitled to a public defender if: (i) according to CJP, chap. 58, section 6a, the prosecutor decides to or has the opportunity to reopen the investigation into the defendant’s involvement in the crime; or (ii) there are other exceptional reasons. This means that even after conviction and enforcement, a person is entitled to a public defender if there may be a new trial.

In criminal proceedings, the victim of a crime is called the ‘injured party’. A counsel for the injured party (*målsägandebitråde*) can be appointed by the state according to the Act on Counsel of an Injured Party (*Lag om målsägandebitråde*) (CJP, chap. 20, section 15). The counsel advocates for the interests of the victim during the proceedings and acts as support (Act on Counsel of an Injured Party, section 3), for example by being present during interrogations and examinations in court and advocating for damages. The cost of the counsel is mostly covered by the state (for work done, loss of time and reimbursement of other expenses). The Swedish Bar Association advises injured parties to obtain an assessment on costs of the counsel in cases where, for example, the counsel must travel often and long distances during the process.¹⁷³

The criteria to obtain a counsel is: (i) if a person is the victim of a sexual offence, unless it is clear that the person does not need counsel; (ii) if a person is the victim of a crime against life and health or a crime against liberty and peace, for which the penalty is a prison term, or the victim of theft, robbery and other acquisitive crimes; or (iii) if the person is a victim of a crime for which the sentence is imprisonment and, due to the personal life and other circumstances of the victim, they need counsel (Act on Counsel of an Injured Party, section 1).

Witnesses due to testify in court are not entitled to state-funded legal aid, however courts do provide witness support. Usually, witness support is provided by charitable organisations, whose staff are trained to provide help, information and support during the proceedings. For example, they inform witnesses about the procedure during the main hearing, who the involved parties are and where they are seated and about how the witness’ expenses can be reimbursed by the court.¹⁷⁴

¹⁷³ Swedish Bar Association. Available at: <https://advokatjouren.advokatsamfundet.se/ratten-till-advokat/malsagandebitrade/> (accessed on 2019-11-07 at 13:25).

¹⁷⁴ Crime Victim Compensation and Support Authority. Available at: <https://www.brottsoffer->

5.7.2. Eligibility criteria for criminal legal aid

A public defence lawyer is appointed by the state if the crime of which the subject is reasonably suspected carries a sentence of no less than six months in prison and the suspect requests a public defence lawyer (CJP, chap. 21, section 3a). A public defence lawyer must also be appointed: (i) if, in light of the investigation, the suspect needs one; (ii) if the possible sentence is unclear and the sentence might be one that is not a fine or a suspended sentence or similar; and (iii) if there are other exceptional reasons due to the personal circumstances of the suspect or the case (CJP, chap.21, section 3a).

The main rule is that if a defendant is convicted, he/she owes the state for the cost of the public defender that the state provided (CJP, chap. 31, section 1). The third paragraph of this section however, states that the convicted person is not obligated to pay back more of the cost of the public defender than the fee they would have payed if they used the legal aid scheme according to the Legal Aid Act (CJP, chap. 23 & chap. 38). The fourth paragraph in chap. 31, section 1 of the CJP also states that the amount of restitution by the offender can be reduced in consideration of the nature of the crime and the financial situation of the offender.

Studies in the neighbouring countries of Finland, Norway and Denmark show that debts to the state such as judicial costs and indemnity to victims (legal debts) are factors which limit the social reintegration of many ex-offenders. Todd-Kvam¹⁷⁵ highlights the impact of legal debts on the mental health of ex-convicted persons, citing psychosocial apathy as a consequence of long-term indebtedness. Aaltonen¹⁷⁶ and Olesen¹⁷⁷ discuss long-term debt as a risk factor of re-offending and anti-social behaviour among ex-prisoners upon re-entry into conventional society. The collection of debt to the state upon employment risks decreasing an ex-offender's motivation to stay in the legal labour market.

5.7.3. Process for obtaining criminal legal aid

myndigheten.se/om-oss/vittnesstod (accessed on 2019-11-07 at 14:54).

¹⁷⁵ Todd-Kvam, J. (2019) *An Unpaid Debt to Society: How Punishment Debt Affects Reintegration and Desistance from Crime in Norway*, British Journal of Criminology, (Issue 6), p. 1478.

¹⁷⁶ Aaltonen, M. (2016) *Post-Release Employment of Desisting Inmates*, British Journal of Criminology, (Issue 2), p. 350.

¹⁷⁷ Olesen, Annette (2016) *Debt as a Criminal Risk Factor in Denmark*, Oñati Socio-Legal Series, (3), p. 676.

The court is in charge of appointing the public defence lawyer of the suspect's choosing, unless there are exceptional reasons not to comply with his/her wishes, such as if the public defence lawyer does not have the appropriate qualifications (CJP, chap. 21, section 5). A person may not be appointed as a public defence lawyer in a case if they have been financially connected to the suspect in a manner that disqualifies him or her from adequately representing the interests of the client (CJP, chap. 21, section 3).

The right to criminal aid is related to the degree of suspicion and to the nature of the crime. In practice, this means that the right to a public defence lawyer is unequivocal beginning at the stage where the person in charge of the investigation notifies the suspect of the crime they are suspected of committing, but only if the suspicion is of the degree of *reasonable grounds*.¹⁷⁸

Wejedal (2017) raises a concern with these provisions because there is a legal possibility that the state could arrange the investigation to postpone access to a lawyer by simply notifying the suspect of the charges at the end of the criminal investigation. This means that the state could regard a person as a suspect during most of the investigation yet only notify the person that they are a suspect on reasonable grounds late in the proceedings. The person might have been interviewed earlier in the proceedings and incriminated himself or herself without the presence of a public defence lawyer. The alternative is, however, no more appealing, i.e. investigators notify the person subject to investigation early in the proceedings and make it easier for them to, potentially, erase incriminating evidence.¹⁷⁹

In 2019, an EU directive on legal aid was adopted in the Swedish Code of Procedure, according to which the prosecutor can appoint an interim public defender immediately after the arrest and detention of a suspect (if the suspect requires one) (Ministry Publications Series 2017:53).¹⁸⁰ This is due to the fact that the prosecutor otherwise has to file a request for a public defence lawyer at the court and wait for the court to process the need for a public defence lawyer (CJP, chap. 21, section 4a).

Appeal against denial of a public defence lawyer is regulated by CJP, chap. 49, section 5, paragraph 1 and CJP, chap. 49, section 6. To appeal one has to file a complaint immediately after the decision by

¹⁷⁸ Wejedal, 2017, p. 668.

¹⁷⁹ Ibid, p. 670-671.

¹⁸⁰ Ds 2017:53. Rätten till offentlig försvarare – Genomförande av EU:s rättshjälpsdirektiv. Available at: <https://lagen.nu/ds/2017:53> (accessed on 2019-11-07 at 15:56).

the court (if the decision is given while the accused is at a hearing) or at the latest one week from the day the person received knowledge of the court's decision. Failure to comply with this time limit leads to the person no longer being able to appeal (CJP, chap. 49, section 6).

As indicated above, a public defence lawyer is appointed by the court upon request by the suspect, which is implicitly optional. However, the court appoints a public defence lawyer if the suspect needs it because of the nature of the case or for otherwise exceptional reasons. In this case, if the prosecutor for the reasons indicated previously deems it necessary with the presence of a public defence lawyer, files a request to the court to appoint one.

This is another area of concern. If a suspect does not exercise their right to a public defence lawyer, the information received from interrogations with the suspect without the presence of a defence lawyer (before the prosecutor requests and the court grants it) can be used against him or her later in the proceedings, which might be in breach of the European Convention on Human Rights.¹⁸¹ Precedent from a Swedish court of appeal does, however, state that courts should take into consideration that information was obtained during this kind of interrogation, when evaluating evidence.¹⁸² Depending on the instance, the use of public defenders varies to certain degrees.

The following are statistics on determined criminal cases that featured a public defence lawyer in the years 2009-2018:¹⁸³

- Districts courts – 458 889 cases (~52% of all criminal cases)
- Courts of Appeal – 76 119 cases (~84% of all criminal cases)
- Supreme Court – 15 846 cases (~41% of all criminal cases).

5.8. CIVIL LEGAL AID

We distinguish between three forms of legal aid in non-criminal proceedings: publically funded civil legal aid, legal expenses insurance (LEI) and public counsel in migration and compulsory care cases. The first two are considered to be civil legal aid (legal cases handled in the public courts, although public legal aid can in theory also be granted in administrative cases) and the third as

¹⁸¹ Wejedal, 2017, p. 671-673; European Convention on Human Rights. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed on 2019-11-11 at 16:00).

¹⁸² Wejedal, 2017, p. 673.

¹⁸³ Swedish Courts. Vera, report number 202 – RFI 21719. Received from the Swedish Courts on 2019-11-11 at 10:55.

legal aid in administrative cases (legal cases handled in the administrative courts). Before we go into a detailed description of legal aid under the Legal Aid Act, we will briefly mention the law regulating public counsel (offentligt biträde) for involuntary institutional care and migration/asylum cases. According to the Act on Public Counsel (Lag 1996:1620), legal counsel can be appointed in accordance with special regulations to be found mainly in the compulsory care laws and in the Aliens Act. The compulsory care acts regulate involuntary institutional care of minors living in troubled conditions (Care of Young Persons Act) and of adults with severe substance abuse (Care of Abusers Act) or suffering from mental health problems (Compulsory Psychiatric Care Act). A person subjected to compulsory care can receive a public counsel appointed by the court. The Aliens Act specifies that a public counsel can be appointed in cases concerning, for example, refusal of entry and expulsion. A public counsel shall be appointed for the person subjected to these regulations, unless it can be assumed that there is no need for counsel. Public counsel will be briefly discussed below in relation to legal aid in administrative legal cases. Legal expenses insurance is dealt with under 5.11, Alternative sources of legal assistance.

5.8.1. *The scope of the public legal aid scheme*

To be eligible for publicly funded civil legal aid you have to meet certain criteria: for example your ‘financial base’ must be less than 27,200 USD (260,000 Swedish Krona – SEK) a year and you must not have legal expenses insurance covering the issue. Legal aid is not granted if your financial situation would have enabled you to take out insurance. Legal aid also applies primarily to private individuals.

This means that legal aid legislation is based on the assumption that the market supplies appropriate insurance policies, and that individuals actually take out insurance.¹⁸⁴ Today, 96% of the Swedish population above the age of 16 have household insurance. In other words, most of the Swedish population is protected by legal expenses insurance. However, young people (16–29 years) and people born abroad are significantly less likely than the average population to have household insurance.¹⁸⁵

The right to legal aid is governed by the Legal Aid Act (1996:1619). Public legal aid covers all legal matters (*rättslig angelägenhet*) not

¹⁸⁴ Swedish National Courts Administration, 2009.

¹⁸⁵ The most recent figures for the percentage of the population with home insurance were received through e-mail from Philip Ando at Statistics Sweden (SCB) (2019-11-13).

specifically excluded in the law (the restrictions are presented below). While legal expenses insurance is limited to cases under litigation, public legal aid has a wider application. However, Renfors et al. (2012) argue that in practice it does not make much difference since many of the issues that would come into question as ‘legal matters’ not requiring litigation, for example, marriage contracts and wills, are in any event excluded in the Legal Aid Act.

