LEGAL AID IN CIVIL PROCEEDINGS BETWEEN WISHFUL THOUGHT AND ACCOMPLISHED FACT

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EXECUTIVE SUMMARY

This thesis explored legal aid in civil proceedings from national, international and supranational perspective. It tended to grasp the overarching features spreading through the competences of national state, the European Court of Human Rights (hereinafter ECtHR) and the European Union (hereinafter EU). It gave the overview of the legal aid inception in these jurisdictions, their development and future prospects.

This study employed descriptive and comparative research methodology and draws heavily on the work of academic commentators, court jurisprudence and normative documents. At the outset a brief overview of the basic concepts of access to justice and civil legal aid is provided. Moving to the specific affairs within each of these jurisdictions it elaborated upon the standards set by the ECtHR regarding civil legal. Moreover two strands of fair trial guarantee created in order to introduce civil legal aid into the realm of the European Convention on Human Rights were clarified. It went on to examine the EU's civil legal aid rationale where besides regulating the cross border aspect of legal aid, legal aid is utilized as a tool of combating social exclusion. In addition the EU utilizes different approaches towards access to justice utilized in its foreign and internal policy.

Finally, on the state level civil legal aid feels most comfortable since it's ways are imbedded into the community and the problems one faces are mostly under state competence. However, the state grapples with the viability of legal aid schemes and experiments' with privately funded arrangements in order to alleviate the pressure on public funds. But in doing so, it has to respect the principles made clear by the ECtHR and to accommodate the EU dimension of it's legal system.

The principal conclusion was that a holistic approach towards access to justice via civil legal aid is attainable only by engagement and partnership of the jurisdictions discussed. In addition, this thesis demonstrated that, despite the utility of other methods of achieving access to justice, civil legal aid remains at the centre of the discussion. Moreover, it has been shown that civil legal aid is a irreplaceable precondition not only in a juridical sense of achieving equality before the law, but as a means of fighting social exclusion and dispersing state benefits among the less well off citizens of one society

1. INTRODUCTION

"curia pauperibus causa est"
The courts are closed to the poor
Ovid, III Amores viii, line *55*

During the past 60 or so years we could witness remarkable move in international legal arena towards placing the individual at the center of attention. Bernhardt is arguing that multilateral human rights treaties are fundamentally different from that in other fields since they regulate the states' *"behavior towards their own citizens"*.[1] On the other hand rights guaranteed at the international level are still being vindicated nationally. While the focus of international human rights law was on endowing the individual with wide array of rights little has been said regarding practical means of their protection. By this I do not have in mind the formal availability of legal remedies but rather their "practical and effective" utilization.

Access to court and civil legal aid have not been explicitly stipulated in international human rights instruments but rather construed to be a part of fair trial guarantees. Having this in mind Hunt and Beloff claim that articles envisaging right to a fair trial are "*arguably the most fundamental in each instrument, because on them depends the ultimate ability to vindicate the other rights guaranteed by the other provisions, as well as the individual's ordinary civil rights"*.[2] This is where civil legal aid comes into play, and from this perspective it should be a paramount right since it enables an individual to assert all other rights. Put differently, having

[1] Bernhardt, *Thoughts on the Interpretation of Human-Rights Treaties*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 65, 65-66 (Matscher and Petzold eds., 1988) cited in Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 H.R.L. REV. 57, 60 (2005)
[2] See Murray Hunt & Michael J. Beloff, *The Green Paper on Legal Aid and International Human Rights Law*, 1 E.H.R.L.R 5, 7 (1996)

loads of rights formally without being capable to vindicate them effectively places an individual in the same position as having none.

Criminal legal aid in this respect differ from a civil one since the state is "coming after you" and is, quite correctly, obliged to guarantee due process including legal aid if needed.[3] On the other hand in civil proceedings state is not "coming after you" and thus the obligation to guarantee effective access to court is much less obvious.[4] Furthermore, civil legal aid necessitates huge funds which, again, the state is traditionally not so happy to provide. This point concerns positive obligations of the state and, going back to the civil and political versus social and economic rights debate, discusses what is the appropriate role of the state in the field of human rights. It is all too often forgotten that rights guaranteed are not just letters on the piece of paper but rather a precondition for achieving human dignity. Failing to acknowledge the importance of civil legal aid illustrates that forcefully. This being said it is not awkward then that civil legal aid is seldom guaranteed in international context and that the state tends to impinge on it as it see fit.

Then again, there is no doubt that the role of the state is changing. It is not limited any more to merely setting the rules of the game, providing formal equality and letting individual interest do the rest. In another words, it seems that there is a move from formalism to efficiency. As Gorialy and Paterson are arguing "*twentieth-century notions of equality demand that all citizens have equal and effective access to justice*"[5] Developed countries have devoted considerable resources in financing free legal aid[6] while others depend on international funding

[3] Jeremy McBride, *International Standards on Access to Justice, in* ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE-FORUM REPORT 21, 23 (PILI et al. eds., 2003)
[4] Ibid.
[5] T.Goriely & A.Paterson, *Introduction: Resourcing Civil Justice, in* A READER ON RESOURCING CIVIL JUSTICE 1, 4 (T.Goriely & A.Paterson eds., 1996)
[6] Annual budget allocated to legal aid per inhabitant as a percentage of per capita GDP in 2006 was as follows: the UK (England and Wales)-0,20%, the Netherlands and Norway-0,06%, Sweden-0.05%, Ireland-0.04, 0,02%,

to address problems of free legal aid[7]. But the state is not the only player any longer. International actors are building their way into the previously internal matter of access to justice. Since obligation on the part of the state is not explicitly defined in international human rights treaties finding an appropriate modus of legal aid was part of an internal political process. However for the Member States of the Council of Europe (hereinafter COE) and those of the EU this debate to a certain extent escapes purely internal context and moves to international arena. This is especially important for the countries whose objective is EU membership. Namely, EU is using its soft power to influence the accessing states to establish, among other things, legal aid system.[8]

Possible problem with this development is that, as we shall demonstrate latter, the ECtHR never established an obligation on the part of the state to set up civil legal aid service within its jurisdiction.[9] It only scrutinized concrete cases and was considerate not to put too big of a burden on the states.

Accordingly, this thesis employs cross jurisdictional approach towards civil legal aid. It endeavors to locate overarching features of access to justice and legal aid and to examine mutual influence and interactions taking place among different legal orders.

Bearing in mind the lack of cogent international rules on civil legal aid I will provide answers to following questions: What are the contemporary tendencies regarding legal aid in international,

Finland-0,03%, in Germany and France-0.02%.For this see EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), EUROPEAN JUDICIAL SYSTEMS, EFFICIENCY AND QUALITY OF JUSTICE 35 (2008).available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1041073&SecMode=1&DocId=1314568&Usage=2 last visited 27.11.2009.

[7] Daniel S. Manning, *Development of a Civil Legal Aid System: Issues for Consideration*, *in* MAKING LEGAL AID A REALITY: A RESOURCE BOOK FOR POLICY MAKERS AND CIVIL SOCIETY 61, 68 (PILI 2009) available at http://www.pili.org/images/pdf/making-legal-aid-a-reality-06-02-2009-web.pdf, last visited 02.11.2009

[8] Roger Smith, *Human Rights and Access to Justice*, 14 INT'L J. LEGAL PROF. 261, 269 (2007)

[9] A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 103 (2004).

supranational and national settings. Are there any overarching standards that permeate them or they are completely detached one from another?

