

RÄTTEN TILL BITRÄDE

Om biträdeskostnaders hantering
vid svenska domstolar



GÖTEBORGS UNIVERSITET
HANDELSHÖGSKOLAN

Akademisk avhandling

som för avläggande av juris doktorsexamen i processrätt
offentligt framläggs och försvaras fredagen den 1 december 2017, kl. 10.00
i SKF-salen, Handelshögskolan vid Göteborgs universitet,
Vasagatan 1, Göteborg

av

Sebastian Wejedal,
jur. kand.

Abstract: Wejedal, Sebastian, “The right to counsel – On the allocation of counsel fees before Swedish courts”. Published by: Juridiska institutionens skriftserie, skrift nr 024, 2017. Printed by: Brand Factory AB, Källered, Sweden. ISBN: 978-91-87869-11-2.

The term “Access to Justice” (AtJ) refers to the fundamental notion that all people – even disadvantaged groups of society – should enjoy effective legal/judicial protection, ultimately through the courts. Accordingly, the principal targets of the AtJ-movement’s criticism have been so called “Access Barriers”, i.e. different legal and/or practical obstacles that make it difficult, or even impossible, for the general public to turn to the courts in order to vindicate their rights. The most significant barrier is legal fees in general, and counsel fees in particular.

In a vast number of cases, the European Court of Human Rights (ECtHR) has concluded that law – substantive as well as procedural – is a rather complicated matter, which is often unintelligible to the layperson. Consequently, many self-represented litigants are neither accorded effective access to court (AtC), nor a fair trial – simply because they lack the skills necessary to present their case properly and competently. Therefore, the right to counsel has gradually evolved into a fundamental human right – not just in criminal cases, but also under the civil head of Article 6 of the European Convention on Human Rights (ECHR).

Before Swedish courts, the parties to a dispute are always free to hire an attorney to conduct their case. In this narrow sense, the “right to counsel” is unconditional under Swedish law – both before the general courts and the administrative courts. In practice, however, the right to be assisted by counsel is conditional, since hiring a lawyer is always associated with a cost. In this way, a right that is theoretically bestowed on all is de facto denied many by the realities of economics. Or as the saying goes: “Justice is open to all; like the Ritz Hotel.”

It is an undeniable fact that most litigants will not be able to obtain counsel, if counsel fees are not covered by a legal aid and/or legal protection insurance scheme, or at least reimbursed through cost shifting rules. Against this background, this thesis examines how counsel fees are handled before Swedish courts in relation to the imbricated notions of AtJ and AtC. More specifically, the thesis discusses (1) “party funding” (i.e. cost shifting), (2) “public funding” (i.e. legal aid) and (3) “third-party funding” (i.e. legal insurance), with a comparative perspective on the Swedish civil, criminal and administrative procedure. Since a right to counsel can be derived from Article 6 of the ECHR, Swedish law is also compared with the case law of the ECtHR. Lastly, the thesis criticises “simplification of procedure” as an unrealistic alternative to lawyer-conducted litigation, at least in court proceedings which are adversarial in structure.

The thesis argues that all people are not guaranteed equal AtJ in Sweden and that Swedish law – in some respects – is not even in compliance with the standards set by the ECtHR. With regard to the general courts, it is argued that the rules concerning assignment of public defence counsel are constructed in a way that infringes the suspect’s fair trial rights under Article 6. Before administrative courts, moreover, it is argued that the absence of legal aid (as well as legal insurances), combined with a default application of the American (“no-way” fee shifting) rule give rise to Access Barriers, since most individual parties (usually “one shot litigants”) are forced to proceed pro se in disputes against highly skilled adversaries, viz. state and municipal agencies (“repeat player litigants”). In view of this asymmetry, it is asserted that self-represented litigants are not always guaranteed effective access to a court/a fair trial.

Keywords: right to legal counsel/representation/assistance, lawyer advantage, access to lawyers, access to justice (AtJ), access to court (AtC), fair trial, equality of arms, counsel fees, fee shifting, legal aid, legal insurance, inquisitorial/adversarial procedure, simplification of procedure, lawyerless litigation, pro se litigation, self-representation, LIP:s, human rights, ECHR/ECtHR.

Sebastian Wejedal, Department of Law, School of Business, Economics and Law at University of Gothenburg, Box 650, SE-405 30 Gothenburg, Sweden. www.law.gu.se