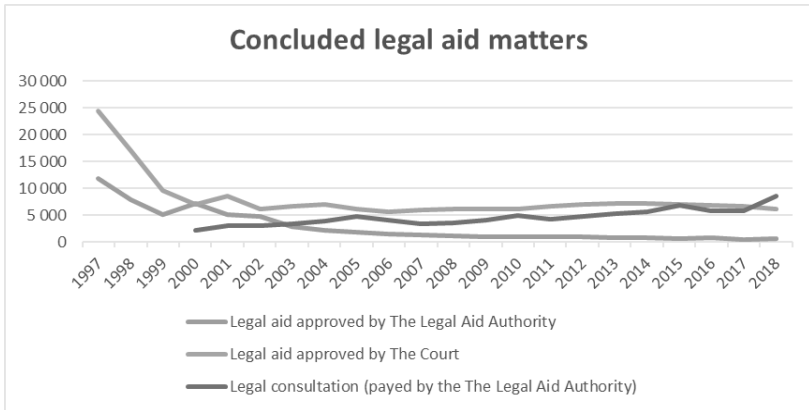
Applications for legal aid are decided by the Legal Aid Authority, unless the matter is already before a court. In that case it is the court that decides on legal aid. Section 2 of the Legal Aid Act states that an application for legal aid must be preceded by consultation with a lawyer or other legal practitioner (a minimum of one hour and a maximum of two hours). Exceptions can be made if it is clear that such consultation is unnecessary. The consultation fee paid by the applicant is set at 170 USD (1,628 SEK) per hour in 2015. The fee can be reduced to half if the individual’s income is less than 7 800 USD (75,000 SEK) per year. In the case of people under 18 with no income or capital, the consultation fee can be waived by the Legal Aid Authority.¹⁸⁶ The application for legal aid is filed jointly with the legal counsel doing the consultation.

Chart 06 shows the use of legal aid approved by the Legal Aid Authority and the courts (when the case was already before a court) between 1997 and 2018.¹⁸⁷ It also shows the use of legal consultation partly or fully funded by the Legal Aid Authority from 2000 to 2018, since no statistics on legal consultation before 2000 exist. The right to appeal a decision on legal aid is discussed in 5.6.

Chart 06. The number of legal aid matters concluded between 1997 and 2018, approved by either the Legal Aid Authority or by the Courts.

¹⁸⁶ Legal Aid Authority. (2019). Har du rätt till rättshjälp? Available at: <http://www.rattshjalpsmyndigheten.se/Vad-ar-rattshjalp/Har-du-ratt-till-rattshjalp/> (accessed on 2019-12-02).

¹⁸⁷ All the statistics on public legal aid have been provided by Ylva Boström-Berglund at Rättshjälpsmyndigheten (the Legal Aid Authority).



Source: Statistics from the Legal Aid Authority

If a legal aid case has been concluded it means that the Legal Aid Authority has decided on the division of the legal aid costs, in other words the legal aid case is closed. The diagram reveals several interesting developments in legal aid. The most noteworthy is the steep decline in legal aid after the legal aid reform. Between 1997 and 2000, the total amount of legal aid cases concluded fell from 36,301 to 14,242 (figures arrived at by adding those approved by the Legal Aid Authority to those approved by the courts). From the beginning of the millennium the total number of legal aid cases concluded steadily declined to 7,952 in 2014. However, if we compare the legal aid approved by the Legal Aid Authority with the legal aid approved by the courts, the former shows the drop, while the latter has remained relatively unchanged since 2000. In fact, legal aid approved by the Legal Aid Authority declined from 7,235 cases in 2000 to 631 cases in 2018. Examining the figures closely, we can see that, of the 7,235 cases in 2000 only 1,411 were granted under the current Legal Aid Act. In other words, in the year 2000 the Legal Aid Authority was still concluding legal aid proceedings from the former Legal Aid Act. However, taking into account only those granted legal aid under the current Legal Aid Act, the number of cases concluded has still been almost halved, from 1,411 in 2000 to 631 in 2018. The decline is not very surprising, given that the number of applications also steadily declined, from 2,587 in 2000¹⁸⁸ to 998 in 2018.¹⁸⁹ These figures leave

¹⁸⁸ Swedish National Courts Administration. Available at: http://old.domstol.se/Publikationer/Arsredovisning/redovisning_2002.pdf (accessed 2019-11-12 at 15:39).

¹⁸⁹ Swedish National Courts Administration. Available at: https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/arsredovisning/arsredovisning_2018_

us with two obvious questions: (1) Why have applications to the Legal Aid Authority fallen so significantly? (2) Why has the approval of legal aid in the courts not declined in line with the rate of approval by the Legal Aid Authority? The answer to the first question is most likely connected to the fact that the income limit for entitlement to legal aid has not been revisited since 1999. In other words, fewer people satisfy the entitlement criteria. It might seem reasonable to expect that the income limit would affect the approval of legal aid in court in a similar manner, but it has not. Unfortunately, there are no statistics on the number of applications for legal aid coming in to the courts so we cannot tell how applications to the Courts have developed during the same period. The second question is therefore hard to answer. We do know, however, that family law cases in the courts (which is a large part of the legal aid granted in courts) increased by 85% between 2001 and 2014, which may be part of the explanation.

Looking again at chart 06 one sees that the number of legal consultations includes consultations where, due to individual financial constraints, the fee has been partly or fully waived. Here, there is an upward trend. In 2000 the Legal Aid Authority paid for 2,113 consultations while in 2014 it paid for 5,664. These numbers do not reveal if the use of legal consultations has increased in general, only that the number of people who had the fee partly or fully waived because of individual financial constraints has increased significantly. The increase is relevant in relation to the previous discussion on access to legal advice being reduced by legal aid reform. What these numbers indicate is that more and more people are helped to afford the legal consultations that are necessary if one is to be granted legal aid.

Chart 07 below presents the types of cases granted legal aid in 2014 by the Legal Aid Authority and the courts. There is a massive preponderance of family law oriented cases. However, this category includes a range of issues, such as divorce (lawsuits), child custody, alimony and various other family-related issues. The preponderance can perhaps be understood in the light of the fact that some insurance companies have excluded the issues of child custody, child maintenance and the like, while others have a withdrawal period of a year or two after the end of the marriage, partnership or relationship before legal protection can be utilized in these disputes.

Chart 07. Legal aid granted in 2014 by the Legal Aid Authority and the Court, based on the concern.

Concerns	Legal Aid Authority	Court	Total
Family law	405	6295	6700
Labor law	189	150	339
Claims, demands	56	274	330
Damages	23	102	125
Rental dispute	2	66	68
Another concern	8	48	56
Other civil	7	31	38
Other administrative matters	3	31	34
Inheritance	6	18	24
Victims of crime abroad	10		10
Property dispute	1	8	9
Social Security	1	1	2
Total	711	7024	7735

Source: Statistics from the Legal Aid Authority (published in Schoultz, 2015).

The most common issues not related to family law are those to do with labour law and claims/demands (concerning for example a dispute where someone claims payment, and the other person rejects the claim). As discussed earlier, issues involving administrative law are not very often granted legal aid. Chart 07 also reveals differences between legal aid granted by the Legal Aid Authority and that granted by the courts. First, the courts grant ten times as much legal aid overall, which means most cases are already before the court when legal aid is granted. Given the number of applications to the Legal Aid Authority presented above, it seems that most people granted legal aid in court did not apply to the Legal Aid Authority before the case went to court. One possible explanation might be that some people, at least, did not know about the possibility of legal aid before the court proceedings.

Second, if one looks at the issues concerned in percentage terms, labour law constitutes a considerable part (27%) of the legal aid granted by the Legal Aid Authority, but not of that granted by the courts (only 2%). In general, family law issues are much more dominant in the cases granted legal aid by the courts. If one looks at legal aid granted over time, family law issues have predominated since 1997. Still, given that family law oriented cases represent 87% of all legal aid granted, Regan may have a point when he argues that the legal aid policy introduced in 1997 has restricted “assistance to

a relatively narrow range of court cases".¹⁹⁰ It is hard to tell to what extent the granting of legal aid matches the legal problems people experience in their daily lives. For example, in chart 07, rental disputes account for quite a small share of legal aid granted in 2014, while classical legal aid studies have shown that people frequently have housing problems, but that these do not necessarily qualify as legal cases.¹⁹¹ Other attempts to measure civil justice problems indicate that consumer issues and those relating to employment, neighbours and debt were most common.¹⁹² However, others have pointed out that divorce problems are some of those for which legal advice is most commonly sought.¹⁹³ Previous research indicates that the fact that public legal aid in Sweden is dominated by family law court cases does not necessarily correspond to the legal problems people have. Norwegian studies also emphasise the need for legal aid programs that reach out to people rather than waiting for them to seek help, and then ask what their 'real problems' are.¹⁹⁴

5.8.2. Eligibility criteria for civil legal aid

As mentioned, according to section 6 of the Legal Aid Act, legal aid can be granted to a person whose financial base does not exceed 27 200 USD (260,000 SEK) a year. This limit was last changed in 1999. The financial base includes annual income after allowances for maintenance obligations, including 2 600 USD (25,000 SEK) per child, to a maximum of 7 800 USD (75,000 SEK), assets and debts (section 38 Legal Aid Act). Generally, capital assets exceeding 5 200 USD (50,000 SEK) are taken into account and half of this amount will be added to the annual income when calculating the financial base. The value of the residence where the claimant lives permanently is not counted as an asset (Renfors et al., 2012). It is hard to tell exactly what percentage of the Swedish population qualify for legal aid in relation to their financial base. In 2018, the median income (including income from pensions, sickness benefit and other taxable payments from the

¹⁹⁰ Regan, 2003, p. 50.

¹⁹¹ Eidesen et al., 1975, Eskeland, S., & Finne, J. (1973). "Rettskjelp" : en analyse og empirisk undersøkelse av tradisjonell rettskjelps muligheter og begrensninger - særlig for folk som lever under vanskelige økonomiske eller sosiale kår. Oslo: Pax.

¹⁹² Buck, A., Balmer, N., & Pleasence, P. (2005). Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups. *Social Policy & Administration*, 39(3), 302-322., Currie, A. (2009). The legal problems of everyday life. In R. Sandefur (Ed.), *Access to Justice* (Vol. 12, pp. 1-41). Bingley, UK: Emerald Group Publishing.

¹⁹³ Genn, H. G., & Paterson, A. (2001). *Paths to Justice Scotland: What People in Scotland Think and Do About Going to Law*. Oxford: Hart Publishing Limited.

¹⁹⁴ Eidesen et al., 1975; Eskeland & Finne, 1973.

Social insurance agency) of the Swedish population was 38 800 USD (370 800 SEK) a year.¹⁹⁵ However, these numbers include neither maintenance obligations, assets nor debts. Based on the income level for 2013, a government investigation concluded that about 43% of the Swedish population was eligible for legal aid.¹⁹⁶ The government-initiated report suggested that the income limit should be raised to 41 800 USD (400,000 SEK), in order to meet the intentions of the law that about 80% of the population should be eligible for legal aid based on their income.¹⁹⁷ However, no such steps have been taken.

