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HET SEMINARIE VOOR PRIVAATRECHTELIJK PROCESRECHT
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o.l.v. Prof. Dr. Marcel STORME

PART XI

EFFECTIVENESS OF JUDICIAL PROTECTION AND THE CONSTITUTIONAL ORDER

Belgian Report
at the II International Congress
of Procedural Law

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Belgian Report
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with a foreword of
Prof. Dr. M. Storme

Kluwer Law and Taxation Publishers
Deventer/Netherlands
Antwerp • Boston • London • Frankfurt

Distribution in USA and Canada
Kluwer Law and Taxation
190 Old Derby Street
Hingham MA 02043
USA

ISBN 90 65 44 152 2

D/1983/2664/62

Effectiveness of Judicial Protection and the Constitutional Order

Foreword

When we were able to organise the first worldwide conference on procedural law in Ghent, it was expected that this international gathering would be repeated quite soon.
It took some effort to find a host country and a colleague who was prepared to take the responsibility for the organisation of the next conference.
This has now become possible and the next meeting will take place in Würzburg under the presidency of our dear colleague Professor W. Habscheid.
The conference at Ghent not only created many international contacts, but also stimulated the creation of national associations for procedural law.
Thus in Belgium the Interuniversity Center for Procedural Law was created. This association was responsible for the appointment of the national reporters for Belgium at the Würzburg Conference.
Although it might be considered preferable to group the reports according to subject matter, it was decided to publish the Belgian reports together.
Thanks to diligence of the authors* and the efforts of the publisher it was possible to produce these texts before the Conference.
It is a great pleasure for me to be able to present this collection of reports and to publish it in my procedural law series at Ghent.
I hope it will be a substantial contribution of Belgium to the Würzburg Conference.

Marcel Storme

Ghent, 14th of May, 1983

* The report of Dr. G. de Leval on 'Current Problems in the Law of execution of judgments' was already published by the Conférence du jeune barreau de Bruxelles in 1982.

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A socio-legal Approach of the Problems of Administration of Justice in Belgium

*Jean van Houtte**

In the seventies, the main source of criticism on the judicial apparatus in Belgium was the fact that the man in the street doesn't get his due in the judicial process. Everywhere alternative legal advisers turned up: law clinics were set up, consumer leagues were more listened to, but also unions and professional organizations got involved in the legal problems of the citizen. Nobody can assert that the "threshold" problem is solved now, but we have to admit that during the past few years another problem, i.e. the delays of the court has become more and more important. This lagging behind is seen as the main obstacle to an accessible judicial system.(1)

In this paper we try to indicate the (possible) contribution of sociology of law to the solution of both problems.

About the two problems there is an abundant literature. The need for empirical sociological research is put forward in several studies but apparently this expressed necessity is not easily converted into actual research projects. Within the Center of Sociology of Law of the University Faculties of St. Ignatius in Antwerp, two projects were set up regarding these problems. To highlight the problem and relevance of the sociological approach it seems most indicated to report on concrete projects. Theoretical papers abound but those can hardly give an idea of the reality of the research effort.

1. Problems of legal aid to marginal groups(2)

At the end of the seventies there was a need to strike a balance on the new initiatives which had been taken since a few years with regard to legal aid and advice. The question arises though if the initiatives indeed made the legal system more accessible for the citizen and if he could in this manner more easily effectuate his rights. What would be the cause if it didn't happen?

Within the framework of the research national project "Social Sciences", set up by the Ministerial Services for the Programmation of Scientific Policy, grants were awarded for the period 1978-1981 to do research on Legal Services for people with low and moderate means.(3)

In the project two parts can be distinguished. The first

part consists of a description of the initiatives in the general sphere of social legal aid and advice (a morphology of the situation). Consequently its characteristics were linked to effective demand for legal service and the achieved legal assistance (explanatory phase).

A. Initiatives in the sphere of general social legal services

Within the general social legal services, as it appeared in Belgium in 1979, we distinguish three categories: the Bar and the Chamber of Notaries, the Public Centers for Social Welfare (P.C.S.W.), Legal Clinics.