In what follows I shall outline the basic structure of this paper and main features of the final conclusions. This thesis considers notion of civil legal aid as one of the, some might argue most important, means aimed at achieving access to justice. It will lead us through the ECtHR civil legal aid jurisprudence, labyrinth of acquis communautaire and provide us with an overview of the UK legal aid system. Similarly, it will consider the main concepts underpinning civil legal aid such as rule of law and fair trial. Also it will consider two notions of legal aid and argue that only one of them is to some extent bound by international standards. The other is designed as a device aimed at facilitating social and economic rights. This dual nature of legal aid was identified back in 1970s by Cappelletti and Gordley [10]. One notion is juridical where *"Legal aid is seen as a kind of armory in which the poor are outfitted before trial with the weapons naturally possessed by the rich"*[11] The other is related to welfare rights and "*by attacking broad social conditions such as slums or malnutrition it promotes an effective economic and social equality"*[12]

We shall look at whether there are viable alternatives to publicly funded civil legal aid and if so what are their strengths and weaknesses. Alternatives to legal aid based on privately funded arrangements are not problematic as such since legal aid is not an end in itself but a means aimed at achieving access to justice.

This paper tends to explore the aspect of cross-border civil legal aid within the supranational setting. Here we shall see how the underlying rational of civil legal aid in cross

[10] Mauro Cappelletti and James Gordley, *Legal aid: Modern Themes and Variations*, 24 STAN. L. REV.347, 392 (1971-1972)
[11] Ibid.
[12] Ibid.

border context is departing from the main access to justice discourse and moving towards enhancing common market by facilitating free movement of persons

It seems that the issue of legal aid before the European Court of Justice (hereinafter ECJ) has not been addressed in its entirety. We shall consider legal aid in the focus of newly introduced Open Method of Coordination (hereinafter OMC) policies of the EU.

Finally, this thesis explores promising ramifications of the Lisbon treaty in the field of access to justice and civil legal aid. It analyses different visions regarding place of the human rights within the EU legal order. The EU approach in access to justice is also controversial, on the one hand there are forces drawing to larger integration and on the other there are Member States selfishly preserving their competencies from further communitarization.

With the purpose of providing answers on the issues sketched above we will need to draw upon the ECJ jurisprudence, the scholarly works of academics, provisions of the EU legislation, a variety of policy papers, provisions of the Lisbon treaty and other developments. Similarly, we will look at the innovative methods of interpretation employed by the ECtHR in order to give way to more effective vindication of rights guaranteed. Insight into the past and current developments of the UK legal aid system will provide us with national outlook on civil legal aid. This is important since the main mechanism providing civil legal aid are being shaped within the state jurisdiction. Outside the international context there is a growing awareness that access to justice and civil legal aid can contribute to social inclusion and help citizens cope with economic hardship.

It will come to acknowledge that these three legal orders considered are not isolated one from another but that there is significant interaction among them with the overall intent of making vindication of rights more effective. For example, the EU by means of accession

conditionality requires from the prospective Member States to establish free legal aid service[13]. Similarly, ECtHR legal aid jurisprudence is exerting influence on the EU through newly adopted Charter of rights[14]. It goes without saying that ECtHR jurisprudence has a significant impact on national policies and accordingly that of civil legal aid as well. Alternatives to legal aid such as conditional fee arrangements are being scrutinized by the ECtHR in order to establish if the new solutions are in line with the Convention requirements. In addition Council Directive 2002/8/EC (hereinafter Legal Aid Directive) addresses this issue as well thus responding to the new trend taking place among the Member States. Similarly, the question of differentiating two strands of legal aid jurisprudence discussed below has not be addressed by the ECtHR. This thesis will argue that states should modify its civil legal aid selection criteria so as to align with the ECtHR jurisprudence.

Scope of this thesis will be focused on access to justice in general and civil legal aid in particular. Given that legal aid stems from and is embedded in access to justice discourse this study shall use latter to an extent necessary to clarify the origins, limitations and prospect of the former. Criminal legal aid will be employed only to the extent necessary to elucidate main features of civil legal aid.

Notwithstanding that this paper shall refer to all major human rights instruments it will predominately focus upon three legal orders: European convention of Human rights (hereinafter ECHR), the EU and the United Kingdom. From the temporal perspective developments that took place in the last sixty years will be considered.

[13] Roger Smith, *Human Rights and Access to Justice*, 14 INT'L J. LEGAL PROF. 261, 269 (2007)
[14] See Explanations Relating to the Charter of Fundamental Rights, (2007/C 303/02), 14.12.2007, explanation on Article 47, para.3, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF,last access date 08.11.2008.

2. CHAPTER I
ACCESS TO JUSTICE

2.1 Introduction of the basic concept

It is interesting to note that access to justice was introduced under international law in the first half of 20th century as a right of aliens and responsibility of host country[15]. Obviously, before modern development of human rights access to justice was not a main issue to be addressed.

Today access to justice is an essential prerequisite of any democratic state based on the rule of law, equality and respect for human rights. Yet, as odd as it may be, this term escapes all attempts to be explicitly defined. According to Parker it encompasses several issues such *as "accessibility of court processes for resolving disputes over mutual rights and responsibilities, the availability of adequate legal representation in criminal trials, access to more informal legal processes such as small claims courts and administrative tribunals, a availability of legal advice and public education."*[16]

According to Francioni access to justice is *"right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law"*.[17]

Concept of access to justice in the modern era has its origins in the classical concept of the rule of law and the welfare state. There is a strong relation between the rule of law and access

[15] Francesco Francioni, *The Right of Access to Justice under Customary International Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 9 (Francesco Francioni ed., 2007).
[16] CHRISTINE PARKER, JUST LAWYERS-REGULATION AND ACCESS TO JUSTICE, 30-31 (1999).
[17] Francesco Francioni, *The Right of Access to Justice under Customary International Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 3-4 (Francesco Francioni ed., 2007).

to justice in the sense that later is a precondition of the former.[18] The ultimate value of the concept of the rule of law is equality[19] and the main thrust that surfaced in modern times is towards making equality effective.[20] It is no longer considered satisfactory that people are formally equal before the law, quite the opposite this equality should be made effective[21]. Certainly, as noted by Smith *"A society with maximum access to justice is a society in which the exclusion from fair determination of rights and duties is not affected by the respective social, economic political or other Inequalities of the parties to any dispute*".[22] Therefore access to justice and ultimately civil legal aid are means employed towards achieving the final end of equality.

Access to justice is also linked with the welfare state. It is considered that access to justice and legal aid should facilitate vindication of the welfare rights of the marginal members of one society. Along these lines Cappeleti is stating that "*the movement to enforce rights on behalf of the underprivileged is an effort to realize promises of the Welfare state*".[23]

Going beyond formal equality and making justice accessible to citizens implies a specific policy undertaken by the state. This policy outlines the general approach and introduces specific systems aimed at enabling majority of people or a specific target group access to justice. Access to justice can be facilitated through various means such as publicly funded legal aid, arrangement

[18] See *Golder v United Kingdom* (App.No.4451/70), February 21, 1975. para. 34 (ECtHR established clear connection between rule of law and access to justice by stating that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.")

[19] See Ian Ward, *Europe and the "principles" of article 6*, 11 K.C.L.J. 105, 109 (2000), ("A rule of law in any political community is never an end. It is merely a jurisprudential instrument, a means. The idea, or end, which is intended to facilitate is, of course, equality".)

[20] T.Goriely & A.Paterson, *Introduction: Resourcing Civil Justice*, *in* A READER ON RESOURCING CIVIL JUSTICE 1, 3 (T.Goriely & A.Paterson eds., 1996) (in previous centuries, equality before the law was often purely formal in character, so that a nominal, but ineffective right to go to court was sufficient. This, it is argued, is no longer sufficient)

[21] Ibid. at 4

[22] ROGER SMITH, JUSTICE: REDRESSING THE BALANCE 9 (1997)

[23] See Mauro Cappelletti & Bryan Garth, Foreword *Access to Justice as a focus of research*, 1 WINDSOR Y.B. ACCESS JUST., at xx (1981)

of the civil procedure so that it doesn't impede access to courts, reasonable court fees. We can add to this legal expenses insurance (hereinafter LEI), different models of contingent fee agreements (hereinafter CFA), simplification of procedure etc. But what ever method employed to achieve access to justice it needs to encompass some form of publicly funded civil legal aid since the most vulnerable often cannot make use of any other method

Therefore, although access to justice can be achieved through different means in its narrower sense it corresponds to the free legal aid in civil proceedings.[24] This narrower scope of access to justice will be the subject of my research.