A person granted legal aid must pay a legal aid fee of between 2% and 40% of the costs to the legal representative. The size of the legal aid fee is based on the financial base and the total costs of the legal representative. The idea is that individuals should contribute to the costs to the extent they can afford.¹⁹⁸ If the claimant is a minor the legal aid fee can be waived, if their financial circumstances justify it.¹⁹⁹

As stated by section 7 of the Legal Aid Act, legal aid cannot be granted if legal assistance can be obtained in another way. At the centre of this paragraph is the claimant's need for legal counsel; if the individual can protect his or her own interests, no need for legal counsel is considered to exist. This includes an assessment of personal qualifications and the seriousness of the issue, for example a trained lawyer may be considered not to have a need for a legal counsel.²⁰⁰ Legal aid can also not be granted if the matter in hand gives entitlement to other forms of legal assistance such as public defenders or public counsel (appointed for example in cases concerning compulsory care and deportations). Similarly, legal aid is not granted if the claimant can obtain legal assistance from trade unions or other organisations, such as tenants' organisations.²⁰¹

Section 8 in the Legal Aid Act makes clear that legal aid may be granted only when, considering the nature and importance of the matter, the value of the dispute and the other circumstances, it is

¹⁹⁵ Statistiska Centralbyrån (SCB). Medianlöner i Sverige. Available at: <https://www.scb.se/hitta-statistik/sverige-i-siffror/utbildning-jobb-och-pengar/medianloner-i-sverige/> (accessed on 2019-11-12 at 09:00).

¹⁹⁶ SOU, 2014.

¹⁹⁷ SOU, 2014.

¹⁹⁸ Legal Aid Authority. (2019). Ansökan och avgifter. Accessed December 2, 2019, from <http://www.rattshjalsmyndigheten.se/Vad-ar-rattshjalp/Ansokan-och-avgifter/>.

¹⁹⁹ SOU, 2014.

²⁰⁰ Renfors et al., 2012.

²⁰¹ Ibid.

reasonable that the state should contribute to the costs. In practice, the nature of the case can mean that an application for legal aid is rejected if it is obvious that the case has no prospects of success, or that the dispute concerns a matter that is considered to involve larger financial transactions unrelated to the claimant's everyday welfare. For example, if the dispute relates to an expensive hobby, the purchase of luxury objects or equities, art speculation, tax avoidance or transactions involving the grey areas between the permissible and impermissible, legal aid may not be granted.²⁰² Renfors et al. state that, according to the explanatory statement of the law, feasibility assessments should be made with caution and balance, taking into account all the circumstances relating to the matter. In addition, as for legal expenses insurance, legal aid is not normally granted if the value of the dispute is considered small: a special reason is needed if the amount does not exceed half a basic amount (2400 USD in 2018). Another circumstance that may negatively influence the right to legal aid arises if it is considered that the claimant has obstructed the investigation of the matter.²⁰³

To be granted legal aid, the applicant must not have legal expenses insurance covering the legal matter (section 9 Legal Aid Act). The same applies if the applicant should have had legal expenses insurance. As already discussed, this is the fundamental difference between the current legal aid scheme and the previous one. The *should have had* legal expenses insurance rule is important here. If the applicant does not have legal expenses insurance, but if, given their insurance coverage in general, or their financial and personal circumstances, they should have had such protection, legal aid is granted only if there are special reasons as regards the nature of the issue or the importance of the claim. This rule was put in place to discourage people from not taking out insurance and relying on legal aid being granted.²⁰⁴ Renfors et al. refer to the preparatory work for the Legal Aid Act regarding what 'financial circumstances' means in practice, and conclude that those located near or within the upper half limit of eligibility for legal aid, are to be considered people who *should have had* insurance.²⁰⁵ This means that if you have a financial base close to or within the range of 12 600 – 27 200 USD (120,000 and 260,000 SEK) your legal aid application may be rejected. Legal practice in this area indicates that if the applicant can prove that he/

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

she is living in certain circumstances (if, for example, he/she has only just received housing as a result of divorce or release from prison) and therefore has not had time to take out insurance, he/she can be granted legal aid.²⁰⁶ In a case where a man had neglected to renew his insurance, the court concluded that, given his financial and personal circumstances, he should have had insurance, but he was still granted legal aid since the matter in question (child custody), and other circumstance, could be classified as a special reason.²⁰⁷ This “should have had an insurance” rule has been criticised by several lawyers participating in the Swedish National Courts Administration survey evaluating Legal Aid Act in 2009.²⁰⁸ Given that most Swedes do have legal expenses insurance, this problem only applies to a small part of the population. Nonetheless, the rule can cause significant limitations to access to justice. Even though those who fall between the cracks have a certain level of income, economic obstacles may nonetheless limit their access to the courts.

As mentioned, all legal matters qualify for legal aid, unless specifically excluded. However, there are various limitations to the right to legal aid in certain areas: the preparation of tax returns, the writing of wills, prenuptial agreements, estate inventories and cases relating to debt restructuring do not get legal aid (Legal Aid Act section 10). The argument here is that people can handle certain simpler issues on their own.²⁰⁹ As described above, the legal aid reform also abolished legal aid in most family law disputes, replacing it with negotiation in disputes involving children and do-it-yourself application forms for divorce.²¹⁰ Thus the current Legal Aid Act (section 11) requires special reasons to grant legal aid in family-related matters. For example, in divorce cases a prerequisite is that the case is considered to be more complicated and to require more legal counselling than is normally required in cases of divorce.²¹¹

Section 11 in the Legal Aid Act requires special reasons in cases concerning taxation, customs fees or other similar charges, as well as small claims (mentioned above), and matters handled abroad. Victims of sexual assault abroad are an exception, no special reasons being required (Legal Aid Act section 21). For anyone who is not a Swedish citizen and has not previously been resident in Sweden, legal aid is

²⁰⁶ Ibid.

²⁰⁷ Swedish National Courts Administration, 2009.

²⁰⁸ Ibid.

²⁰⁹ Renfors et al., 2012.

²¹⁰ Regan, 2003.

²¹¹ Renfors et al., 2012.

limited to matters dealt with in Sweden.²¹²

Another highly relevant limitation to legal aid is the fact that legal aid is not generally granted for hearings before the administrative courts. Such cases are also excluded from legal expenses insurance.²¹³ As mentioned before, there is not deemed to be the same need for legal representation, since the administrative courts have their own investigative responsibility. The exemption is cases involving individual freedom and personal integrity, such as those involving the deportation of asylum seekers or the deprivation of liberty due to mental illness or addiction; such cases have public counsel appointed by the state. Since the 1997 reform these provisions are no longer included in the Legal Aid Act.²¹⁴

The law regulating public counsel (*offentligt biträde*) for involuntary institutional care and migration/asylum cases is more generous than that concerning legal aid because it does not include a means test. There is nonetheless a test of necessity (where the need for legal assistance cannot be met by any other mechanism other than state-funded legal aid). However, in practice, this means that legal aid is only refused when it is clear that the party does not need it. People facing deportation and or involuntary institutional care do de facto qualify for a public counsel.²¹⁵ Public counsel for involuntary institutional care are appointed by the court, while the Migration Authority appoints public counsel concerning the Aliens Act. The latter has been criticised on the grounds of impartiality since the Migration Authority can become a party in the legal case.²¹⁶ The public counsel in migration cases have also received critique, over the years, for their insufficient quality. As Wejedal points out, the right to legal counsel is not enough, the appointed legal counsel also have to have required qualifications for the assignment. The fact that the Migration Authority also ensures suitability of counsel can be another problem of impartiality.²¹⁷

Beyond cases of involuntary institutional care and migration/asylum for which public counsel are appointed, most people fall

²¹² Swedish National Courts Administration, 2009, p. 21f.

²¹³ Renfors et al., 2012.

²¹⁴ Ibid.

²¹⁵ Wejedal, 2019.

²¹⁶ Wejedal S., 2018. Rätten till effektivt biträde i migrationsprocessen. En problematisering av Migrationsverkets behörighet att förordna offentliga biträden. Juridisk publikation, Särtryck ur häfte 2/2018, p.221-252. <http://juridiskpublikation.se/wp-content/uploads/2019/01/Sebastian-Wejedal.pdf>.

²¹⁷ Wejedal, 2019.

outside the scope of legal aid in administrative cases concerning for example taxes, permits, social security and welfare.²¹⁸ For these cases, people will have to fund their own litigation before the administrative courts as administrative cases are not covered by LEI (legal expenses insurance) or the Legal Aid Act and because they fall outside the scope of the Act concerning Public Counsel.²¹⁹

In the government-initiated evaluation of the Legal Aid Act in 2009, lawyers addressed the limited possibility of receiving legal aid in administrative courts. The formulated criticism indicated that access to justice is limited in administrative cases. This is all the more so because administrative law cases are excluded from legal expenses insurance policies (see 5.11). In cases concerning, for example, the withdrawal of social benefits, people can be assumed to have a very limited ability to pay for legal services themselves. This means that an individual may, without knowledge and experience, have to fight a case where a government agency is the opposing party. Administrative cases regarding, for example, the right to social benefits may have a great impact on people's lives. The evaluation of the Legal Aid Act suggests that there are grounds for reviewing the possibility of legal aid in administrative law cases,²²⁰ however no such review seems to be taking place.

Legal aid is, in general, not granted to business owners in matters arising from business activities, unless there are special reasons relating to the nature of the case and limited extent of his or her economic and personal conditions and circumstances.²²¹ In addition, the requirement in section six of the Legal Aid Act provides that legal aid applies to private individuals and denies legal aid to organisations and groups of individuals.

The benefit of legal aid counsel covers work to a maximum of 100 hours, with some limited opportunity for increase. The state pays the costs of evidence in the public court, the Labour Court and the Market Court. The state also pays the costs of an investigation up to 1 000 USD (10 000 SEK), except for investigation of a matter that should be heard by an administrative court or an administrative authority (Swedish National Courts Administration, 2009).

The majority of lawyers participating in the above-mentioned

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Swedish National Courts Administration, 2009.

²²¹ Ibid.

survey say that often or very often 100 hours is not enough.²²² One of three things usually happens when legal aid is exhausted: the client pays the excess, or the legal representative does not charge more, or the client drops the case (Swedish National Courts Administration, 2009). The court can grant, under certain circumstances, continued legal aid for the hours required to complete a process. In legal expenses insurance, a similar possibility does not exist. In order to avoid these differences in the systems the Swedish National Courts Administration is proposing to give the Supreme Court and the Supreme Administrative Court the ability to grant extended LEI at public expense.²²³ However, the suggestion has not yet been implemented.

Our description of the entitlement criteria, general restrictions and procedural issues relating to public legal aid has revealed the strengths and limitations of the Swedish legal aid scheme. Public legal aid covers those on average to low incomes who do not have insurance, and have not failed to take out insurance when they ought to have done so. The above description does not however reveal that nowadays the percentage of the population that is eligible for legal aid has decreased significantly, and that this goes against the intentions of the law.²²⁴

The legal aid scheme does potentially cover some issues not generally covered by legal expenses insurance, such as more complicated child custody and child maintenance cases, and work related issues. A significant difference between public legal aid and legal expenses insurance is the coverage of costs when a case is lost in court. Public legal aid does not cover the opposing party's legal expenses in the way legal expenses insurance does. On the other hand, in the survey of lawyers conducted by Swedish National Courts Administration, several respondents raised the issue that individuals using their legal expenses insurance may have to pay a considerably higher fee than people with the same income who have been granted public legal aid. One lawyer says: "people who have no or a very low income pay 20–25% of the legal counsel's fee [when using their legal expenses insurance]. If they had been granted legal aid, it would have been about 2–10%".²²⁵ In such cases, it is a disadvantage to have legal expenses insurance.

According to Regan, the reform of legal aid has significantly

²²² Swedish National Courts Administration, 2009.

²²³ *Ibid.*

²²⁴ SOU, 2014.