The Bar and the Chamber of Notaries are the organized professional groups of respectively the lawyers and the notaries. These professions offer their legal services on the market. The Bar and the Chamber of Notaries obtained several legal tasks, among other things with regard to internal control of the profession. The Bar was instructed by the law to run a general social legal service for people with low means.

The Public Centers for Social Welfare (P.C.S.W.) are legally charged with the organization of the public social and medical assistance. Particularly the new law of 1976 assigned a more prominent role to the P.C.S.W.'s. They are e.g. obliged to supply "all useful information". As a consequence a number of commissions have established legal services.

Legal Clinics finally are autonomous initiatives for legal advice which were set up at the beginning of the seventies, following the example of Anglo-Saxon experiments. Legal service is given by volunteers.

This diversity of initiatives results in a great variety of general social legal services. Within the general framework of legal aid and advice different accents are put.

One of our research objectives was to map this diversity.

Given the means at our disposal and given the measure of cooperation from different social legal help institutions, we were able to establish an identical registration system in seven legal service institutions for the period of February 1st. 1979 until April 30th 1979.

The services involved are two initiatives of the Bar (the Bureau for Consultation and Defense at Antwerp and a legal advice initiative of the Bar and the Chamber of Notaries in Bruges), three P.C.S.W.-initiatives of the Public Social Welfare Center (in Antwerp, Mol and Westerlo)

and two legal clinics (in Antwerp).

Before embarking on a qualitative analysis of the different institutions, we will first make a quantitative comparison of the demand. We reduced in principle the duration of registration in all institutions to three months, to make a more direct comparison between the different institutions possible.

Table: Number of clients for each legal institution during three months

Legal help services		*Number of clients*	
Bureau for Consultation and Defense	Bar of Antwerp	353	760
Mandatory assignments and assignments to persons in custody	Bar of Antwerp	407	760
Legal initiative Bruges		75	
Legal service P.C.S.W. Antwerp		31	
Legal service P.C.S.W. Westerlo		33	
Legal service P.C.S.W. Mol		59	
Legal clinic Antwerp South		253	
Legal clinic Antwerp North		191	
		1402	

Strictly speaking only those help institutions can be compared on the level of the demand which cover the same area.

In this manner the Bar of Antwerp, the legal help service of the P.C.S.W. Antwerp and the two law clinics can be compared.

The Bureau for Consultation and Defense of Antwerp gets eleven times more clients on its sessions than the legal advice service of the P.C.S.W. Antwerp. If we add the mandatory assignments and assignments to persons in custody this totals 25 times more clients. This considerable difference in number of clients between the two initiatives is the result of the fact that the Bar provides besides simple legal advice also more specialized help. In the Bureau for Consultation and Defense one can certainly get more different kinds of help than in the sessions of the P.C.S.W. Antwerp.

When we total the number of clients of the two law clinics, it turns out that they together attract more clients than the Bureau for Consultation and Defense. We have to keep in mind that besides these two law clinics, there are two other law clinics active in the same region.

In short, the majority of general social legal services is on the one hand situated at the Bureau and on the other

hand at the law clinics.

From the table it appears that in general the P.C.S.W.'s are obviously less called upon. They also started more recently.

In the legal services at study, foreigners as well as young people (under 20) are generally statistically under-represented. Considering sex and activity they give a pretty good reflexion of the Belgian population. However this is the overall picture. Between services large differences appear. E.g. the Bureau (Bureau for Consultation and Defense) attracts a relative low percentage of active persons, while one law clinic attracts the highest percentage (except for one).

In general clients of the general social legal services tend to be in a juridically more dependent position (tenants, employees, unemployed ...).

After these first morphological data we go on to a confrontation of demand and help realized.

B. The demand for general social legal advice and the offered legal assistance

New initiatives with regard to general social legal advice try on the one hand to find a solution for a problem which didn't get a chance so far and on the other hand to renew and expand the existing legal assistance.

The traditional demand with regard to legal services is located in the sphere of family law and penal code. The question arises if the "new" legal services cover the less traditional legal problems such as rent problems, social security problems ...

The traditional demand with regard to legal service is also related to court case assistance because one had to apply to the Pro Deo-bureau of the Bar. In the new initiatives do questions arise independent from on-going court cases?