2.2 International instruments

Access to justice, even if not expressly worded, is guaranteed by major international human rights agreements. These agreements are mostly focused on procedural right to a fair trial. Therefore we can say that access to justice can be derived from:

Article 8 of the Universal Declaration of Human Rights[25],

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[26],

Article 25 of the American Convention on Human Rights[27]

Article 7.1 of the African Charter on Human and Peoples' Rights[28]

[24] Francesco Francioni, *The Right of Access to Justice under Customary International Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 1 (Francesco Francioni ed., 2007). ("access to justice can be used to describe the legal aid for the needy, in the absence of which judicial remedies would be available only to those who dispose of the financial resources necessary the, often prohibitive, cost of lawyers and the administration of justice")

[25] The Universal Declaration of Human Rights, adopted on December 10 1948 by the General assembly of the United Nations, available at http://www.un.org/en/documents/udhr/, last visited 07.11.2009.

[26] The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on November 4, 1950, entry into force on September 3, 1953, available at http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG last visited 07.11.2009.

[27] The American Convention on Human Rights adopted on November 22. 1969, entry into force on July 18, 1978, available at http://www.oas.org/juridico/English/treaties/b-32.html last access date 07.11.2009.

Article 14.3 (b) and (d), of the International Covenant on Civil and Political Rights (ICCPR)[29], Article 47 of the European Charter of Fundamental Rights.[30]

This last instrument is paramount since it explicitly mentions access to justice and makes no distinction between criminal and civil legal aid. Charter is due to become legally binding upon the ratification of the Lisbon treaty.

As we will see later the biggest hindrance for larger engagement of Member States of the COE is the ECtHR's hesitation, in the absence of the provision that expressly states this obligation, to interpret the Convention so as to impose a larger financial burden on the states. Similarly, while regulating the cross border aspect of legal aid, the EU lacks competencies to engage in substantive harmonization of legal aid systems in the Member States. Other instruments explicitly dealing with access to justice and legal aid are the Hague Convention on international access to justice[31], European agreement on the Transmission of Applications for legal aid[32], Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.[33]

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[28] African Charter on Human and Peoples' Rights, adopted on June 27. 1981, entry into force on October 21, 1986, available at http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf last visited 07.11.2009.

[29] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, entry into force on March 23, 1976, in accordance with Art. 49, available at: http://www.un.org/millennium/law/iv-4.htm

[30] Charter of Fundamental Rights of the European Union solemnly proclaimed by the presidents of the European Parliament, the Council and the Commission in the European Council in Nice, December 2000. available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf last visited 25.11.2009.

[31] Hague Convention on international access to justice concluded on October 25, 1980 within the Hague Conference on Private International law, entry into force on March 1,1988 available at: http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=91 last visited 09.11.2009

[32] European Agreement on the Transmission of Applications for Legal Aid signed January 27, 1977 within the Council of Europe, entry into force on April 23, 1983, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/092.htm last visited 25.11.2009.

[33] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. (L 26/41), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:026:0041:0041:EN:PDF last visited 22.11.2009.

2.3.Free legal aid in civil proceedings

2.3.1 Introduction of the basic concept

Unlike the criminal legal aid, right to civil legal aid is not explicitly stipulated in international human rights law. Nevertheless right to civil legal aid has been recognized by jurisprudence of the ECtHR. However, as McBride rightly suggested, the right to free legal assistance *"is much weaker in civil proceedings. It is considered most essential when highly complex and emotional issues such as family cases are discussed."*[34] There is no widely accepted definition of civil legal aid which is why some authors are defining it negatively à propos criminal legal aid"[35] Therefore we can associate free legal assistance in civil proceedings with specific situations where certain persons are faced with insuperable obstacles in accessing justice due to their social position, lack of financial resources and complexity of the case concerned. The ECtHR case-law provides us with useful guidelines in assessing which cases are eligible for free legal assistance in civil proceedings. Bearing in mind the delicate position of the prospective applicants McBride rightly points out that access to justice is *"one of the most significant issues before the European Court of Human rights"*.[36]

[34] Jeremy McBride, *International Standards on Access to Justice*, *in* ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE-FORUM REPORT 21, 23 (PILI et al. eds., 2003)
[35] Daniel S. Manning, *Development of a Civil Legal Aid System: Issues for Consideration*, *in* MAKING LEGAL AID A REALITY: A RESOURCE BOOK FOR POLICY MAKERS AND CIVIL SOCIETY 61, 62 (PILI 2009) available at http://www.pili.org/images/pdf/making-legal-aid-a-reality-06-02-2009-web.pdf, last visited 02.11.2009 (the author defines civil legal aid as "provision of legal assistance in anything other than criminal matters for people who are poor, disenfranchised, or otherwise excluded from society")
[36] Jeremy McBride, *International Standards on Access to Justice*, *in* ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE-FORUM REPORT 21, 23 (PILI et al. eds., 2003)

2.3.2 Two faces of civil legal aid

Legal aid is not a self standing value in itself. It is rather means to an end. What are these ends one might ask? I argue that they are two separate values. First value is a formal one. Role of legal aid is facilitating access to justice, to courts before all, and ensuring a fair trial. It is more connected to civil and political rights, although it has its economic component.[37] Second value is much broader and its breadth expands over a wide range of benefits. It is, generally speaking, connected with the redistribution of resources from rich to poor. Therefore, we can say that legal aid has two faces or that it wears two hats.

One hat is embedded in traditional civil and political rights discourse and stems from the concept of the rule of law on the one side and the right to a fair trial on the other.[38] Put differently, legal aid should ensure, or at least contribute to, access to justice of each and every citizen. It has its origins in the medieval ages.[39] Access to justice in this context means that person can address the court or other state institution in order to have his legal claim adjudicated. This position was supported by the so called "effectiveness doctrine" established by the ECtHR.[40] In addition legal aid aims to ensure equality of arms between the litigants. To be precise it endeavors to make certain that one party is not put in a substantial disadvantage *vis a vis* the other during the proceedings.[41] Fox has this notion of legal aid in mind when he passionately argues that *" Legal aid is not another form of welfare. The provision of an adequate*

[37] Economic component of this notion of legal aid is connected to the resources available for facilitating access to courts and fair trial. This problem was tackled by the ECtHR in the Aire case. See *Airey v Ireland,* (App. No. 6289/73), October 9, 1979, para.26. (economic aspect dealt with in Airey is much more narrower in scope than welfare notion of legal aid which is all about social and economic rights.)

[38] See *Golder v United Kingdom* (App.No.4451/70), February 21, 1975, para 34. ("in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.")