²²⁵ Swedish National Courts Administration, 2009, our translation.

downgraded access to legal advice and minor assistance in legal cases, and thus actively discouraged many Swedes from seeking advice or assistance from lawyers for legal problems.²²⁶ The legal aid scheme places considerable responsibility on the individual to identify the legal problem and pay for legal assistance to access legal advice. Even though the legal advice fee can be reduced to half if you have a very low income (or waived for those under 18 with no income or capital), others have to pay quite a high fee to receive legal advice. In other words, the support that people might need to work out whether they have a legal problem or not, and how it can be solved, is costly. This is inconsistent with the fact that most people need assistance with every-day non-litigation legal problems.²²⁷ This is a significant example of a limitation on access to justice. Legal advice and assistance can play an important role in tackling social exclusion.²²⁸

Furthermore, a prerequisite for obtaining legal aid is that citizens are aware of their right to legal assistance. A survey conducted by the Swedish National Courts Administration reveals that awareness of legal protection is low; most people cannot distinguish between legal aid and the legal protection provided by household insurance. Most are not even aware of the extent to which they have such insurance. The Courts Administration therefore proposes that information about the opportunities for legal assistance must be made more widely available.²²⁹

As this section has shown, there is a range of limitations to the granting of legal aid. These limitations will also be apparent when we look at how many people are granted legal aid.

5.8.3. Process for obtaining civil legal aid

As has already been described above, applications for legal aid are decided by the Legal Aid Authority, unless the matter is already before a court, then the court decides on legal aid. An application for legal aid must be preceded by consultation with a lawyer or other legal practitioner (see 5.8.1).

²²⁶ Regan, 2003.

²²⁷ Eidesen, A., Eskeland, S., & Mathiesen, T. (1975). *Retts Hjelp og samfunnsstruktur*. Oslo: Pax., Kilian & Regan, 2004.

²²⁸ Buck, A., Balmer, N., & Pleasence, P. (2005). Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups. *Social Policy & Administration*, 39(3), 302-322.

²²⁹ Swedish National Courts Administration, 2009.

5.9. HOLISTIC LEGAL SERVICES

An example of a holistic legal service in Sweden is found with the frame of protection of the child in the criminal investigation processes. Barnahus (Children's Home) offers a safe environment for children (up to the age of 18) who have been subjected to, or witnessed, violence or sexual abuse. They also work with children who have exposed another child to sexual acts. Barnahus are located in many cities in the country. Each Barnahus employs a social secretary, curator, psychologist, police, prosecutor, pediatrician and forensic doctor.

5.10. LEGAL AID BEFORE REGIONAL HUMAN RIGHTS MECHANISM

Public legal aid is generally not approved for cases in the European Court of Human rights or the UN commissions.²³⁰ However, an applicant to the European Court of Human rights may be granted legal aid through the Court. In Schoultz's analysis of all judgments made by the European Court of Human Rights in relation to the Swedish state between the years 2000 and 2010, she found that in 10 out of 53 judgments legal aid was granted by the Court.²³¹

5.11. ALTERNATIVE SOURCES OF LEGAL ASSISTANCE

As has already been mentioned, the primary source of legal aid in non-criminal cases is through legal expenses insurance. The eligibility and scope of legal expenses insurance will be further discussed below. Thereafter we present legal aid provided through trade unions in work-related issues. In addition, there is a range of legal aid alternatives in Sweden, although they are not as well known or comprehensive as in Norway, for example. Thus, we will also present information on pro bono legal services, legal advice on immigration law and voluntary student legal clinics. There are, however, other forms of alternative aid, for example public institutions offering consumers' legal aid, which we will not discuss.

5.11.1. *Legal expenses insurance*

Today, legal expenses insurance is the primary source of legal protection in Sweden. Household insurance has contained a legal

²³⁰ Renfors et al., 2012.

²³¹ Schoultz, Isabel (2014), *Controlling the Swedish state: studies on formal and informal bodies of control*. Stockholm: Department of Criminology, Stockholm University.

expenses element since the 1960s, and prior to the 1997 reform claimants could obtain legal protection both through insurance and through public legal aid. Nowadays it is a matter of either/or – anyone who has legal expenses insurance covering the case in question will not receive legal aid.

Johnsen differentiates between *litigation aid* and *legal assistance aid*.²³² Legal expenses insurance only covers the former, i.e. cases under litigation. One of the significant limitations of legal expenses insurance is the lack of cover for legal advice and minor legal assistance.²³³ In general, insurance covers hearings in a District Court, a Land and Environmental Court, a Court of Appeal, or the Supreme Court. Insurance does not apply to criminal cases or disputes that may be examined by administrative authorities, specialist courts or the administrative courts.²³⁴ The administrative courts have their own investigative responsibility²³⁵ and therefore the need for legal representation is not deemed to be the same.²³⁶

Legal expenses insurance is incorporated into household insurance policies, and is not offered as an ‘add on’ or separate ‘stand-alone’ insurance. As a rule, insurance companies require that the policy has been in force for at least two years before use can be made of the legal expenses insurance element.²³⁷ Generally, in addition, legal protection through the insurance is not granted if the value of the case is less than half a base sum which represents 2 400 USD (23 250 SEK) in 2019. Insurance does not generally apply to disputes having to do with divorce or the dissolution of partnerships, or to disputes relating to the insured’s employment or other professional duties (Swedish National Courts Administration, 2009). The costs for the individual can vary since insurance companies have different conditions, but liability for 20% of the base amount and 20% of the damages costs exceeding 20% of the base amount is common.²³⁸ In practice, liability can amount to as much as 6 300 USD (60 000 SEK).

In addition, different insurance companies have different exceptions and rules. Some companies exclude child custody, child maintenance and similar issues. Others have a withdrawal period of a year or two after the marriage, partnership or relationship ends before

²³² Johnsen, 1994.

²³³ Kilian & Regan, 2004.

²³⁴ Swedish National Courts Administration, 2009.

²³⁵ Carlson, 2012.

²³⁶ Swedish National Courts Administration, 2009.

²³⁷ Ibid.

²³⁸ Swedish National Courts Administration, 2009.

the legal protection can be utilized in these disputes. Several insurance companies do not cover litigation under the Group Proceedings Act (2002:599).²³⁹ The National Courts Administration found in their evaluation that, even though the insurance criteria differed somewhat between insurance companies, insurance policies have not changed since the reform came in to place to a degree that would imply that the system is no longer functioning as it is supposed to.²⁴⁰

As a rule, the legal representative hired must be operating close to the insured party's home, or the place where the hearing takes place. The legal representative must be a lawyer or an associate employed in a law firm. The possibility of appointing other appropriate legal representation exists, but needs to be approved by the Board for Legal Protection Insurance Issues.²⁴¹ Generally, the insurance company pays the legal representative's fees and costs in accordance with an hourly rate norm, the costs of the investigation and collection of evidence, and administrative costs in court. Legal expenses insurance generally also covers situations when the insured is compelled to pay legal expenses to the opposing party or to the State, as well as settlements (if it is likely that the Court would have decided on a higher amount).²⁴² In 2019, the maximum amount of legal protection varied between insurance companies, from 13 600 to 41 800 USD (130,000 to 400,000 SEK).²⁴³ In other words, there are significant differences between the insurance companies.

In a survey conducted in 2009 by the Swedish National Courts Administration, directed at lawyers, several negative consequences of legal expenses insurance were highlighted. More than 90% of lawyers thought that there was a need for the possibility of public legal aid in cases where legal protection through insurance has been exhausted. Another issue brought to light by the lawyers, was the need for legal advice. For legal expenses insurance to be used, the issue has to be formally considered a legal dispute (when a claim has been wholly or partly rejected by the other party) but legal advice may be necessary prior to that.²⁴⁴

In 2018, legal expenses insurance was used in 10 636 cases at an

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Swedish National Courts Administration, 2009.

²⁴³ The Swedish Consumers' Insurance Bureau. (2019). Jämför hemförsäkringar. Available at: <https://www.konsumenternas.se/forsakring/boende/om-hemforsakringar/jamfor-hemforsakringar> (accessed 2019-11-12 at 13:30).

²⁴⁴ Swedish National Courts Administration, 2009.

estimated cost of 33 million USD (319 million SEK).²⁴⁵ In 1997, the amount paid by legal expenses insurance was estimated at 16 million USD (157 million SEK) distributed between 11,401 insurance cases. Ten years later, in 2007, the equivalent sum was estimated at 28 million USD (271 million SEK) distributed between 13,046 insurance cases.²⁴⁶ These figures include legal expenses insurance in both household insurance and second/holiday home insurance. The costs have increased significantly but, interestingly, the developments indicate that the number of insurance cases has not increased to the extent that might be expected, given that legal aid reform made legal expenses insurance the primary source of legal protection. The increased costs are probably related to rises in legal costs in general, and the fact that insurance companies have raised the ceiling for the amount of legal costs being reimbursed. The number of policyholders who received compensation peaked in 1999, with more than 15,000 disbursements for legal expenses.²⁴⁷

In relation to developments between in 1997 and 2007, Regan concludes that, since the increase in the insurance industry's costs were much smaller than the decrease in public expenditure after the reform, legal disputes are either being funded by alternative means, or more cases are abandoned before they go to court.²⁴⁸ Many of the 'missing cases' are probably family law cases that are now dealt with through negotiation or do-it-yourself divorces. However, Regan suggests that some are cases where people have been discouraged from seeking legal advice since it is too costly. The issue raised by Regan may still be valid; the legal aid reform may have discouraged citizens from using lawyers and going to court.²⁴⁹ From an access to justice perspective, the figures may indicate that effective equality, in the sense of equal opportunities, is not being achieved.

5.11.2. *Legal aid through trade unions*

Work-related issues are not covered by legal expenses insurance, but can qualify for public legal aid if a person is not unionized, or if the union cannot help. Members of a trade union have the right, under certain conditions, to obtain legal aid in matters connected with

²⁴⁵ The figures from 2018 were received from Insurance Sweden (Svensk Försäkring): <https://www.svenskforsakring.se/statistik/statistikdatabas/> Accessed 2019-11-13. These numbers exclude legal expenses insurance for businesses and real estate.

²⁴⁶ Swedish National Courts Administration, 2009.

²⁴⁷ Ibid.

²⁴⁸ Regan, 2003, p. 58f.

²⁴⁹ Ibid.

or relevant to their work. Before you can obtain legal aid the union may require you to have been a member for a certain period of time. The dispute must be related to work: matters such as wage disputes, redundancy, the right to occupational injury or disease benefits, and work-related criminal charges. Legal aid through the union can be granted if there is deemed to be a reasonable chance of winning the case. For those who are granted legal aid, the union pays all legal costs if the case goes to court, and both sides' costs if the case is lost. In addition to legal costs, lost earnings and any accommodation and travel costs incurred in connection with the proceedings can be paid.

The trade union confederations LO²⁵⁰ and TCO²⁵¹, as well as some of the unions in the third confederation Saco²⁵², employ the same law firm (LO-TCO Rättsskydd) to take legal proceedings relating to social insurance and labour law. The firm is primarily owned by LO. According to its own statistics, in 2014 more than 40 trade unions employed the firm on about 1000 cases, including ones relating to labour and social insurance law.²⁵³ These numbers are a minimum of those receiving legal aid though the unions, since each case can include more than one person, and several trade unions handle their own cases.

Union membership has declined since the mid-1990s, from 85% of all wage earners (excluding full-time students working while studying) in 1995 to 69% in 2017.²⁵⁴ From an international perspective union membership in Sweden is still among the highest in the OECD countries (OECD, 2015). Union membership differs greatly with age, from 37% in the 16 to 24 bracket to 78% for those aged 45 to 64. Union membership among foreign-born workers is somewhat lower than among workers born in Sweden. The union confederation that caters mainly for blue-collar workers (LO) has seen a greater decline since the mid-1990s than the other two main union confed-

²⁵⁰ LO stands for the Swedish Trade Union Confederation, which is the central organisation for 14 affiliates, which organise workers in both the private and the public sectors.

