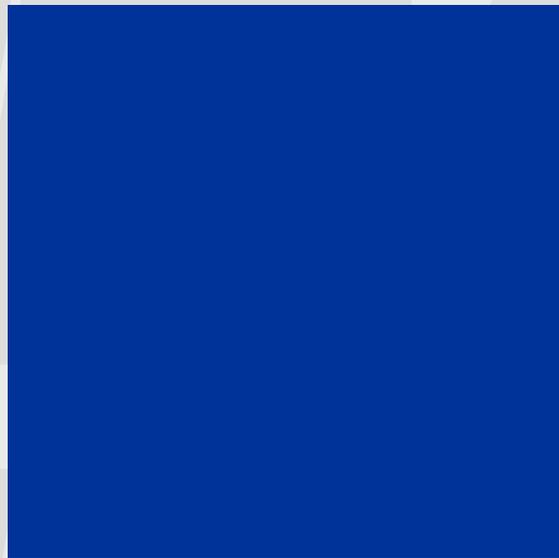


BEITRÄGE ZUR SOZIALEN SICHERHEIT

Nationale Plattform zur Prävention und Bekämpfung von Armut

Rechtsberatung und Rechtsschutz von Armutsbetroffenen in der Sozialhilfe

Forschungsbericht Nr. 18/20



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NATIONALE PLATFORM
GEGEN
ARMUT

Die Nationale Plattform gegen Armut

Die Nationale Plattform zur Prävention und Bekämpfung von Armut unterstützt die Umsetzung der im Nationalen Programm gegen Armut 2014–2018 erarbeiteten Empfehlungen. Sie dient dem Austausch unter Fachpersonen und stellt fundierte Grundlagen bereit zu ausgewählten Schwerpunktthemen in den Handlungsfeldern Bildungschancen, soziale und berufliche Integration sowie allgemeine Lebensbedingungen. Die Nationale Plattform gegen Armut ist auf sechs Jahre befristet (2019–2024). Sie wird getragen von Bund, Kantonen, Städten und Gemeinden sowie Organisationen der Zivilgesellschaft.

Weitere Informationen unter www.gegenarmut.ch

Die präsentierten Folgerungen und Empfehlungen geben nicht notwendigerweise die Meinung des Bundesamtes für Sozialversicherungen oder der Steuergruppe wieder.

- Autoren/Autorinnen:** Gesine Fuchs*, Marina Abbas*, Melanie Studer°, Nikola Koschmieder*, Kurt Pärli°, Anne Meier°, Nathalie Blanchet*, Marion Ruch°
(*HSLU / Soziale Arbeit | °Uni Basel / Juristische Fakultät)
Hochschule Luzern / Soziale Arbeit
Werftstrasse 1
CH-6002 Luzern
Tel. +41 (0) 41 367 49 18
E-Mail: gesine.fuchs@hslu.ch
Internet: www.hslu.ch/de-ch/soziale-arbeit
- Auskünfte:** Philipp Dubach
Geschäftsfeld Familie, Generationen und Gesellschaft
Bundesamt für Sozialversicherungen
Effingerstrasse 20
CH-3003 Bern
Tel. +41 (0) 58 480 89 28
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Schlussbericht

Projektteam:

Gesine Fuchs

Marina Abbas

Melanie Studer

Nikola Koschmieder

Kurt Pärli

Anne Meier

unter Mitarbeit von Nathalie Blanchet und Marion Ruch

Kontakt

Hochschule Luzern – Soziale Arbeit

Institut Sozialmanagement, Sozialpolitik und Prävention

Prof. PD Dr. Gesine Fuchs

Werftstrasse 1

Postfach 2945

CH 6002 Luzern

T +41 41 367 49 18

gesine.fuchs@hslu.ch

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Foreword

Social assistance is the ultimate safety net within Switzerland's social security system. That is why conflicts between social services and their clients can have serious repercussions: for those affected, it is a question of securing their material livelihood. Legal protection in the social assistance arena is consequently a sensitive and important issue.

At events organised by the National Platform against Poverty (NAPA), people affected by poverty have repeatedly voiced their need for low-barrier, independent counselling when conflicts arise with the authorities. For this reason it was decided to delve more deeply into this topic by means of a study: To what extent is legal protection guaranteed in the area of social assistance? What role do the various independent legal advice services play? Are urgent measures required to improve legal protection?