[39] 1215 Magna Carta para. 40 ("To no one will we sell, to no one deny or delay right or justice.") available at http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html

[40] See *Airey v Ireland,* (App. No. 6289/73), October 9, 1979, para. 24, ("The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective")

[41] See *X v Germany* (App. No. 2857/66), decision of the Commission, May 22,1969 and *G.S. v Germany* (App. No. 2804/66), decision of the Commission, July 16, 1968.

system of justice available to all cannot be treated as another budgetary item…. It is a matter of duty for the government to ensure that it has sufficient funds, and to apply them to what is a core essential of organized society."[42] Similar line of reasoning has been employed by Grey while discussing that "*on equity grounds it can be argued that justice is a fundamental right in a way which differentiates it from most other services or goods and, consequently, that excluding individuals from the legal system purely on grounds of income is an infringement of this right."*[43]

Second model of legal aid is developed much later and is related to expansion of social and economic rights under the welfare state. In this sense legal aid systems are *"vehicles to secure the effectiveness of other parts of the welfare apparatus."*[44] Its ways are embedded into the legal system thus enabling poor people access to benefits such as health, housing, social security, education etc. If the state is poor or developing, legal aid will not be used towards this end since the public purse is empty. In this notion of legal aid states are not bound by international standards since legal aid system stems from political process and reflects the balance struck among the political forces of one society. Along these lines Johnson discusses that "*Legal aid itself improves nobody's welfare, except the income it furnishes to the providers. However, legal aid might have a key function by providing access to resources not available otherwise.*[45]

Cappelleltti and Gordley contributing to 1970/80s legal aid "crusade" identified pretty much the same dualism of legal aid.[46] Consequently legal aid can be perceived as a "*juridical*

[42] See RUSSELL FOX, JUSTICE IN THE TWENTY-FIRST CENTURY 88-89 (2000).
[43] Alastair M. Gray, *The Reform of Legal Aid*, 10 OXF REV ECON POL 51, 51-52 (1994)
[44] Jon T. Johnsen, *Progressive legal services in Norway?, 6* Int'l J. Legal Prof. 261, 263 (1999)
[45] Ibid at 305-06
[46] Mauro Cappelletti and James Gordley, *Legal aid: Modern Themes and Variations*, 24 STAN. L. REV.347, 391 (1971-1972) "Western nations now have two basic and alternative methods of protecting a right. They may follow the essentially juridical approach of the last century of the last century, combining it where necessary with affirmative state action. Alternatively, they may institute a state social services program resembling the modern welfare apparatus."

right"[47] or as a "*welfare right*".[48] Although this twofold nature of legal aid disclosed more than 35 years ago still stands we can attach some new developments to it that emerged in the meantime.[49] Juridical aspect of legal aid obtained international recognition in the ECtHR jurisprudence. It is well established that right to a fair trial can be violated in the absence or inadequate application of legal aid provisions. Truth be told, the state is granted certain margin of appreciation in facilitating access to justice. Nevertheless, there are standards which the state has to respect while designing or providing legal aid and more broadly access to justice.[50] In this sense, although there is no explicit obligation for states to establish legal aid schemes there is an implicit one.

[47] Ibid. at 392-93 The authors are relating juridical right to legal aid with traditional approach in protecting civil and political rights which is "essentially legalistic and individual: it involves the promulgation of legal standards defining the obligations of the state, the vesting of corresponding legal rights in individuals, and the provision of judicial or quasi-judicial redress if these state obligations are not met."

[48] Ibid. at 407-08 Authors are describing welfare face of legal aid as "break(ing) radically with the traditional pattern… establishment of a concrete government program, funded to the limit that political and budgetary constraints will allow, and staffed with experts trained in social welfare administration….. it strives to provide aid that the needy will actually be able to use rather than merely have the formal liberty to use." Finally the authors conclude by commenting the unorthodox approach of the method they have outlined with remark that it is "'"legal answer" of the modern world to problems of legal aid"

[49] While elaborating upon the juridical notion of legal aid Cappelleti highlighted the new developments regarding civil legal aid before ECtHR. These developments preceded even the Aire case and were associated to legal aid from the equality of arms perspective. Clearly, the authors study needs to be updated. For this see Mauro Cappelletti and James Gordley, *Legal aid: Modern Themes and Variations*, 24 STAN. L. REV.347, 382 (1971-1972)

[50] For example some provisions of the UK 1999 Access to Justice Act were inserted into the final text in order to assure compliance with the ECHR , see Lord Justice Jackson, *Review of Civil Litigation Costs- Preliminary Report*, Vol.1, Ch.12, para.2.2 (2009), available at http://www.judiciary.gov.uk/about_judiciary/cost-review/docs-prelim-report/volume1.pdf last visited Nov.19.2009.

3. CHAPTER 2
CONTEMPORARY TENDENCIES ON THE STATE LEVEL AND PRIVATE FUNDING ARRANGEMENTS

The comprehensive and inclusive legal aid schemes proved to be unsustainable from the fiscal perspective and ultimately inefficient.[51] Moorhead and Pleasance explain that old endeavors toward universality of access to justice and comprehensive legal aid programs are being abandoned and that weight is being given to "*targeting services to those most in need*".[52] They continue by saying that "*the old models have been appropriated but the ideology has not: the focus is on efficiency and effectiveness rather than equality and ideals*".[53] Therefore, against this "*shift from equality to effectiveness*"[54] we should examine modern strategies employed towards facilitating access to justice To that end in this chapter I will look at the development of legal aid in one representative jurisdiction, as well as alternative approaches to access to justice designed to complement publicly funded programs.

3.1 Case study of the UK

If we want to gain insight into the trends of legal aid policy in purely internal situation we should look at the development and the current state of legal aid affairs in a particular country. Only by examining the internal political, social and legal debate in the particular setting we would be able to draw lessons for the future. Similarly, it would be convenient if that country is the "trendsetter" within legal aid discourse which would make the lessons learned more valuable.

[51] See Lord Justice Jackson, *Review of Civil Litigation Costs- Preliminary Report*, Vol.1, Ch.12, para.1.5 - 1.6 (2009), available at http://www.judiciary.gov.uk/about_judiciary/cost-review/docs-prelim-report/volume1.pdf (last visited Nov.19.2009). [hereinafter Review of Civil Litigation Costs]
[52] Richard Moorhead & Pascoe Pleasance, *Access to Justice after Universalism: Introduction*, 30 J.L. & SOC'Y 1, 2 (2003)
[53] Ibid.
[54] Ibid.

That being said, the logical choice is the United Kingdom[55] where legal aid in the modern sense of the word was conceived. In addition the UK is considered a leader in legal aid programs measured by the amount of resources devoted.[56] For the purpose of this paper I will briefly outline the inception of legal aid system, its development until the end of the 20th century. More attention will be devoted to the new civil legal aid scheme under the 1999 Access to Justice Act (hereinafter AJA) that laid foundations of the modern legal aid scheme, and current developments in the UK legal aid discourse.

3.1.1 Development of legal aid system

Before 1949 dignity of legal profession imposed a moral obligation on its members to provide some legal assistance without remuneration. Therefore, legal aid work in the UK was being performed on the charitable bases.[57] Needless to say, this approach was not put into practice without controversy.[58] The problem of legal aid was exacerbated by the consequences of the ongoing war.[59] After the end of the war new Labor government, following the Rucshliffe Committee Report, sponsored Legal Aid and Advice Act along with the overall welfare state social reforms.[60] The Act laid foundations for the modern legal aid system.

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[55] Within the UK there are three different legal aid systems, namely England and Wales, Scotland and Northern Ireland. In this paper the legal aid scheme of England and Wales will be examined.

[56] According to 2006 data the UK (England and Wales) allocates the highest amount of money annually for legal aid per inhabitant-56, 2 Euros. See EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), EUROPEAN JUDICIAL SYSTEMS, EFFICIENCY AND QUALITY OF JUSTICE 34 (2008).available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1041073&SecMode=1&DocId=1314568&Usage=2 (last visited 27.11.2009).

[57] Tamara Goriely, *Gratuitous assistance to the "ill-dressed": debating civil legal aid in England and Wales from 1914 to 1939*, 13 INT'L J. LEGAL PROF. 41, 41 (2006)

[58] Ibid.