The traditional demand with regard to legal help is, considering the social distance from the Pro Deo-bureau, an ultimate step, after the client himself has tried to do something about his problem.

Corresponding with the traditional demand there is a traditional form of legal aid: court case assistance considered as a specialized legal service. On the other hand giving information or advice, referring to another social service can be seen as "first line" legal service; some practical services (drafting documents, making contacts) are situated in between.

a. demand

Our experiences with the demand are not clear cut.

The legal problems covered are divergent, looking at them from the point of view of the "legal domain". The fact that the organizing authority works with professionals who are or aren't (also) active in the legal profession seems to matter. General social legal services involving lawyers and/or notaries attract more traditional legal problems, i.e. mainly in the sphere of family law. Initiatives set up without those professionals treat the less traditional legal problems like rent problems, social security problems, etc.

In two institutions we establish that a demand which involves less litigation is attracted. Notaries seem to attract a more preventive demand. The combination of social service and a salaried lawyer offers chances for a demand which involves less litigation. The law clinics though are not (very) successful in attracting this aspect (preventive and no litigation). They lack the tradition (which is the case with the notaries); they also don't link up with channels open for a wide variety of social problems (as the P.C.S.W. does).

The accessibility differs strongly depending on the legal service institution. The law clinics succeed in realizing a (more) direct access, regardless of the fact that they are oriented towards the neighbourhood or not. More than half of their clients have not had any contact with other services before. In their turn the P.C.S.W.'s and the Bar-notaries initiative are doing better than the Bureau (Bureau for Consultation and Defense). If the clients of both legal clinics and P.C.S.W.'s had any previous contacts this usually is with social service rather than with legal service. For the two Bar-initiatives the relation is reversed: there are previously more judicial than social contacts.

b. services rendered

The pattern of assistance of the general social legal services at study is mainly determined by the type of professionals employed. The presence of lawyers (and notaries) results in a predominately restricted first line activity. This consists above all of giving information, providing limited advice and mainly in the Bureau, referring and assigning. In those general social legal services where the lawyers are not (as well) active on the

free market, we notice that a much broader first line legal service is realized. The main feature of this is that the part of the practical services gets more attention (30 to 50 percent of the cases are drafting and making contacts).

Only the Bureau can offer a full specialized service (assistance in court cases). This has its influence on the offered first line activities: to a large extent this "first line" functions as an instrument for selecting a pro deo lawyer. Indeed it appears from the study that half of the people looking for help only get a referal and not concrete help. On the contrary those who are not referred to a lawyer get some limited actual help. As a result we have a very differentiated help offer: or the assignment of a pro deo lawyer without direct help, or direct limited help without a referal.

Conclusion

Initiatives to renew legal aid and advice can not always sever themselves from the traditional patterns. This has to do with the organizational "constraints" which are not always kept in mind. The organizational structure of the offer prefigures the demand as well as the services rendered. Similar results can be found in foreign studies.

Traditional structures, e.g. the Bar, have difficulties to attract a non-traditional demand and to develop the appropriate help, not fitting into the classical profession of a lawyer.

The voluntary work of the law clinics is hindered by obstacles which handicap their good intentions (turn-over, administrative support, training).

New forms of legal help with an innovative structure, e.g. a lawyer employed within the P.C.S.W., seem to attract a new demand and to be able to render an appropriate type of help.

From the policy making point of view a number of conclusions can be drawn.

Each form of legal assistance not only has to develop new initiatives keeping ideal objectives in mind, but also has to be aware of its own organizational constraints which perhaps with the right approach can be partially eliminated. There is a need for sociological monitoring, evaluation of the objectives and the results.

On the level of the general (national) government we have to conclude that a pluralistic organizational structure is necessary, considering the limited radius of action of each form of organization. A flexible and of

necessity participatory structure is indispensible. The licensing and subsidy policy should take this diversity into account.