The present study takes an interdisciplinary approach to these questions. It interprets legal protection as more than just the legal issue of whether those affected receive a decision from an impartial government agency within a reasonable period of time. It also examines whether administrative, social or economic obstacles exist that de facto deny the affected access to justice.

This complex, balanced analysis does not make any blanket judgements of the situation in Switzerland as a whole – the differences in cantonal law, in the practices of the social services and in the local support services on offer are simply too great for that. But the study does make unmistakably clear that there *are* gaps in the legal protection in the social assistance arena and that some of them are serious.

In order to improve access to justice, the study recommends action at three levels. These are: legislation (right to independent legal advice, free legal assistance); the practices of the social services (clear and comprehensible information that is suited to the situation and the target audience); and strengthening independent legal advice services. These recommendations are based on the idea that people living in poverty have to be able to understand the decisions made by the social assistance authorities and feel confident they are being treated fairly. Existing examples show that measures of this kind can have a de-escalating effect and enhance quality.

NAPA's steering group considers it important that the study be given close consideration. The platform will organise events to discuss the study results and recommendations with experts and those directly affected. The steering group also calls on those responsible at cantonal and local level to take on board the findings of the study and assess what action they can take.

On behalf of the steering group of the National Platform against Poverty

Ludwig Gärtner

Vice-Director of the Federal Social Insurance Office and
Head of the "Family, Generations and Society" Domain

The key facts in brief

The present study addresses the question of how legal protection is guaranteed for people living in poverty who are receiving social assistance and what role the respective advice centres play in this context. Legal protection is understood as the possibility, in the case of legal disputes, of receiving a decision from an impartial government agency within a reasonable period of time. Access to such an agency may prove difficult for a variety of reasons, whether they be administrative, social or economic obstacles in terms of knowledge, a sense of what is right or wrong, or the availability of independent and legal representation. The investigation focuses on counselling centres offering legal advice, because they can facilitate actual access to legal protection rapidly and directly. The right to legal protection also performs a vital integrative function. An awareness of being able to rely on a functioning legal protection system in cases where rights may have been violated plays a key role in integrating individuals into the community and promoting social involvement. There are three overriding questions at the centre of the study:

1. **Problem analysis:** At present, are significant difficulties faced when it comes to guaranteeing legal protection for people living in poverty who are receiving social assistance and – if so – what form do these difficulties take?
2. **Legal advice and ombudspersons' services:** How are legal advisory, arbitration and mediation services contributing to the provision of legal protection for people living in poverty and do the current measures need to be optimised?
3. Are there any complementary **approaches** in place to improve legal protection where necessary?

These questions are examined from a sociolegal perspective, which sees structural, procedural and situational factors as relevant to legal protection. This includes material and procedural law in addition to the actual nature of appeal proceedings. Also investigated are the high degree of vulnerability on the part of people living in poverty, their legal knowledge and awareness as well as their effective access to advice and information. Key factors on the social services front are legal expertise, the use of discretionary powers, as well as information on social assistance recipients. Ultimately, advice centres with their focus areas, their concepts and their funding are important actors in the legal protection arena. The investigation examines these factors in terms of their *application* and their *significance* with regard to legal protection in the social assistance sector.

Combining qualitative and quantitative approaches, the study employs investigation methods applied in both the legal and the social sciences. The study is divided into seven work packages, namely:

1. Legal-dogmatic analysis of the legal basis
2. Interviews with bodies of appeal and analysis of legal rulings
3. Online survey of advice centres, ombudspersons' offices and lawyers
4. Interviews with persons living in poverty, either with or without experience of appeals
5. Interviews with experts at advice centres and ombudspersons' offices
6. Interviews with legal services within social assistance authorities
7. Compilation and assessment of possible approaches to adopt

The survey of advice centres, ombudspersons' offices and lawyers was conducted nationwide. A more in-depth investigation was conducted in four case study cantons (GE, FR, ZH, SG). The analytical framework of the study allows not only to assess the contribution of advice centres to legal protection and access to justice, but also to identify those factors in the responsibility of other actors.