[59] See Alastair M. Gray, *The Reform of Legal Aid*, 10 OXF REV ECON POL 51, 54 (1994)

[60] See A. Paterson and D. Nelken, *The Evolution of legal services in Britain: pragmatic welfarism or demand creation?*, 4 WINDSOR Y.B. ACCESS JUST. 98, 102-03 (1984) (the authors are stating that apart from Labor government "a crucial factor contributing to the reforms(concerning legal aid) was the recognition by the Lord Chancellor's Office and the Law Society that the increasing demand for the legal services for the poor could no longer be met under existing arrangements which left the profession inadequately remunerated for the work done.")

For the present purpose I will use the Moorhead's division of legal aid development in the UK on *"growth, crisis and reinvention"*.[61] Since its inception legal aid has been steadily expanding. It has been argued that two factors contributed to the rise of costs.[62] In 1960s the method of remuneration was changed by introducing hourly rates.[63] Furthermore, national legal aid fund replaced local funds that previously furnished legal aid expenditures.[64] Additionally, in legal aid academic discourse of that time legal aid system was being criticized as inefficient from the position of *"unmet legal need"* and "*rights"*[65] perspective. Basically, they were arguing for expansion of legal aid activities. These developments were followed by massive increase in legal aid spending. In addition to financial eligibility threshold there was also a merit test under which a large number of cases could be subsumed.[66] Consequently the costs skyrocketed.

Moorhead placed the margin between the growth and crisis phase in the second half of 1980s.[67] Yet, one cannot really divide these stages since one is corollary of the other. The rationale of the scheme was that legal aid fund was paying legal practitioners on hourly basis. This situation most likely triggered what in economic parlance came to be known as the

[61] Richard Moorhead, *Third Way Regulation? Community Legal Service Partnerships, 64* MOD. L. REV. 543, 543 (2001)

[62] Department for Constitutional Affairs, *A Fairer Deal for Legal Aid*, at 8 (2005), available at http://www.dca.gov.uk/laid/laidfullpaper.pdf last visited 22.11.2009

[63] Ibid.

[64] Ibid.

[65] Unmet legal need was perceived as a "gap between the rights "promised" by the welfares state and their application in the real world" while rights position could be summarized as situation where "many interests of the poor , e.g., social security, employment and tenancy "rights "had not been transformed into, or not been perceived as legal property rights" See A. Paterson and D. Nelken, *The Evolution of legal services in Britain: pragmatic welfarism or demand creation?*, 4 WINDSOR Y.B. ACCESS JUST. 98, 104-05 (1984)

[66] Pleasance is describing the merit test in the following manner "The legal merits of applications for civil legal aid were determined exclusively by reference to their importance to individual applicants, and in accordance with a broad funding principle intended to reflect the decision making of a reasonably minded private client." *Pascoe Pleasence, Legal Services Commission,"*Targeting and Access to Justice: An Introduction to Legal Aid Reform in England and Wales" *Pan Pacific Legal Aid Conference, Tokyo, 6-7 December 2001*,p. 1, available at http://www.lsrc.org.uk/publications/PPLAC.pdf last visited 05.11.2009.

[67] Richard Moorhead, *Third Way Regulation? Community Legal Service Partnerships, 64* MOD. L. REV. 543, 548 (2001)

"supplier induced demand".[68] It seems that lawyers were maximizing benefits stemming from legal aid scheme and induced by lack of cost control mechanisms. Dramatic increase in the number of legal practitioners followed.[69] One of the sources of such an increase was predominant focus on costly litigation while neglecting other possible solutions.[70] Similarly, Gray is arguing that in addition to moral hazard of suppliers (behavior maximizing benefits procured by the legal aid system) there was a moral hazard on the part of consumers as well (they lightly commenced litigation and had no incentives to settle a dispute out of court).[71] On the other hand Paterson and Nelken rebutted the presumption that legal profession induced demand for legal aid and instead offered a *"pragmatic welfarism explanation"*.[72] While Bevan would go thus fare to say that "*the history of legal aid may be summed up as spending more and doing worse"*[73] one cannot belittle the positive sides of this system such as enhanced access to justice for major part of the population.[74]

[68] See Gwyn Bevan, *Has there been supplier-induced demand for legal aid?*, 15 C.J.Q. 98, 100-01 (1996). In this paper the author notes that "Supplier-induced demand can arise where those who supply services decide what they will supply (as opposed to those who pay for them). Under these circumstances, the supplier's decisions on whether to take a case, and, how much time to spend on each case will depend on the supplier's opportunity costs: that is the opportunities forgone by not doing other work. When a lawyer lacks opportunities for private work then legal aid becomes more attractive. This is what happened in the late 1980s and spend on legal aid increased substantially. This constituted supplier-induced demand because the resultant increases in expenditure were far greater than what the payer (the Government) could afford (hence this resulted in the Government reducing legibility and changing fee rates)."

[69] Department for Constitutional Affairs, *A Fairer Deal for Legal Aid*, at 10 (2005), available at http://www.dca.gov.uk/laid/laidfullpaper.pdf last visited 22.11.2009
("Between 1955 and 2004 the number of solicitors holding a practice certificate has risen from 17,969 to 96,757 – an increase of 438%. Over the same period the number of independent/ self-employed barristers has risen from 2,008 to 11,564 – an increase of 476%")

[70] Ibid. at 9

[71] For the elaboration of the issue of supplier induced demand and moral hazard in legal aid systems see Alastair M. Gray, *The Reform of Legal Aid*, 10 OXF REV ECON POL 51, 54 (1994)

[72] A. Paterson and D. Nelken, *The Evolution of legal services in Britain: pragmatic welfarism or demand creation?*, 4 WINDSOR Y.B. ACCESS JUST. 98, 102 (1984)

[73] Gwyn Bevan, *Has there been supplier-induced demand for legal aid?*, 15 C.J.Q. 98, 99 (1996)

[74] See Review of Civil Litigation Costs, Vol.1, Ch.12, para.1.5. Jackson LJ, inter alia, notes that "the legal aid scheme operating under the Legal Aid Act 1988 was probably the best and certainly the most expensive scheme of its type in the world"

3.1.2 Reinvention

Legal aid system became financially unsustainable when AJA introduced a thoroughly different approach towards access to justice, at least in its civil limb. We can say that with the enactment of the AJA legal aid system in the UK saw its reinvention. Its main features were cost capping for civil legal aid, providing legal framework for privately funded methods aimed at furthering access to justice, collaboration of various providers and quality assurance mechanism. The eligibility paradigm in the UK was changing through the years. The 1945 Rushcliffe Committee drafted a report on legal aid thus laying foundations to modern legal aid system in the UK. One of its recommendations was that legal aid should not be confined to the poorest segment of the population. This stance was maintained, more or less successfully through the years.[75]

It seems that the adoption of AJA matches the drop of legal aid eligibility.[76] However, the government did not gave up enabling access to justice to wider segment of population. AJA changed the pattern of over excessive spending on civil legal aid and tried to facilitate access to courts via privately funded mechanisms such as CFA, third party funding and LEI. Put differently, restricting publicly funded legal aid scheme was followed by creating legal framework conducive to privately funded mechanism that would enable access to justice and lessen the burden on public finances. The basic contours of civil legal aid scheme under AJA are the following.

[75] Cyril Glasser, *Legal Aid- Legal aid eligibility*, L.S.Gaz., March 1988, at 1,1. It seems that at the outset of the scheme 80 percent of the population was eligible for legal aid in 1988 this number was just about over 50 percent.