²⁵¹ TCO stands for the Swedish Confederation of Professional Employees and comprises 14 affiliated trade unions.

²⁵² Saco stands for the Swedish Confederation of Professional Associations and is a trade union confederation of 22 affiliated associations.

²⁵³ Based on e-mail correspondence with Sussanne Lundberg and Claes Jansson at LO-TCO Legal AB by 2015-10-12 respectively 2015-10-15.

²⁵⁴ Kjellberg, A. (2018). Kollektivavtalens täckningsgrad samt organisationsgraden hos arbetsgivarförbund och fackförbund. (1 uppl.) (Studies in Social Policy, Industrial Relations, Working Life and Mobility; Vol. 2018, Nr. 1). Lund: Department of Sociology, Lund University.

erations.²⁵⁵ The decline in union membership is relevant from a legal aid perspective because legal expenses insurance does not normally cover labour law disputes. As already mentioned, if people are not unionized or if the union cannot help, it can sometimes be possible to get legal aid through the Legal Aid Act. However, those who are not members of a union and have a financial base exceeding 27 200 USD per year, have nowhere to turn in disputes relating to their work.

5.11.3. *Pro bono legal assistance*

According to Regan, pro bono work by lawyers diminished after the comprehensive 1973 legal aid reform, since the Legal Aid Act covered most legal advice and minor assistance as well as legal representation in most courts. At this time, legal services could be obtained from both private and public lawyers. With the second reform in 1997, a renewed need for pro bono legal assistance arose.²⁵⁶

Since 1998, the Swedish Bar Association has organised free legal advice offered by lawyers working in their spare time in several cities in Sweden. One of these services offers consultations with a lawyer for about 15 minutes on certain dates at local libraries and civic centres. They can be found in more than 30 places in the Stockholm area and in eight other cities in Sweden. During the consultation, the lawyer does not draw up legal documents, or take any other direct action, but offers advice on how the client can move forward with their issue.²⁵⁷

Another form of pro bono work is offered by a well-known law firm operating as a foundation supported by donations and grants from individuals. The firm takes on cases pro bono if they concern equal treatment (non-discrimination), freedom of association, property rights, freedom of trade, rule of law and personal privacy, where the state, municipality, trade union or the employer is the opposing party (Centrum för rättvisa, 2015). They deal with only a few cases each year – ones, for example, in the European Court of Human Rights, or class actions on gender discrimination in the national courts.

Cappelletti discusses pro bono work from an access to justice perspective and argues that it is a sign of a ‘political laissez-faire philosophy’, where the state has not undertaken necessary measures

²⁵⁵ Ibid.

²⁵⁶ Regan, 2003.

²⁵⁷ Advokatsamfundet. (2019). Advokatjouren. Available at: <https://www.advokatsamfundet.se/Behover-du-advokat/Advokatjouren/> (accessed 201912-02 at 10:45)

to solve a known problem.²⁵⁸ However, the way the program is structured by the Swedish Bar Association enables it to meet, to some extent at least, the criterion Cappelletti discusses, namely geographical availability, even though the program is not nationwide and is concentrated in medium-sized and large cities. Since lawyers offer legal advice in local libraries and civic centres, they at least come somewhat closer to being able to “reach out to the poor”.²⁵⁹

5.11.4. *Legal advice on immigration law*

There are also NGOs offering free legal advice on immigration law. For example, the Swedish Refugee Law Centre (*Asylrättscentrum*) provides free legal advice in the two biggest cities in Sweden (Stockholm and Gothenburg) on issues relating to asylum, family reunification and Swedish citizenship, and on other matters relating to Swedish immigration law.²⁶⁰ Other NGOs, such as Centrum för rättvisa, provide similar services in other cities.²⁶¹ The Swedish Refugees Advice Centre, in cooperation with the Church of Sweden, is expanding its service.²⁶² Other organisations, such as the Swedish Red Cross, offer information and legal advice support on asylum and family reunification cases via a free-of-charge telephone number. For urgent cases, applicants can book an appointment and see a case-worker or lawyer. Swedish Red Cross lawyers based in Stockholm, Malmö and Gothenburg can act as legal counsel in areas prioritised by the Swedish Red Cross such as family reunification, need for protection due to risk of torture or gender persecution.²⁶³

Finally, some refugee groups have founded their own organisations to support asylum seekers, such as the International Federation of Iranian Refugees. Unaccompanied children have formed two different associations that provide advice and support to newly arrived unaccompanied children. Another organisation called Young in Sweden (*Ung i Sverige*) has, since 2017, organised a series of

²⁵⁸ Cappelletti, M. (1992). Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform. *South African Law Journal*, 109(1), 22-39.

²⁵⁹ *Ibid.*, p. 30.

²⁶⁰ Swedish Refugee Law Centre. Available at: <https://sweref.org/> (accessed 2019-12-02 at 13:53).

²⁶¹ Centrum För Rättvisa. Vårt Uppdrag. Available at: <http://centrumforrattvisa.se/om-oss/#-vartuppdrag> (accessed on 2019-11-04 at 13:48).

²⁶² Asylum in Europe. Access to NGOS and UNHCR. Available at: <http://www.asylumineurope.org/reports/country/sweden/asylum-procedure/information-asylum-seekers-and-access-ngos-and-unhcr/access>. (accessed on 2019-11-11 at 10:36).

²⁶³ *Ibid.*

protests and sit-ins in Stockholm against deportations to Afghanistan.²⁶⁴ Young in Sweden has also highlighted the question of unaccompanied children who were considered to be over 18 and forced out of their accommodation to live far from their current school. Fatemeh Khavari, a young Afghan woman who is the spokesperson for Young in Sweden has received a number of awards for her courage and leadership.²⁶⁵

5.11.5. *Voluntary student legal clinics*

There are several voluntary student legal clinics in Sweden, targeting homeless people and other socially disadvantaged groups in society. Some of the clinics are sponsored by larger legal firms, while others are not.²⁶⁶ Other law student-initiated aid schemes are more general, such as Juristjouren in Lund and Uppsala. The work of the clinic in Lund will be discussed as an example of the work conducted at student legal clinics in Sweden. Juristjouren in Lund was formed in 1978 to offer free legal advice and information to the public. Juristjouren in Lund is an independent non-profit organization run by law students from Lund University. Their office in the town centre is financed by the municipality. During a visit to Juristjouren 2015, Schoultz was able to interview two of the students working there.²⁶⁷ The Lund legal clinic offers legal advice in face-to face meetings or on the phone (the similar clinic in Uppsala also offers advice via e-mail). Meetings take place either in their office in Lund, where they have a drop-in hour four days a week, or in local libraries or civic centres in the region of Malmö and Lund. Individuals and small businesses are offered a 30 minute consultation. While other student-initiated legal clinics provide help with drawing up documents and contacting authorities, Juristjouren does neither of these things, focussing instead on offering legal information in a wide variety of areas. Among the most common issues handled by Juristjouren are ones to do with family law (e.g. divorce, cohabitation agreements, child custody), inheritance law, housing, consumer law (e.g. the purchase of various types of services and contractual interpretation),

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Gatujuristerna. (2019). Vårt arbete. Available at: <https://advokatfirmanglendor.se/gatujuristerna/> (accessed on 2019-12-11 at 09:54), Faktumjuristerna. (2019). Om Faktumjuristerna. Available at: <http://faktum.se/faktumjuristerna/> (accessed 2019-12-11 at 09:55), Juridikcentrum (2019). Available at: <https://www.juridikcentrum.se/> (accessed 2019-12-02 at 14:20).

²⁶⁷ The interview was conducted in 15 October 2015 with Robin E. Göbel and Agnes Emaus Günzel at Juristjouren in Lund.

criminal law and administrative law (matters concerning the Social Insurance Agency and Social Services).

Juristjouren can be understood as a first resort: “Many people come to us to see if they have a case at all, before turning to a lawyer, since it is very expensive to turn to a lawyer”, one of the students, Robin, explains. He describes the nature of many of the cases they help with: “A lot of cases are not that difficult really, but people do not know how to handle them”. The other student, Agnes, expands on this: “People do not really know what they are entitled to.” In this type of case, the legal clinic can inform people about their rights and what they can expect from, for example, the authorities. The classic Norwegian legal aid study²⁶⁸ and more recent international studies²⁶⁹ indicate that people rarely know their rights and what they are entitled to. Furthermore, research has shown that people often do not see their problems as legal ones.²⁷⁰ In line with the students’ experiences, Eidesen et al. found that the legal aid citizens needed seldom involved complicated legal issues but had to do with concrete problems in a legal framework.²⁷¹ The students experience that few people know about legal expenses insurance is significant to an access to justice perspective, where knowledge of your rights is a cornerstone.²⁷² If Swedes generally do not know if or how they are covered, this becomes a problem if they end up in a litigation process. A prerequisite for the use of legal aid is that citizens are aware of their rights. Like the pro bono program organised by the Swedish Bar Association, the student clinic initiative in the Lund and Malmö area strives to achieve geographical availability by offering services in the Lund office as well as in local libraries and civic centres. From an access to justice perspective, student legal clinics are evidently filling a gap that the general legal aid scheme is not able to fill, namely the provision of legal information and, to some extent, legal advice.

The Department of Law at Gothenburg University has, since 2014, operated a Law Clinic (*rättspraktik*) as a platform for clinical legal education, research and collaboration with civil society and the

²⁶⁸ Eskeland & Finne, 1973.

²⁶⁹ Curran, L., & Noone, M. A. 2008, Access to justice: a new approach using human rights standards. *International Journal of the Legal Profession*, 15(3), 195–229.; Denvir, C., Balmer, N. J., & Pleasence, P. 2013, When legal rights are not a reality: do individuals know their rights and how can we tell? *Journal of Social Welfare & Family Law*, 35(1), 139–160.

²⁷⁰ Sandefur, R. L. 2009, Access to Justice: Classical Approaches and New Directions. In R. L. Sandefur (Ed.), *Access to Justice* (pp. ix–xvii). Bingley, UK: Emerald Group Publishing.

²⁷¹ Eidesen et al., 1975.

²⁷² Curran and Noone, 2008.

City of Gothenburg.²⁷³ This clinic aims to cooperate with a range of non-profit organisations offering free legal advice with the aim of creating a good exchange of experiences for the students and the organisations involved. The students conduct internships at these various organisations where they can develop practical legal skills and knowledge under the supervision of practicing lawyers and staff at the Department of Law.²⁷⁴ As far as students legal clinics are concerned in Sweden, the Gothenburg model is unique because it is combined with a unique course, Welfare Law in Theory and Practice.²⁷⁵ Throughout the course, the students work at non-profit organisations providing legal advice to disadvantaged people while attending lectures and seminars at the Department of Law. For three days a week, the students work closely with their supervisors at the organisation in which they are based, while for two days a week they attend lectures and seminars at the Department of Law, which provides the academic part of the course. One of the aims is to support students to develop their legal skills by providing a good theoretical basis within the different areas of welfare law, while applying their knowledge in practice. Additionally, upon completion of the course, the students obtain academic credits (30 ECTS).²⁷⁶

The Faculty of Law at Uppsala University runs a Human Rights Clinic where students have the opportunity to work on real cases under the supervision of their teachers.²⁷⁷ The Human Rights Clinic is a collaboration between teachers, researchers, students and human rights organisations such as Civil Rights Defenders. The Clinic's aim is to strengthen the protection of the human rights of particular vulnerable groups in society, and by doing so, to contribute to a systematic reinforcement of the legal capacity of civil society organisations.²⁷⁸

²⁷³ University of Gothenburg, Department of Law – Rättspraktik (Law Clinic). Available at: <https://law.handels.gu.se/english/rattspraktik> (accessed on 2019-11-08 at 10:52).