2. Delay in the courts

The new Judicial Code dates from 1970. Despite of the reforms it introduced, one has stated "force est de constater qu'à certains égards, le service public ayant un palais en ville suscite des critiques et surtout de grandes inquiétudes. Rendre la justice est avant tout l'art de terminer les procès en donnant, dans un délai raisonnable, une solution définitive à une situation contentieuse. De ce point de vue, en 1979, le diagnostic est sèvère. A divers niveaux et dans plusieurs secteurs, la durée des procédures est devenue intolérable: longueur des instructions, attentes interminables des conclusions de certains plaideurs, manoeuvres dilatoires, délais parfois incroyables pour obtenir une fixation, durée de certains délibérés sont des symptômes alarmants. Notre justice souffre de langueur. Parfois l'inefficacité est telle qu'il n'est pas exagéré de parler de paralysie, de quasi-déni de justice.".

These alarming words were spoken by Professor Albert Fettweis in his introductory speech for the Francqui Chair in Law during the academic year 1979-80.(4)

What could be the contribution of the socio-legal research regarding this problem of delay in court?

Let us first give an overview of some solutions which are suggested by legal specialists.

M. Storme expects much of a closer cooperation between the presidents of the courts and the dean (bâtonnier) of the local bar. A. Fettweis, on the contrary, is not convinced that they would be able to improve the functioning of respectively magistrates and advocates. However, he emphasizes the role of the legislature. A few alterations of the law, which would be fairly easy to edit, would be sufficient to make the judicial procedures far more efficient.(5) From the side of the Judiciary a claim is made for an expansion of their numerical strength.

Similar suggestions must be examined on their merits. However, it is not enough to restrict oneself to an exchange of ideas and wishes. Only with the help of an accompanying socio-legal approach one can get rid of the issue of delay. Otherwise, the impact of the proposed measures remains uncertain.

However, the Judiciary is not convinced of the usefulness

and the necessity of a socio-legal approach. "In the procedural area the lawyers" ancient instincts prevail: look to the past and thus foster stability, continuity, and orderliness. These instincts have produced a standard approach to law reform: discern a social evil; legislate a supposed remedy; go on the next perceived evil. So long as lawmakers were satisfied by the remedial measure, there is no need to test it in the real world."(6)

The usefulness of an adequate empirical approach can be demonstrated at two levels: the general policy and the practice of the local courts.

The general policy is first of all a business of the legislator, but also the Minister of Justice has to play an important role in it. It is obvious that it needs adequate empirical data. Of course, there are the judicial statistics on civil courts which are published in Belgium by the National Institute for Statistics. But they show the typical defects of the traditional court statistics. Their content is poor, inaccurate and unreliable; they are published with a considerable delay; the tables are unreadable and of almost no interest for possible users. Consequently, they are hardly used.

The lack of content of the traditional statistics is not difficult to prove. Information on the nature of the cases treated by the court is not systematically supplied. Some specific headings (e.g. on divorce, adoption) are being used, but even in these cases the data are rather elementary and with little explanation power. One finds almost nothing about the course of the lawsuits, except some indirect indications about delays of the cases. For each year only the number of newly introduced and settled cases is registered.

The remaining defects have to do with the way statistics are produced. In the respective jurisdictions lists are being filled out in which the number of juridical acts is tabulated. While the date are being collected a number of problems arise. It is an additional burden for the clerks' office. The bad quality of the data provided can also be explained by the fact that the statistical work is a very marginal duty for both local and central Ministry personnel. An additional problem is the lack of statistical training of the personnel involved. Nevertheless the statistics are of vital importance for the producers. Both the number of clerks' registry and magistrates is decided on the basis of these statistics. Consequently, it is hardly surprising that a systematic bias arises, mostly in favour of the producers. In some courts the number of cases is inflated by dividing one case, comprising several claims,

into different cases, one for each claim. Sometimes provisional sentences are rather artificially created.

The records are centrally aggregated into statistics which are published with long delays. In Belgium one usually has to wait five to six years.

For all these reasons it is understandable that the government does not trust its own statistics. E.g. for determining the staffing of the courts in Belgium, more adequate data are collected "ad hoc" by the competent authorities.

Taking into account the foregoing, it is obvious that the production of valid and reliable statistics is a matter of the highest importance for the general policy, if it wants to passess an empirical basis for its action.

This supposes the construction of an adequate data-system. However, this can be conceived differently. Depending on the data it contains, it can fulfill several functions.

It can be restricted to the general characteristics of the cases or include the different steps of the procedure more or less extensively.