A need for legal protection and legal advice follows from the (potential) conflicts in social assistance. Indeed, such conflicts can arise even when support and counselling services are ideally organised and funded. As in other areas of social life, the law can then be used to resolve conflicts in a binding and non-violent manner. The reasons for conflicts in the social assistance sector are many and varied. Notable examples are the small-scale organisation, the existential significance of social assistance (if it is not granted, the only other option is the much lower emergency aid provided under Art. 12 of the Swiss Federal Constitution; where these eligibility requirements are not met, the degrading prospect of a life of begging looms), frequent cost shifting between social insurance schemes and social assistance, as well as a relatively high degree of politicisation of social assistance.

Besides these rather structural factors, topics with particular potential to cause conflict are encountered in practice. These include eligibility checks, repayments and reimbursements, the amount of social assistance provided and (impending) sanctions. And when all is said and done, misunderstandings are also a cause of conflict: those affected often do not understand communications and decisions.

The right to legal protection is assured in the Constitution and under international law; it is founded in particular in Art. 29 of the Swiss Federal Constitution and Art. 6 of the European Convention on Human Rights (ECHR). These norms obligate the state to *guarantee* that, in as broad a manner as possible, this right becomes a reality for those who are entitled to it. Consequently, concrete and active steps need to be taken to ensure that the right to legal protection is also effectively accorded to people living in poverty. To ascertain whether further steps are necessary here and if so which ones, the concrete circumstances of the social assistance recipients and their position in the social assistance system also have to be taken into consideration. Both factors are characterised by an increased level of vulnerability. Effective access to legal protection, including in particular access to free legal assistance, including legal representation, calls for *information, advice and representation* as postulated for example by the UN Convention on the Rights of People with Disabilities (UN CRPD) for another vulnerable group and can be achieved by consistently implementing entitlement to *assistance and care* in accordance with Art. 12 of the Swiss Federal Constitution, which also includes entitlement to legal advice.

In order to assess to what extent legal protection is *practical and effective*, concrete procedural rules and realities need to be observed. To this end, appeal proceedings and outcomes were examined and processed from the perspective of the different actors. Observations in the four case study cantons show that the rule of law is being complied with, but they also reveal considerable gaps. (Overly) short deadlines and the possibility of levying the costs of proceedings can hinder effective access to the law for social assistance recipients. The provision of free legal assistance continues to prove particularly problematic in practise. Overall, social assistance legislation appears to be complex and opaque.

The findings suggest that, contrary to current practice, legal representation should generally be assumed as necessary if legal protection is to be effective. Given that the course of proceedings is set by the lower courts, it is advisable above all to grant free legal assistance under an internal administrative process. In the interests of a fair hearing and of gaining acceptance of the proceedings, it is also advisable to invite social assistance recipients to verbal deliberations both more frequently and at an early stage in the proceedings.

In order to ascertain the contribution that advice centres and ombudspersons' offices make to legal protection, a Switzerland-wide online survey of over 300 centres and offices was conducted, 131 of which responded and 102 of which offered legal advice. These include contact points offering a general range of (social) advisory services for disadvantaged people (general advice centres), advice centres addressing specific areas and issues (e.g. women's refuges, family, disability; issue-specific advice centres) which can

correlate significantly with living in poverty, and ultimately offices providing legal advice under the aegis of a public body (public advice centres).

Independent advice centres and public ombudspersons' offices are essential for providing legal protection for people living in poverty. Both general and more detailed legal advice are important here. General legal advice comprises providing information and highlighting rights and obligations. Legal questions can often be answered in a single briefing. More detailed legal advice is case-specific, also entails advice on the chances of winning a complaint and often requires more than one briefing.

*Switzerland's advice centre landscape is manifold and diverse. The majority of the 102 advice centres surveyed offering legal advice (very) often provide advice to people living in poverty. 34 advice centres offer detailed legal advice in the area of social assistance legislation. Their funding is relatively complex: As a rule, they are reliant on several sources of funding and relatively heavily dependant on donations. Only very few centres providing advice in the area of social assistance legislation (SAL advice centres) impose tough access criteria, but a shortage of resources does result in practical obstacles to access, strict triage rules and waiting times. Centres which, in addition to other forms of advice, exclusively provide general legal advice (i.e. blanket information, no detailed case counselling) are an important first contact point for people living in poverty. Where detailed legal advice is provided, the *general advice centres for the socially disadvantaged are especially important in terms of legal protection*. General advice centres of this kind seldom impose access criteria, they engage lawyers more frequently and provide more detailed legal advice with legal representation more often. Augmenting their ranks would be key for legal protection. A clear overall need for action within the advice centre sector has been identified, especially as regards access to legal advice and legal representation. Among other things, more advice centres are required that can also offer detailed advice on social assistance legislation.*