[76] As far as civil legal aid is concerned the numbers dropped rapidly in the last decade so that, from 52 percent of population eligible in 1998 the numbers dropped to only 29 percent in 2007, See Ministerial answer on the question of the UK MP Dr. Ashok Kumar on 20 February 2008, available at http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080220/text/80220w0018.htm#08022111100002 8 (last visited 25.11.2009)

For legal representation legal aid scheme provides certain amount of money for legal practitioners but allows them to be fully remunerated from the opposing party if successful in court.[77] On the other hand if the case is lost legal aid recipient is protected from paying the costs of the other side.[78] Similarly, the successful opposing party in legally aided litigation usually cannot recover his costs from the legal aid fund either.[79] Legal aid fund can recover the money invested by way of reimbursement from the successful legal aid recipient via the so called statutory charge.[80] More often than not, however, the lawyer effectively running the case can charge the entire amount of his costs to the opposing party thus relieving the legal aid fund the duty of disbursement.[81]

Another feature is that the government introduced new design for civil legal aid - the so called "community legal services partnership" (hereinafter CLS). Overall idea of CLS was to create synergy between different legal aid suppliers and funders in order to "get better value for the money".[82] The common criteria was introduced regarding quality control. The partnership promotes involvement of local authorities, local providers and legal aid funders. Different suppliers gathered under the CLS partnership umbrella are better suited to provide coherent services for a range of legal problems tending to cluster together[83] The Carter Review

[77] *Review of Civil Litigation Costs*, Vol.1, Ch.12, para.4.3. (Jackson LJ notes that a state acts as a banker "by providing payments on account as the case progresses" and insurer "by guaranteeing a minimal level of remuneration should the case be unsuccessful")
[78] Ibid Vol.1, Chapter 12, para.4.7
[79] Ibid Vol.1, Chapter 12, para.4.8
[80] Ibid Vol.1, Chapter 12, para.2.5
[81] Ibid Vol.1, Chapter 12, para.2.5 "(This effectively turns legal aid in successful cases from a gift into a loan and puts the legally aided litigant in the same position as someone who has funded their costs privately.")
[82] See Richard Moorhead, *Third Way Regulation? Community Legal Service Partnerships, 64* MOD. L. REV. 543, 552-53 (2001)Moorhead is also stating that "partnership seek to work through an inclusive, but voluntary, framework and at a specifically local level. They have a wide remit to recommend local strategies and influence (but not control) funding decisions. They also seek to balance the interests of all the main stakeholders in the provision of publicly funded legal services: the funders, the suppliers and the clients"
[83] See PASCOE PLEASENCE ET AL, CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE 65-70 (2nd ed. 2006). (for example one identified cluster "involved a broad range of problem types including those relating to consumer transactions, money/debt, employment, neighbors, personal injury, rented housing, owned housing, welfare benefits

encouraged this approach aimed at better co-ordination of different stakeholders in providing legal services.[84]Administration of the entire scheme is entrusted to Legal Services Commission (hereinafter LSC). The main tool of LSC is the Funding code, drafted by the LSC itself and endorsed by the Parliament. The code is defining all major principles of the legal aid scheme, the most important being priorities of funding.[85] Similarly the code takes into consideration whether the case raises issues of wider public interest or some important human rights matter is at stake.[86]

3.1.3 Conclusions drawn and lessons learned

Commitment of the legal and political establishment to ensure access to justice is significant. Funds spent on legal aid are amongst the highest in the world. But is this enough? I would say no. The UK system of legal aid is in a constant state of evolution, it is a laboratory experimenting with different methods and approaches to access to justice and legal aid. The approach employed is multidisciplinary and innovative. It is a process that is constantly changing to provide solutions to new challenges with the overall aim of getting better value for money and ensuring quality and efficiency.

Activities are aimed at fine-tuning the system by using statistical data, and academic commentaries thus spotting new trends and devising adequate solutions. The system is constantly revised in order to verify the practical implications of newly adopted solutions.

and discrimination." The other cluster encompasses "homelessness, unfair treatment by the police, and action being taken against the respondent")

[84] Lord Carter's Review of legal aid procurement, *Legal Aid a market based approach to reform*, recommendation 3.8 at 65 (2006) http://www.legalaidprocurementreview.gov.uk/docs/carter-review-p3.pdf (last visited 21. 11.2009).

[85] Review of Civil Litigation Costs, Vol.1, Chapter 12, para.2.8. Jackson LJ is pointing out that "The Code is the embodiment of priorities for civil legal aid. So whilst almost all cases under the Code have prospects of success criteria, different hurdles apply for different case types"

[86] Ibid Vol.1, Chapter 12, para.2.9

The LSC introduced unified contract for all legal aid suppliers.[87] This was challenged by the Law society especially the provision that enables LSC to unilaterally amend the contract. Finally, the out of court settlement was achieved with the Ministry of Justice in 2008.[88] This example illustrates the power of legal profession whose interest does not necessarily correspond with that of the state or legal aid recipients.

In the last couple of years the overall cost of legal aid was about 2 billion pounds. Civil legal aid spending amounted to 800 million pounds.[89] It seems that capped budget on civil legal aid is seen by some prominent lawyers, such as the Law Society President[90] as jeopardizing access to justice. Voices have been mounted against decrease of civil legal aid expenditure. Smith is suggesting that civil legal should be protected against growing expenditure of criminal legal aid since whatever happens criminal legal aid will be protected because of Article 6 of ECHR.[91] Here we can see how international obligations can affect internal legal aid program. One could argue that civil legal aid minimum will be protected too. But the bare minimum is not enough. Legal Action Group is highlighting that need for civil legal aid is larger than ever in the time of the ongoing financial crisis.[92] Detaching civil legal aid from criminal legal aid budget[93], providing legal services by telephone and internet[94], promoting self help[95], advancing legal

[87]Ibid. para. 2.22
[88] See House of Commons paper, *Legal Aid Reform: the unified civil contract* available at http://www.parliament.uk/commons/lib/research/briefings/snha-04314.pdf last visited 26.11.2009
[89] Roger Smith, *Rights & Wrongs: The vision thing*, L.S.Gaz., May 2009, at 1,1.
[90] Edward Nally, *President's Podium: Saving Legal Aid*, L.S.Gaz., Nov. 2004, at 1,1.
[91] Roger Smith, *Rights & Wrongs: The vision thing*, L.S.Gaz., May 2009, at 1,1. Also see Legal Services Commission, CP 13/06, *Legal Aid: a sustainable future Civil and Family Regulatory and Diversity Impact Assessment*, para.6 available at http://www.dca.gov.uk/consult/legal-aidsf/civil-family-ria.pdf last visited 24.11.2005.("Since 1997 the cost of legal aid has increased from £1.5 billion to £2.1 billion. This 10% real terms rise masks the 37% increase in spending on criminal legal aid. The growth in criminal legal aid is putting pressure on vital services for vulnerable people provided via civil and family legal aid. The system needs to be reformed and modernized to adapt to new circumstances.")
[92] STEVE HYNES & JON ROBINS, THE JUSTICE GAP -- WHATEVER HAPPENED TO LEGAL AID? at 2 (2009).
[93] Ibid at 4.
[94] Steve Hynes, *Legal aid -- a flawed diamond*, L.S.Gaz., April 2009, at 1,1.
[95] Ibid.

education[96], growth of legal expenses insurance[97] are just some of the suggestions for improving civil legal aid system in the UK.

3.2 Alternatives to public funding of civil legal aid

Legal aid should be studied in the overall political, social and economic context. It is not so much the question of what is the best than of what is the most sustainable and effective solution. As elsewhere, ideal solutions exist only in hypothetical constructions. Viable systems entail pragmatic answers that can reconcile ideals with scarce resources available.