²⁷⁴ Ibid.

²⁷⁵ University of Gothenburg, Department of Law – Welfare Law in Theory and Practice (Law Clinic). Available at: <https://law.handels.gu.se/english/rattspraktik/Welfare-Law-in-Theory-and-Practice+> (accessed on 2019-11-08 at 11:00).

²⁷⁶ Ibid.

²⁷⁷ Uppsala University, Faculty of Law, Human Rights Clinic. Available at: <https://www.uu.se/en/support/human-rights-clinic/> (accessed on 2019-12-10 at 07:50).

²⁷⁸ Ibid.

6. COSTS OF RESOLVING DISPUTES WITHIN THE FORMAL JUDICIAL MACHINERY

Civil procedural rules in Sweden have been described as “creating a defendant-friendly forum”, and increasing the economic risk for the plaintiffs.²⁷⁹ The civil litigation process also includes an allocation of legal costs and fees whereby the losing side in the majority of cases has to pay both sides’ costs and fees.²⁸⁰ In relation to legal aid, economic obstacles limiting individuals’ access to information and adequate representation are highly relevant.²⁸¹ Access to justice could also be seen as a major element of the welfare state.

Cappelletti and Garth point to barriers in the legal system that may be of relevance to an understanding of the need for legal aid: the costs of litigation, time and party capability (including the competence to recognize and pursue claims, and experience of the judicial system).²⁸² Thus, getting access to justice in practice, rather than merely at a theoretical level, may require legal aid to overcome these significant barriers. In this section, we will discuss the costs of resolving disputes within the formal judicial machinery. Since this section partly overlaps with sections 3 and 5 we refer to those sections when the issue has already been discussed.

6.1. OVERVIEW OF JUDICIAL COSTS FOR LITIGANTS

To file a claim at court in a civil case, the plaintiff must pay an application fee. The size of the fee is dependent on the value or size of the claim. If the claim is a small claims case not exceeding half of a price base amount (maximum 23 250 SEK, 2 417 USD), the application fee is 900 SEK or roughly 93 USD. For claims exceeding half the price base amount, the fee is 2 800 SEK or 291 USD.²⁸³ There are no fees to appeal to a higher instance.²⁸⁴

The most significant costs of the judicial process in civil cases

²⁷⁹ Carlson, 2012, p. 135.

²⁸⁰ Carlson, 2012.

²⁸¹ Cappelletti, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, p. 282.

²⁸² Cappelletti, M., & Garth, B. (1978). *Access to justice: the newest wave in the worldwide movement to make rights effective*. *Buffalo Law Review*, 27(2), p. 181–292.

²⁸³ Swedish Courts, on Civil Cases. Available at: <https://www.domstol.se/amnen/tvist/sa-gar-en-tvist-till/hantera-en-tvist/>. (accessed 2019-11-25 at 10:46). Rate of currency indicated from 25 November 2019 .

²⁸⁴ Swedish Courts, on appeal. Available at: <https://www.domstol.se/amnen/overklaga-en-dom/overklaga-till-hovratten/att-overklaga-till-hovratten/> (accessed on 2019-11-26 at 09:54).

are the costs of legal representation. In the Swedish civil system, the costs of legal representation are divided into three brackets: litigant financed, publicly funded and third party funded legal representation.²⁸⁵

Litigant financed representation means that litigants appoint their own legal representation. This, of course, is an option in which access to courts (and implicitly access to justice) is contingent on the financial ability to hire a lawyer, making it an exclusive option.

The publicly financed legal representation or legal aid, discussed in sections 3 and 5, means that the state funds the large part of the legal representation. However, as we have seen, it is an option that presents many obstacles in terms of requirements related to the size of the claim, one's financial situation and, furthermore, legal aid might not cover enough of the costs of the case.

Third party funded legal representation refers to the legal aid scheme discussed in section 5 where plaintiffs have the possibility to fund their legal representatives through home insurance. This is another area that was discussed above (section 5.8.1), revealing that some sections of the population (e.g. people born abroad and people between the ages of 16-29) are likely to not have access to this alternative. Marginalised people, such as homeless people, are also likely excluded from this option.

Another cost of the judicial process to be accounted for is repayment of the trial costs of the losing party in civil cases. According to chapter 18, section 1 of the Code of Judicial Procedure, the losing party must repay the winning party's costs of the trial. Individual litigants in administrative cases (thus having the state/government as the counterpart) are, however, not entitled to restitution for judicial costs if they win a case against a government agency and vice versa, they do not have to repay judicial costs if they lose. In spite of multiple government inquiries into the possibility of repaying individual litigants' judicial costs, each party is responsible for the costs of the judicial process.²⁸⁶ The only exemption from this is in tax cases.²⁸⁷

The argument here, according to Wejedal (2017),²⁸⁸ is two-fold and is similar to the reason why legal aid is not, in practice, granted

²⁸⁵ Wejedal, 2017, p. 95.

²⁸⁶ Wejedal, 2017, p. 192.

²⁸⁷ Wejedal, 2017, p. 906.

²⁸⁸ Ibid, p. 192-193.

in administrative cases.²⁸⁹ Firstly, individuals as members of society cannot be regarded as adversaries of the state in court (i.e. the state works for the individual) and secondly, since agencies are obliged to investigate the issue before court proceedings, the plaintiff does not need legal counsel. This is a problematic area, because the state's benevolence cannot be an argument against full protection of an individual's rights to challenge the exercise of power by state agencies. One cannot assume that state agencies always work for the benefit of an individual since they are constrained by budgets and other institutional (legal) frameworks incentivising them to deny individuals access to their services.

6.2. EXEMPTION FROM JUDICIAL COSTS

There are no means test to the application fee the plaintiff must pay in civil cases (see. 6.1). Persons who have been granted legal aid, however, do not have to pay application fees, service charges or any other additional fees to the court (Legal Aid Act §19).

In sections 3 and 5, we discussed the pro bono legal aid schemes to avoid costs of legal representation (if the case is lost, repayment is due), state funded legal aid in which persons of lower income can receive discounts for legal aid and out-of-court settlements, however, these are not to be seen as exemptions.

6.3. MECHANISMS TO REDUCE COSTS BY VARIATIONS TO COURTS AND PROCEDURES

Court sponsored settlements (see section 3.2), are perhaps the most effective judicial procedure for reducing the costs of litigation. Litigants may choose to have a meeting with a judge on one occasion and settle differences on mutually agreed grounds, such as that each party covers their own costs. Of course, this does not erase the application fee, costs of preparing evidence and potential losses of income (and other expenses such as travel to the settlement), that precede this procedure.

These different provisions and judicial costs protect the judiciary to avoid frivolous litigation; however, decreasing numbers of legal aid grants and reduced eligibility for legal aid are examples of increasing difficulty of access to justice.

²⁸⁹ Ibid, p. 325.

7. THE PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS

The possibility of class actions was introduced into Swedish law in 2002 through the Group Proceedings Act. Thus, it is a relatively new phenomenon in the Swedish judicial system. Only public and organisation group actions are permitted.²⁹⁰ The applicable rules on joinder of parties and consolidation of cases are found in Chapter 14 of the Code of Judicial Procedure.²⁹¹ Any civil claim before the general courts, such as commercial disputes, may be subject to group action. Other types of claim may not become group actions unless supported by statutory provisions such as those covering a number of environmental and competition matters. Notable matters that may not be litigated as group actions are maritime, patent, trademark and a number of employment matters. Under the Group Proceedings Act 2002:599, it is possible to bring a group action in damages claims for environmental matters. Public authorities can only bring group actions for matters relating to damages claims. Private and organisation groups may bring claims concerning the prohibition of environmentally harmful activity and claims to order the defendant to take protective measures or other precautions regarding such activity. Furthermore, non-profit associations that, in accordance with the associations' charters, protect environmental interests, as well as associations of professionals within the fishing, agricultural, reindeer and forestry industries, are entitled to bring an organisation group claim to court. The Group Proceedings Act is subject to the Swedish Limitations Act, which means that a general limitation period of 10 years applies from the occurrence of a claim unless otherwise agreed upon by the parties or specifically regulated elsewhere.

The plaintiff in a group action must be a person with a claim which forms part of the group action. Only the plaintiff (not the defendant) can apply for a case to be treated as a group action. A claim initiated by a single claimant (which is not in itself a group action) against several defendants cannot be litigated as a group action.²⁹²

In addition, an attorney who is a member of the SBA must rep-

²⁹⁰ Lindblom Henrik Per (2009), The Globalisation of Class Action. *The Annals of the American Academy of Political and Social Science*, Vol. 622, p. 231-241.

²⁹¹ The Swedish Code of Judicial Procedure (rättegångsbalk 1942:740). *Government Offices of Sweden*. Available at: https://www.government.se/49e41c/contentassets/a1be9e99a5c-64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf (accessed on 2019-10-22 at 10:58).

²⁹² Lindblom Henrik Per (2009), The Globalisation of Class Action. *The Annals of the American Academy of Political and Social Science*, Vol. 622, p. 231-241.

resent group actions brought by a private group or an organisation. There is no such requirement for a public group, and it is not unusual that the authority bringing the claim use in-house lawyers in such group actions. The court may grant exemptions to the 'member of the Bar' requirement where special reasons apply. Accordingly, the court will enquire whether the claimant's attorney is a member of the Bar. The court will also assess any contingency fee arrangement made under the Group Proceedings Act and how each member of the group will be kept informed during the proceedings.²⁹³

In general, the winning party is entitled to full compensation from the losing party for reasonable litigation costs such as counsel costs, compensation for the party's own costs, costs for experts and witnesses, and interest. However, there are exceptions to this loser-pays principle. A group member is, generally, not liable for costs since it is only the claimant i.e. the entity that represents the group and not the actual group members, that is considered a party. Most notably, if the defendant has been ordered by the court to compensate the claimant for its costs but is not able to do so, the group members are instead liable to pay these costs. The same applies for additional costs resulting from contingency fee arrangements made under the Group Proceedings Act, as mentioned above. Each member of the group is liable for his or her share of the costs but is not liable to pay more than what he or she has gained through the proceedings. A further barrier is that several insurance companies do not cover litigation under the Group Proceedings Act and public legal aid does not cover groups of individuals (see section 5.11).

Generally, under Swedish law, a settlement does not require court approval. However, a settlement concluded by the claimant on behalf of the group members is valid only if the court confirms it in a judgment. The settlement shall be confirmed at the request of the parties, provided it is not discriminatory against particular members of the group or in any other way manifestly unfair. A group member has the opportunity to settle his/her claim individually without involving the claimant. It is also possible for the claimant to settle claims on behalf of the group.

8. PROFESSIONAL LEGAL ETHICS

In Sweden there are several laws regulating the conduct of lawyers, notably the Swedish Code of Judicial Procedure, the Code

²⁹³ Ibid.

of Professional Conduct for Members of the SBA and the Charter of the SBA. The Code of Conduct for European Lawyers, the Swedish Regime for Continuing Professional Training of Advocates, the Funds Accounting Act (1944:181) and the Prohibition against Supply of Legal or Financial Services in Certain Cases Act (1985:354) also apply.²⁹⁴ Among these laws there are several provisions supporting ethical and professional conduct, thus rendering the implementation of a legal Hippocratic Oath unlikely.