In the first alternative one obtains information useful for the general policy. At the level of the local courts this information on the general course of affairs can be used for the evaluation of the progress of the cases.

The second option enables a more efficient management of the activities of the record-office and the court with the help of a computer or terminal. It is possible to retrieve the "status questionis" of each case at every moment. Also a more general state of affairs can be obtained immediately. This data-system could also produce documents which would facilitate the tasks of the record-office, e.g. the design of the session-role.

The sight into these needs on a general and local level, induced the Minister of Justice in 1980 to charge the Centre for Sociology of Law with a study regarding the processing of data on the activities of the courts and tribunals.

Our study was made up to two stages. First, a comparative research of the situation in some surrounding countries was performed. Then a case-study of the tribunal of first instance in Antwerp was developed. On the basis of these acquirements it became possible to develop a databank system producing as well solid and reliable statistical material for the general policy as a useful instrumentarium for the management of the procedures at the local level. Hence, a useful contribution is made for the solution of the delay in court.

After our comparative study of the already existing data-systems, the French system looked most adequate. Consequently, we have started from this as a basis.(7)

Successively, we will treat the relevant data, which are included in the data-system and the method for the collection and the processing of the data.

The relevant data

They can be classified into three headings.

A.: Introduction. This category covers: data on the nature of the case (ratione materiae) and the nature of the procedure, as well on previous steps in the procedure.

B.: Parties. In this heading information is given on the parties, their role in the case and their representation.

C.: Settlement. The various steps in the course of procedure are included in this category.

Method

When a case is introduced, the clerk takes a set of carbon forms. What is written on the first page is copied on the following pages. On the basis of the introductory document, the headings A and B are filled in. One of the forms, the so-called statistical introductory form, containing information on the headings A and B is detached and sent to the statistical center for processing. Every step in the judicial procedure is filled in in heading C. Finally, when the case has come to an end in one way or another, another form containing the information on the three headings is also sent to the statistical center.

The instrumentarium as we have designed and briefly described, seems to have the possibility to build up an adequate data-system being useful as well for the general policy as for the administration of a local court.

It enables the production of judicial statistics for the general policy. The system, however, contains not only information on the number of cases, but also on the nature and the course of the cases. The statistics are reliable because the production is completely integrated in the work of the courts themselves. They are so to speak a natural by-product of the all-day routine courtadministration. The gathering of the statistics does not involve supplementary work for the clerk personnel. Consequently, the probability

of producing biased statistics has strongly decreased.

Due to the fact that the introductory form and the final form can be processed immediately, statistics can be produced without delay.

The also collected data enable the general policy to get a real insight into the bottle-necks. Traditional statistics don't do so, because they lack information on the course of the cases. Also the new developed German data-system lacks the possibility to sketch a dynamic picture of the cases.(8) It is restricted to the settled cases. In our data-system data are collected as well on the beginning as on the termination of the cases. Also information is processed on the nature (ratione materiae) of the cases. This is a relevant factor since the course of time differs strongly according to the nature of the case. Summarizing, our data-system enables the production of adequate statistics. But it can do more. It also enables a better management of the procedures at the level of the local courts.

Because of the profound study of the documents and the working of the record-office it was possible to design the headings A, B and C in such a way that they can contain all the relevant data of the procedure. An adapted codebook helps the standardisation of the data, which does not only improve the surveyability, but also facilitates the use of the computer. It is also possible to rationalize and to modernize the work of the record-office by means of the forms. The existing registers of the general and special role and the many other indexes can abolish. Finally our data-system is in accordance with some evolutions taking place in the procedural law, in which a more active role is assigned to the judge and the record-office. This implies that the judge and the record office have enough means at their disposal for their intervention in the procedure.

Sometimes one is disappointed that the existing possibilities for activation which are available in the Judicial Code are not used at all. This is mostly explained by the unwillingness of the concerned parties or by the inadequacy of the rule. Nevertheless, the question must be raised if this has nothing to do with the lack of appropriate logistics of the record-office. Still Fettweis is convinced that a few reforms in the Judicial Code would allow judge and record-office to master the procedure better and to accelerate it. However, it seems obvious to us that these measures will not be effective unless at the same time an operational data-system is introduced in the courts for a better management. We