Therefore if we are to address the funding problem state run legal aid should be complemented by other mechanism aimed at achieving access to justice such as CFA and LEI to name but a few. If a person cannot afford legal services some of them can afford LEI or put in motion CFA. Only if these avenues are unavailable one should consider legal aid. Similar approach is already in use in Sweden regarding LEI. Namely, civil legal aid is not available if a person has legal expenses insurance.[98] The same solution is employed by the EU in a cross border context.[99] Contingency fee has been legalized in Italy as well.[100] Hodges claims that several jurisdictions in Europe are going towards gradual introduction of some kind of contingency system[101] Therefore, the latest trend in Europe is aimed at introducing private funding as means of enhancing access to justice. This can be viewed as a response to

[96] Ibid.
[97] Ibid.
[98] See Francis Regan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance*, *30* J.LAW & SOC. 49, 55 (2003), But see Christopher Hodges, *Europeanization of Civil Justice: Trends and Issues*, 26 C.J.Q. 96, 100 (2007) (on the other hand, Swedish bar association considers this procedure to be infringement of the EU legal aid directive)
[99] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, art.5.5., 2003 O.J. (L 26/41) it is stipulated that legal aid does not have to be granted where applicants can have access to justice via other means.
[100] See Christopher Hodges, *Europeanization of Civil Justice: Trends and Issues*, 26 C.J.Q. 96, 102 (2007)
[101] Ibid at 101-03 (The author is arguing that contingency fee arrangements are being considered in Central European states)

unsustainability of publicly funded legal aid schemes. Similarly, the state can encourage self help[102] in some simple legal matters as well as legal education.[103]. Legal aid crafted in this manner can be or aim to be sustainable and achieve to deliver what in English legal aid discourse came to be known as "best value for money". Put differently, to achieve that the scarce resources are used in a manner that ensures optimal efficiency that is to say optimal balance between the means employed and results achieved.

3.2.1 Conditional fee arrangements in the UK

Remodeling civil legal aid in accordance with AJA left a serious gap in access to justice.[104] Logically, with the decrease of funds the eligibility also fell.[105] Idea was to fill the gap created by restricting civil legal aid by CFA.[106]

CFA was incorporated into the UK legal system for the first time in 1995.[107] AJA introduced following innovations. Personal injury cases were removed from legal aid scheme, the "principle of recoverability"[108] was introduced and CFA extended to a number of

[102] But see JOSEPH M. JACOB, CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS, 147 (2007).(the author notes that litigants in person are usually aided by the judge. He argues that this assistance is more expensive than assistance provided by a legal aid lawyer. It follows that since judge is usually paid more in total it is more expensive for a state not to provide legal aid than to provide one.)
[103] See Richard Moorhead & Pascoe Pleasance, *Access to Justice after Universalism: Introduction,* 30 J.L. & SOC'Y 1, 7-8 (2003) Here the authors examine advantages as well as limits of this approach
[104] See *Review of Civil Litigation Costs,* Vol.1, Ch.12, para.2.1 (2009)
[105] As far as civil legal aid is concerned the numbers dropped rapidly in the last decade so that, from 52 percent of population eligible in 1998 the numbers dropped to only 29 percent in 2007, See Ministerial answer on the question of the UK MP Dr. Ashok Kumar on 20 February 2008, available at http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080220/text/80220w0018.htm#08022111100002 8 (last visited 25.11.2009)
[106] See *Review of Civil Litigation Costs,* Vol.1, Ch.12, para.2.1 (2009)
[107] Ibid. Vol.1, Chapter12, para.2. (CFAs were regulated in the UK for the first time in 1990 in Courts and Legal Services Act while this provisions became operational in 1995 in three types of proceeding, Namely, "personal injury, insolvency and ECHR applications")
[108] Recoverability means that insurance companies can recover the insurance premiums from the opposing party in the court proceedings, This development advanced the so called after the event insurance for this see Ibid Vol.1, Chapter 16, para.2.4.

proceedings.[109] The question is if the use of CFA will lead to decreased level of access to justice?

Basically CFA are a variation of the US style contingent fees.[110] Lawyers are taking a case to court without remuneration. When, or rather if, the case is won the fees, uplifted in order to reflect the risk undertaken, are being charged to the losing party.[111] This in itself sounds like a fear deal. But if we scratch below the surface we can see that CFA is advancing adverse selection of cases. Lawyers will select presumably successful cases. This could compromise the progress of human rights since most lawyers wouldn't risk losing a case by advancing unorthodox arguments.[112]

Secondly, at the outset of the CFA the lawyers were reimbursing their expenses from the damages of their clients which was in line with the US style contingency fees. However, they gained the advantage to charge fees directly to the losing party under the indemnity principle. Moreover, as undertaking significant risk, they were permitted to charge the "success fee uplifts" which can go up to 100 percent of standard fees.[113] But the problems do not stop there. Since the claimants are still liable for the opposing party's costs the insurance companies stepped in by offering after-the-event insurance (ATE).[114]. Usually the insurer charges the premium to the

[109] Ibid. Vol.1, Chapter 16, para.2.4.
[110] see Lua Kamal Yuille, *No one's Perfect (not even close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 894 (2003-2004) ("The basic principle of the fee structure is that the lawyer is not entitled to payment unless the client wins the case. Then, the lawyer is compensated based on a percentage of any recovery from the favorable judgment, if the client does not recover anything, the lawyer does not receive any compensation")
[111] Lord Carter's Review of legal aid procurement, *Legal Aid a market based approach to reform, Annex 3.1* at 141 (2006) http://www.legalaidprocurementreview.gov.uk/docs/carter-review-p3.pdf (last visited Nov. 20.2009).
[112] Lua Kamal Yuille, *No one's Perfect (not even close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 895 (2003-2004) In addition to this another argument is advanced "meritorious claims with important legal implications but limited pecuniary prospects will not be pursued under contingent fees"
[113] See *Review of Civil Litigation Costs*,Vol.1, Ch.12, para.3.1. The rationale behind this was to compensate practitioners for the other cases they have lost so that they would be motivated to use the CFA at the first place.
[114] Moorhead is defining ATE as "cover against the risk of being ordered to pay their opponents cots, their own disbursements (experts fees and so on), and their own barristers fees". However he is noting that the insurance

opposing party That being said, we can imagine that the defendant's costs skyrocketed. The CFA became popular outside the personal injury cases. Some commentators are arguing that the mere situation where claimant bears no financial risk and defendant faces expenses that could ruin him financially can lead to article 6 violation of the ECHR.[115] In addition, challenges to this system have been mounted under Art.10 by alleging that gigantic costs in libel cases can have "chilling effect" on the freedom of the press.[116] Similarly, since the losing party is usually also insured the ancillary litigation takes place on the former litigation costs.[117] Thus far, in *A. v UK* the ECtHR found that CFA could be used as a means in achieving access to justice together with "*initial two hours' free legal advice*".[118]

policy can cover risk against some or all of these events. See Richard Moorhead, *Conditional fee agreements, Legal Aid and Access to Justice*, 33 U. BRIT. COLUM. L. REV. 471, 483 (1999-2000)

[115] See A.A.S. Zuckerman, *Cost capping orders in CFA cases improve costs control but raise questions about the CFA legislation and its compatibility with Art.6 of the European Convention on Human Rights*, 24 C.J.Q. 1, 12-15 (2005) (the author argues that the equality of arms aspect of fair trial might be infringed The logic is since "a party must not … be given a significant procedural advantage denied to other parties" the mere situation where one party can via the success fee be financed by the opposing party puts them in unequal position. Finally he notes on page 15 that "it is difficult to see how there can be justification for transferring the claimant's access to justice to the particular defendant that he chose to sue, who may himself have no means of shouldering the burden.") Also see Keith Ashby & Cyril Glasser, *The Legality of Conditional Fee Uplifts*, 24 C.J.Q. 130, 134 (2005)

[116] Ibid, p. 10 Namely, in the libel cases advanced under CFA the costs were so high that the respective media risked bankruptcy in case of unfavorable outcome. The latest challenge to CFA in defamation cases is the case *MGN Ltd v United Kingdom* currently pending before the ECtHR. A top model entered into CFA arrangement and ultimately won a case before the House of Lords against a newspaper and was awarded 3,500 pounds in damages. On the other hand, the costs of litigation along with success fee wee estimated on 1,1 million pounds. Application to the ECHR, Statement of Facts and Third Party Intervention available at http://www.soros.org/initiatives/justice/litigation/uk, last visited 05.11.2009.