The Swedish Code of Judicial Procedure provides the statutory rules.²⁹⁵ In particular, Chapter eight of the Swedish Code of Judicial Procedure has a number of rules regarding an advocate's duties from which it can be established that the responsibility to follow the ethics of good advocate conduct only applies to an advocate's practice of law and not to other work.²⁹⁶ However, other statutes provide some provisions as well. The Charter of the SBA,²⁹⁷ first adopted in 1962, and amended in 2010, requires government ratification before any amendment enters into force. The Code of Professional Conduct,²⁹⁸ adopted in 2008, requires all members of the Bar to follow professional and ethical standards. It contains provisions on how to run a firm, fees, relations to opposing parties and the courts, and conflicts of interests. Moreover, the Code emphasises lawyers' obligation of loyalty to their clients (*god advokatsed*).²⁹⁹ Notwithstanding that the SBA holds professional legal ethics in high regard, legal ethics are not formally taught per se in law schools. Rather, some universities offer courses where legal ethics are part of the mandatory and/or optional education of law students. Since January 2004, law graduates

²⁹⁴ Sveriges Advokatsamfund (1887). Rules and regulations regarding lawyers. Available at: <https://www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/>. (accessed on 2019-11-11 at 11:03).

²⁹⁵ The Swedish Code of Judicial Procedure (rättegångsbalk 1942:740). *Government Offices of Sweden*. Available at: https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf (accessed on 2019-10-22 at 10:58).

²⁹⁶ Sveriges Advokatsamfund (1887). *Code of Conduct of the Swedish Bar Association*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf (accessed on 2019-10-31 at 08:27), p. 6.

²⁹⁷ Sveriges Advokatsamfund (1887). *Charter of the Swedish Bar Association*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/charter.pdf (accessed on 2019-10-31 at 08:15).

²⁹⁸ Sveriges Advokatsamfund (1887). *Code of Conduct of the Swedish Bar Association*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf (accessed on 2019-10-31 at 08:27).

²⁹⁹ Sveriges Advokatsamfund (1887). *Vägledande regler om god advokatsed*. Available at: <https://www.advokatsamfundet.se/Advokatetik/regler-om-advokatetik/Vagledande-regler-om-god-advokatsed1/> (accessed on 2019-11-04 at 11:03).

who want to join the SBA have to take a compulsory course that is mostly about ethics, training for and handling of negotiations in court, constitutional law and different professional issues that lawyers may face.³⁰⁰ In Section 34 (Professional Duties) of the Charter of the SBA it is stated: "In conducting his practice, a member must perform engagements entrusted to him honourably and diligently and in all matters comply with professional ethics."³⁰¹ As part of the European Union, Sweden's lawyers are bound by European legislation. The Council of Bars and Law Societies of Europe adopted the Code of Conduct for European Lawyers in 1988.³⁰² The Code was amended in 2006 and applies to all cross-border activities of lawyers in the European Union and European Economic Area.

As members of the SBA, lawyers are required to maintain and develop their professional qualifications. The Board of the SBA may release additional regulations on lawyers' duties to undertake continuing professional training for this reason, and to provide information about this back to the Board. For this purpose, in 2003, the Board adopted the Swedish Regime for Continuing Professional Training of Advocates,³⁰³ which guidelines were last revised in 2008. Furthermore, the SBA has adopted regulations for the administration of clients' funds (money) and valuable documents (shares, bonds, debentures, bankbooks belonging to clients), and for keeping records of received engagements.³⁰⁴ Finally, additional provisions regulating lawyers' activities can be found in the Funds Accounting Act (1944:181) and in the Prohibition against Supply of Legal or Financial Services in Certain Cases Act (1985:354).³⁰⁵

The Swedish Regime for Continuing Professional Training

³⁰⁰ Sveriges Advokatsamfund (1887). *Advokatexamen*. Available at: <https://www.advokatsamfundet.se/Att-bli-advokat/Advokatexamen/> (accessed on 2019-11-04 at 10:17).

³⁰¹ Sveriges Advokatsamfund (1887). *Charter of the Swedish Bar Association*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/charter.pdf (accessed on 2019-10-31 at 08:15), p. 15.

³⁰² Sveriges Advokatsamfund (1887). *Code of Conduct for European Lawyers*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/advokatetik/2006_code_en.pdf (accessed on 2019-10-31 at 08:39).

³⁰³ Sveriges Advokatsamfund (1887). *The Swedish Regime for Continuing Professional Training of Advocates*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/regime_for_professional_training.pdf (accessed on 2019-10-31 at 08:49).

³⁰⁴ Sveriges Advokatsamfund (1887). *Accounting Regulations*. Available at: <https://www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/Accounting-regulations/> (accessed on 2019-10-31 at 09:00).

³⁰⁵ Sveriges Advokatsamfund (1887). *Rules on lawyers in other statutes*. Available at: <https://www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/Other-statutes/> (accessed on 2019-10-31 at 09:24).

of Advocates provides that lawyers be required to maintain and develop their professional qualifications throughout their careers.³⁰⁶ Furthermore, Chapter 8 of the Swedish Code of Judicial Procedure provides that lawyers have a responsibility to follow the ethics of a good advocate.³⁰⁷ Additionally, section 36 (Professional Duties) of the Charter of the SBA provides that lawyers must develop their professional qualifications.³⁰⁸

9. TECHNOLOGICAL INNOVATION AND ACCESS TO JUSTICE

In Sweden, 7 730 800 people (total population is 10 313 447) between the ages of 16 and 85 have access to the internet in 2019.³⁰⁹ Of this population, 6 577 300 have a mobile phone for personal use.³¹⁰ All parts of Sweden are accessible in terms of internet and mobile phone coverage.

A high level of internet access and mobile phone coverage are important factors when it comes to the relationship between inhabitants and public services in Sweden. An example: for non-emergency health services such as booking medical appointments, medical advice and accessing medical records, Sweden has a website and telephone number called 1177 *Vårdguiden* (1177 Health Guide).³¹¹ A patient in Sweden can call 1177 for medical advice or receive an appointment or visit the website 1177.se for these services and have access to their medical records. To identify themselves and log in to this website, they use an online identification service called Bank ID or Mobil Bank ID where you register your social security number and a personal code to access different online public services (e.g. tax authorities, health services, insurance services, student loans etc.). Government agencies use their websites as an online office and many

³⁰⁶ Sveriges Advokatsamfund (1887). *The Swedish Regime for Continuing Professional Training of Advocates*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/regime_for_professional_training.pdf (accessed on 2019-10-31 at 08:49).

³⁰⁷ Sveriges Advokatsamfund (1887). *Code of Conduct of the Swedish Bar Association*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf (accessed on 2019-10-31 at 08:27), p. 6.

³⁰⁸ Sveriges Advokatsamfund (1887). *The Swedish Regime for Continuing Professional Training of Advocates*. Available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_eng/regime_for_professional_training.pdf (accessed on 2019-10-31 at 08:49).

³⁰⁹ Statistiska Centralbyrån (SCB). Available at: http://www.statistikdatabasen.scb.se/pxweb/sv/ssd/START_LE_LE0108_LE0108D/LE0108T10/table/tableViewLayout1/ (accessed on 2019-11-27 at 10:53).

³¹⁰ *Ibid.*

³¹¹ 1177. Available at: <https://www.1177.se/> (accessed on 2019-11-28 at 14:13).

services are accessible without physical meetings.

Many legal practitioners, especially lawyers, use their websites as their primary online presence. They use this space to communicate their line of expertise, how to contact them and the kind of legal services that they offer. Some law firms offer short (15-20 min) consultation phone calls, free of charge.³¹² Social media platforms are also used as marketing tools.

One firm in Sweden, *Advokatfirman Defens*, has developed an app, offering free legal consultation and information through text messages.³¹³ A legal practitioners' network called Helpie Law also has an app where legal consultation is offered through text message and video calls.³¹⁴ It can be presumed that lawyers keep in contact with their clients through phone calls, text messages and e-mail in addition to in-person meetings.

Lawline, for example, is a network of lawyers and law students that operate a free legal consultation website, covering most legal questions.³¹⁵ Questions answered by Lawline are published (with discretion for the privacy of those asking) on the website and visitors can refer to these answers.

NGOs with special legal interests (e.g. asylum matters, child rights and violence against women) have an online presence to communicate which legal services they offer and some offer free legal consultation via telephone or e-mail. However, most NGO's that provide free legal aid have offices where persons can meet legal practitioners.³¹⁶

Although online legal services are a useful addition to traditional legal services, in-person meetings remain the dominant way for most people to access legal services. Online access is restricted mostly to brief consultations on small matters and to providing legal information. Face-to-face meetings remain important because for some people translation is needed (e.g. asylum law), and in some cases legal advice or consultation requires lengthy explanations and de-

³¹² Stockholms Advokatbyrå. Available at: <https://xn--advokatbyrstockholm-9wb.nu/> (accessed on 2019-11-28 at 11:27); Frisells Advokatbyrå. Available at: <https://frisellsadvokat.se/> (accessed on 2019-11-28 at 14:45).

³¹³ Law firm Defens. Available at: <https://www.defens.se/> (accessed on 2019-12-02 at 10:35).

³¹⁴ Helpie Law. Available at: <https://helpielaw.se/> (accessed on 2019-12-02 at 14:50).

³¹⁵ Lawline, online legal consultation. Available at: <https://www.lawline.se/> (accessed on 2019-12-02 at 13:45).

³¹⁶ Refugee Law Students. Available at: <http://www.asylrattstudenterna.se/> (Accessed on 2019-12-02 at 09:56); Swedish Refugee Law Centre. Available at: <http://sweref.org/om-oss/> (accessed 2019-12-02 at 10:56).

tailed accounts that cannot be contained to short answers in phone and e-mail conversations.

10. UNMET LEGAL NEEDS

As the current legal aid scheme in Sweden is structured, most of the population have to rely on legal expenses insurance, rather than public legal aid. Thus, the legal protection offered today is primarily through people's private household insurance and secondarily through publicly funded legal aid. Legal expenses insurance limits the type of legal services provided, since it only covers legal problems that involve litigation in court. The figures presented above on the use of legal aid in Sweden show that the great majority (90%) of those granted public legal aid are already before the court when they are granted legal aid, and the rest will most likely also eventually end up in court. In other words, out-of-court cases lose out when it comes to entitlement to legal protection, both through legal expenses insurance and public legal aid. The legal problems, even quite mundane ones, people experience with government agencies, employers, neighbours and landlords can have serious consequences if not resolved.³¹⁷ Thus, offering legal advice services can prevent legal problems from escalating. As previously pointed out, the hourly rate for a legal consultation (the prerequisite to applying for legal aid) is high enough to discourage people from seeking advice, and it can only be reduced in retrospect for those with no income or a very low one. The increasing numbers of people having the fee partly or fully waived due to their financial constraints indicates that more and more people cannot afford the legal consultations that are a prerequisite to being granted legal aid.

In addition, access to legal aid in administrative cases is limited and such cases are excluded from legal expenses insurance policies. A recent report from the Swedish Section of the International Commission of Jurists³¹⁸ concludes that administrative cases are not included in the state funded legal aid system and many plaintiffs wanting to pursue a case in court against a government agency cannot afford to appoint their own legal counsel. Restitution for costs of legal representation is not granted to those who pay for their own legal counsel either, which might deter even more people from pursuing

³¹⁷ Sandefur, 2009.