Public ombudspersons' offices are also essential in terms of legal protection for people living in poverty. What clearly sets them apart from advice centres is their substantial powers vis-à-vis the authorities as well as the means to initiate changes that go beyond the individual case. They are locally based all-party agencies.

In order to establish a fair support relationship, it is necessary for clients to be informed fully and clearly about their rights and how they can assert claims. This is frequently not the case, and social services need to be reminded of their mandate. The interviews with the various actors reveal that social services largely provide support when their interests and those of the social assistance recipients coincide, namely, when asserting claims against third parties (e.g. social insurance and private law claims). On the other hand, they tend to practise constraint when it is a matter of enforcing claims against social assistance offices. All actors, including social services, have acknowledged the problem of a lack of clear and accessible information and in some cases taken action. An awareness that procedural and basic rights must always be respected is essential for effective legal protection.

Lawyers are key players in terms of providing effective legal protection to people living in poverty when procedural steps are necessary. Over 220 lawyers specialising in social insurance and/or social assistance legislation responded to our survey, including 84 in SAL. Based on the practices reported, they are frequently able to successfully settle disputes before needing to go to court or able to convey the finding that the authorities acted lawfully, which in turn emphasises their relevance. Employing a variety of instruments, the majority of lawyers surveyed endeavour to achieve a high level of accessibility, whether by means of cost containment, overcoming inhibitions, providing foreign language resources or cooperating with civil society organisations. Specialisation in SAL is rare. A possible explanation is the restrictive nature of free legal representation, which discourages lawyers. This is why advice centres offering expertise in SAL are all the more crucial.

More social work action on the part of social services avoids conflicts and contributes to effective legal protection. Social assistance recipients are a heterogeneous group of people. People living in poverty often find themselves in precarious situations. This requires the social services personnel to act in a way that follows the central tenet and image of humanity that social work embodies. It calls also for working conditions that permit this. People living in poverty possess very different levels of legal awareness and legal knowledge. To guarantee equal access to the law for everyone, social services must inform their clients in detail about their rights and duties as well as the independent advice options and services available to them. There are gaps here in many places.

To sum up, the study has identified a need for action and approaches with regard to legislation, the authorities, advice centres and sensitisation work.

At the legislative level

- The right to independent legal advice is a fundamental right with precedents in other areas of the law (e.g. the Victim Support Act). It is to be implemented by means of legal entitlement to advice and information and funding from independent advice centres.
- Access to legal information needs to be improved in keeping with the rule of law and the principle of public access.
- Free legal assistance, including legal representation, must be expanded and should be increasingly provided at the first procedural stage (internal administrative process).
- Further possible actions in the area of procedural law include, in particular, verbal deliberations as part of the social assistance process, generally not imposing deadlines of less than 30 days, and refraining from levying the costs of proceedings.

At the level of the authorities

- Social assistance recipients must be informed proactively, in detail and commensurately about their rights and duties, the legal situation and their options for appeal.
- Information from the social assistance authorities should be thoroughly checked to ensure it is clear and comprehensible and to reduce any unnecessary complexity.
- Information from the social assistance authorities should be published in multiple languages, be current, easily accessible and cover the whole catchment area.
- Social assistance authorities must provide support in clarifying and asserting social insurance claims.
- More time for social work and social services not only improves reintegration, it also prevents conflicts. This calls for a continuous professionalization and, where necessary, regionalisation of services.

At the level of the advice centres

- To be funded by public money, a targeted upscaling of legal advice centres in respect of their resources and professional skills is necessary.
- Barriers to access to independent advice must be kept low in order to ensure that the most vulnerable groups have recourse to legal advice.
- Easily accessible centres providing general legal advice should be given optimum support in their triage function.
- Networking and expertise should be fostered at the legal advice centres.
- Setting up local public ombudspersons' offices outside larger cities is desirable.