³¹⁸ Swedish Section of the International Commission of Jurists (2019) Programme for the Constitutional State of Sweden, p. 8. Available at: <https://www.icj-sweden.org/trashed/> (accessed on 2019-12-05 10:14).

actions in administrative cases. The commission goes on to discuss the increasing unavailability of legal aid, as an obstacle to access to justice and concludes that special attention and resources should be directed at administrative cases where the state is the counterpart. Discrimination cases are one of the areas of administrative cases that pose great difficulties for individuals who wish to pursue legal action. The commission suggests amendments in legal aid legislation and discrimination legislation that make it easier for individuals to pursue legal actions. They also suggest improving legislation on class action lawsuits by providing a civil society-run fund (funded by the state) to provide legal aid in labour and discrimination cases.³¹⁹

Furthermore, as has been discussed, there are access to justice issues relating to criminal legal aid (see section 5.7). The criteria for obtaining a public defence lawyer require the suspected offense to be of a certain degree of seriousness. If a suspect does not exercise their right to a public defence lawyer, the information received from an interrogation without the presence of a defence lawyer can be used against him or her later in the proceedings which, as we discussed under section 5.7, might be in breach of the European Convention on Human Rights.

11. PUBLIC LEGAL EDUCATION

In Sweden, public legal education is mostly found within the school system. The Swedish National Agency for Education (*Skolverket*) promotes fundamental values that uphold, in addition to the development and education of pupils, the inviolability of human life, individual freedom and integrity, the equal value of all people, equality between women and men, solidarity, an individual sense of justice, generosity, tolerance and responsibility.³²⁰ The school should also make clear to pupils and parents what rights and obligations the pupils and their guardians have. The Swedish National Agency for Education sets out goals and guidelines so that pupils can knowingly define and articulate ethical perspectives based on knowledge of human rights and basic democratic values, and so that schools and teachers can vigorously fight discrimination and degrading treatment

³¹⁹ Swedish Section of the International Commission of Jurists (2019) Programme for the Constitutional State of Sweden, p. 14-15. Available at: <https://www.icj-sweden.org/trashed/> (accessed on 2019-12-05 10:14).

³²⁰ Skolverket (2018) Curriculum for the compulsory school, preschool class and school-age educare 2011. Available at: <https://www.skolverket.se/getFile?file=3984> (accessed on 2019-12-02 at 11:55).

of individuals and groups.³²¹ Furthermore, during preschool, pupils should have the possibility to learn about children's rights in accordance with the Convention on the Rights of the Child (UNCRC).³²² Moreover, pupils should learn about norms and rules associated with their everyday lives, and why rules are necessary. Pupils should learn about ethnicity, gender roles, body image and consumption as well as critical scrutiny of how these phenomena are represented in the media and pop-culture, and about democratic values and principles and children's rights in accordance with the UNCRC.³²³

Another overarching theme that must be taught in schools is that of civics. Teaching should give pupils the preconditions to consider societal questions from different angles and to develop their own understanding of living conditions. Content should include, for instance, the importance of gender equality, how different interests and opinions materialise, how they are articulated and how different players try to influence society's development. In grades 1-3, as part of social studies (*samhällskunskap*) pupils learn about basic human rights and about the UNCRC.³²⁴ In grades 4-6, pupils learn about rights and the judicial system and about society's need for legislation, different laws and sanctions, crime and its consequences on the individual, family and society. During these years, pupils learn about human rights, their meaning and importance, including the rights of the child under the UNCRC.³²⁵ In grades 7-9, as part of social studies, legal education is quite extensive and pupils learn about a broad range of legal aspects. What constitutes discrimination under Swedish law, the position and rights of minorities such as the Sami people in Swedish society, democratic freedoms and legal rights, the legal system in Sweden and the principles of the rule of law.³²⁶ In grades 7-9, pupils also learn about consumer knowledge (*hem- och konsumentkunskap*) and consumers' rights and obligations.³²⁷ Pupils learn about the work that various organisations do to promote human rights and how human rights are violated around the world. They learn about Sweden's political system and the European Union, par-

³²¹ Ibid.

³²² Skolverket (2018) Curriculum for the Preschool Lpfö 98. Available at: <https://www.skolverket.se/getFile?file=2704> (accessed on 2019-12-04 at 10:08).

³²³ Skolverket (2018) Curriculum for the compulsory school, preschool class and school-age educare 2011. Available at: <https://www.skolverket.se/getFile?file=3984> (accessed on 2019-12-02 at 11:55).

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid.

liament, government, county councils and municipalities.³²⁸

The school curriculum for the upper secondary school (*gymnasieskolan*) promotes similar fundamental values, goals and guidelines focusing on democratic foundations such as human rights and fundamental democratic values.³²⁹ Schools should promote an educational environment that is against any form of discrimination, whether on the grounds of gender, ethnic affiliation, religion or other belief systems, transgender identity or its expression, sexual orientation, age or functional impairment, or any other forms of degrading treatment.³³⁰ According to the Education Act, education in schools should follow fundamental democratic values and human rights, covering the inviolability of people, the freedom and integrity of the individual, the equal value of all people, gender equality and solidarity between people.³³¹

Hence, the Swedish Education system includes a broad public legal education. However, it does not include, according to the curriculum, education on legal aid. Additionally, Sweden has not conducted any public information campaigns on legal aid and how to access it. Public libraries may offer legal information in the form of leaflets and access to pro bono lawyers and legal aid clinic run by law students (see section 5.11).³³² We suspect that the public awareness of how to apply for legal aid is quite low. The Legal Aid Authority noted low knowledge among the people who contacted them. In addition, because of interviews conducted with law students running a legal aid clinic in Lund, it appears that a common trend among those who sought their advice was a lack of knowledge about their rights and entitlements (see section 5.11). In general, how well a non-legally trained person comprehends Swedish laws vary for person to person with the younger generations as well as the well-educated probably having a better understanding of it.

12. GLOBAL EFFORTS ON ACCESS TO JUSTICE

In Sweden, there are transnational NGOs that collaborate with

³²⁸ Ibid.

³²⁹ Skolverket (2013) Curriculum for the upper secondary school. Available at: <https://www.skolverket.se/getFile?file=2975> (accessed on 2019-12-02 at 14:27).

³³⁰ Ibid.

³³¹ Ibid.

³³² See for example the case of the City library in Malmö Malmö Stad, Juridisk hjälp på Stadsbiblioteket. Available at: <https://malmo.se/Uppleva-och-gora/Biblioteken/Vara-bibliotek/Stadsbiblioteket/Program-pa-Stadsbiblioteket/Program-for-vuxna/Juridisk-hjalp.html> (accessed on 2019-12-04 at 11:27).

local legal practitioners and local NGOs to promote access to justice in specific areas. The focus of attention has been immigration law for NGOs such as the Red Cross, Save the Children and of course UNHCR.

In section 5, we discussed alternative legal aid and pro bono legal assistance where local organisations engage in efforts to improve access to justice. Major NGOs in Sweden also offer legal assistance and consultation, mainly concerning immigration and asylum. The Red Cross, for example, organises meetings (in local offices/civic centres) with legal practitioners conducting pro bono work for people with immigration questions. They offer information and consultation on asylum questions and, in some cases, they offer a legal counsel in asylum cases in immigration courts in Sweden.³³³

13. CONCLUSIONS

The rule of law underpins the Swedish legal system. Legal provisions support all public exercise of power and if this is not the case, there are appropriate legal channels to challenge such power and prevail. The governmental structure contains “checks and balances”, i.e. functions of control and oversight of state institutions, from ombudsmen working to ensure effective legal administration to the appeal system available for individuals to challenge public authorities’ decisions. Accessibility of legal services and thus possibility access to justice is, however, dependent on availability of those services.

Limited access to legal advice and minor assistance for problems outside of litigation is a consequence of the legal aid reform in 1997.³³⁴ Prior to the reform Sweden was known as a country coming close ‘to attaining the ideal of equal access to legal services for all’.³³⁵ Regan argues that the reform brought back the need for pro bono work by lawyers in civil cases,³³⁶ which today provides the free legal advice (albeit limited to 15 minute consultations in specific locations in Sweden) that public legal aid does not. Student legal clinics to some extent also cover the need for legal information and legal advice. Nonetheless, the structure of the current legal aid scheme in Sweden

³³³ The International Red Cross and Red Crescent Movement, Swedish section. Available at: <https://www.rodakorset.se/vad-vi-gor/folkratt-och-skydd/asyl/> (accessed on 2019-12-03 15:59).

³³⁴ Regan, 2003.

³³⁵ Kilian & Regan, 2004, p. 246.

³³⁶ Regan, 2001.

places considerable responsibility on the individual to identify their legal problem. In other words, the form of support that people might need to decide whether they have a legal problem or not, and how it can be solved, is costly.

We have also highlighted how the reform of legal aid policy has left some groups without help for their legal problems: for example, those with moderate means who do not have legal expenses insurance, are not poor enough to qualify for legal aid but may still not be able to afford a private lawyer. The same goes for those with moderate means who are not eligible for legal aid for work-related legal problem and who do not belong to a union. Taking into account the fact that fewer and fewer people meet the income criteria in the Legal Aid Act,³³⁷ the number of people who fall between the cracks will increase if the income ceiling is not raised. Thus, state funded legal aid, specifically the financial eligibility criteria, is in need of re-examination. The income criterion places a number of groups in society at a disadvantage to receive legal aid and in many cases, it does not cover the costs of legal proceedings to a satisfying degree. The fees for legal representation might deter low-income groups even if legal aid covers a certain amount.

In addition, access to legal aid in administrative cases is limited. The fact that administrative law cases are excluded from legal expenses insurance policies results in higher dependence on public legal aid. In practice, in administrative cases, the individual has to bear his/her own costs of legal representation, even when a case is successful. This indicates limited access to justice in legal matters where an individual may have to pursue a case in court against a government agency with very limited ability to pay for legal assistance. In line with the Swedish Section of the International Commission of Jurists³³⁸ and Wejedal,³³⁹ we suggest that administrative cases where the state is the counterparty should be eligible for publicly funded legal assistance during the process in order to strengthen the rule of law and access to justice.

Furthermore, related to criminal legal aid (see section 5.7), in order to strengthen access to justice we suggest the following: that the criteria to obtain a public defence lawyer should not (i) require

³³⁷ SOU, 2014.

³³⁸ Swedish Section of the International Commission of Jurists (2019) Programme for the Constitutional State of Sweden, p. 10. Available at: <https://www.icj-sweden.org/trashed/> (accessed on 2019-12-05 10:14).

³³⁹ Wejedal, 2017, p. 955ff.

the suspected offense to be of a certain degree of seriousness; (ii) put the responsibility on the suspect to ask for a public defender; and (iii) depend on a needs assessment by the prosecutor and the court. The first point is significant since the presence of a defence lawyer, regardless of the nature and seriousness of a crime, is crucial as a safeguard of individual rights and rule of law. A defence lawyer in criminal proceedings should not only be reserved to those who can afford to appoint their own. The second point relates to the first point as far as suspects (who in many cases lack legal expertise) might not understand the importance of having a defence lawyer present during hearings and interrogations with the police and prosecutors. Statements made by suspects in these circumstances may be used as evidence against them and therefore the counselling of a lawyer is important. The third point relates to the conflict of interests between the prosecution and the court on the one hand and the suspect on the other, i.e. the assessment of the need for a public counsel should not be up to the court or prosecution because the risk of punishment is on the individual under suspicion.

From an international perspective, the legal aid system and access to justice in Sweden in general could be considered both generous and comprehensive. However, in this report we have highlighted several shortcomings concerning civil, administrative and criminal legal aid. These examples cast a dark shadow over the promises of the welfare state and can be argued to contribute to weakening access to justice for certain groups of people. We have also identified some areas in need of improvement when it comes to access to justice.