[117] Adrian Zuckerman, *Lord Justice Jackson's Review of Civil Litigation Costs - Preliminary Report (2009)*, 28 C.J.Q. 435, 436 (2009)

[118] See *A. v United Kingdom*, (App. No. 35373/97), December 17, 2002, para 98. But see JOSEPH M JACOB, CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS 153 (2007). (the author argues that in A v UK "The Court did not consider any of the difficulties of the CFA such as whether the different financial interests of the client and lawyer under such an arrangement made any difference. It may be that this financial wedge removes effective representation")

3.2.2 Legal expenses insurance

LEI can significantly contribute to access to justice by complementing publicly funded legal aid schemes. LEI are basically "*insurance contracts that cover the risk of litigation costs*"[119] but can cover "*any kind of legal assistance, including advice lines*".[120] It is most developed in Germany where 42 percent of the households are covered.[121] While considering reasons why LEI is so successful in Germany, Kilian notes that legal aid is not so interesting since "*the cost-shifting principles are unaffected by its grant*".[122] We can speculate that this is one of the reasons why LEI have never prospered in the UK as it has in Germany. On the other hand, it has been advanced that LEI leads to more litigious society. Commentators have contradictory results about this issue.[123] In any event, its utility cannot be denied.[124]

[119] Michael Coester & Dagobert Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, 24 C.J.Q. 83, 86 (2005)

[120] See Matthias Kilian, *Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience, 30* J.LAW & SOC. 31, 32 (2003)

[121] Ibid p.38 LEI is widely used in the Netherlands and Belgium as well, for this see RESEARCH TEAM ON ENFORCEMENT OF COURT DECISIONS (UNIVERSITY NANCY (FRANCE) / SWISS INSTITUTE OF COMPARATIVE LAW), EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), ACCESS TO JUSTICE IN EUROPE 106 (2008) available at http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes9Acces_en.pdf last visited 27.11.2009.

[122] See Matthias Kilian, *Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience, 30* J.LAW & SOC. 31, 43 (2003)

[123] Ibid p.46 is claiming that according to the mid 1990s research funded by the German government has shown that indeed LEI "was responsible for between 4 and 8 per cent of additional litigation" But see Erhard Blankenburg, *Private Insurance and the Historical "Waves" of Legal Aid, 13* WINDSOR Y.B. ACCESS JUST.,185, 199 (1993)

[124] See Matthias Kilian, *Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience, 30* J.LAW & SOC. 31, 46 (2003) *"a well-developed LEI market can improve access to justice"*. This is corroborated by the case study on the Swedish 1997 legal aid reform See Francis Regan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance, 30* J.LAW & SOC. 49, 65 (2003) ("LEI can play an important role in ensuring that citizens have adequate access to lawyers and the courts")

3.2.3 Limitations of privately funded arrangements

Alternative means can only complement publicly funded legal aid. CFA is merit based scheme and only cases with strong prospects can qualify. Therefore, big chunk of legal aid applicants would not suffice to higher merit standards of lawyers taking on CFA cases.[125]

LEI is based on the classical insurance principle and is available only to people that can afford one.[126] Similarly, family cases, due to their personal character, are not regarded as suitable for LEI.[127] As suggested by Moorehead the overall success of the CFAs depends upon the vital and vigorous insurance market[128] Same could be said for LEI. Therefore the replication of these models depends upon the general development of the market insurance in a particular country.

Consequently, publicly funded legal aid schemes will remain the only recourse for citizens that cannot afford LEI or do not satisfy the high merit standards advanced in CFA. Finally, Moorhead and Pleasnace are calling for *"the public interest to be carefully interposed within the commercial market for access to justice"*.[129]

[125] Moorhead is arguing that the prospect of success rate in law firms dealing with CFA are as high as 95 or even 98 percent. This is much higher than current legal aid threshold that goes as low as 50 percent. See Richard Moorhead, *CFAS A Weightless Reform of Legal Aid*, 53 N. IR. LEGAL Q. 153, 157 (2002)

[126] Erhard Blankenburg, *Private Insurance and the Historical "Waves" of Legal Aid, 13* WINDSOR Y.B. ACCESS JUST.,185, 201 (1993) Along these lines Blankenburg is discussing ("Legal service insurance policies are typically not sold to marginalized groups of the society whose jobs are threatened, or who are facing eviction from housing, or who enter a country illegally, or who live in immigration camps. There is no substitute for legal aid to the growing groups of the poor and underprivileged throught Europe.")

[127] See Matthias Kilian, *Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience, 30* J.LAW & SOC. 31, 43 (2003) the author is noting that in Germany "The main area not traditionally covered by LEI is family law and so it is no surprise that almost 80 per cent of legal aid is spent on family cases"

[128] Richard Moorhead, *Conditional fee agreements, Legal Aid and Access to Justice*, 33 U. BRIT. COLUM. L. REV. 471, 480 (1999-2000)

[129] See Richard Moorhead & Pascoe Pleasance, *Access to Justice after Universalism: Introduction,* 30 J.L. & SOC'Y 1, 7 (2003)

4. CHAPTER 3
LEGAL AID IN CIVIL PROCEEDING IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In this chapter I will examine the origins and try to outline the current state of affairs regarding the right to free legal aid in civil proceedings in the case law of the ECtHR. While doing so I will try to distinguish the particular notions that the ECtHR invokes while dealing with civil legal aid cases. Similarly, I will endeavour to envisage prospects and limits of the ECtHR civil legal aid jurisprudence and examine what the domestic legal aid schemes should consider while laying down eligibility criteria in order to fall in line with the requirements of the Strasbourg court.

I will attempt to demonstrate that civil legal aid is simply a corollary or precondition for enjoinment of other, more paramount rights, such as access to court and, finally right to fair trial. Unlike legal aid in criminal proceedings ECHR does not guarantee legal aid in civil proceedings. This right is incorporated into the Convention by the ECtHR. How did the Court include this right and what are eventual consequences of such interpretation? Source of civil legal aid in the ECHR is fair trial guarantee envisaged in Article 6(1).[130]

The ECtHR held that the states are *"under the obligation to organise their legal systems "so as to ensure compliance with the requirements of Article 6 para. 1"*.[131] This general obligation is not straightforward though since it is subject to ever evolving jurisprudence of the ECtHR. In this sense McBride explains that *"The fact that the standard-setting is essentially*

[130] Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms envisages "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.")

[131] *De Cubber v. Belgium* (App. No. 9186/80), October 26, 1984 para. 35

case-based means that, although certain key provisions can be distinguished, the process is essentially ad hoc in character, dependent upon the vagaries of litigation and the full extent of the obligations already undertaken remain to be clarified".[132] Therefore we should not perceive fair trial guarantees as a monolithic block of requirements. Conversely, it is not enough for the states to simply abide by the formal notion of fair trial stipulated in article 6 of the Convention. A more proactive approach is necessary to ensure that the states actions are in line with the Convention requirements. On the other hand this is more easily said than done since, as far as fair hearing is concerned *"the Court has avoided giving an enumeration of criteria in the abstract".*[133] Therefore *"in each individual case the course of the proceedings has to be assessed to decide whether the hearing concerned has been a fair one".*[134]

4.1 Origins of civil legal aid in the ECtHR jurisprudence

4.1.1 Right of access to court as a prerequisite of civil legal aid

So let's start from there. The ECtHR held in *Golder case*[135] that access to court is inherent to Article 6 of the ECHR. Mr. Golder, a convicted prisoner, was denied by the prison authority, and ultimately the Secretary of State, to contact a solicitor in order to find out his prospects regarding defamation proceedings against one of the prison guards.

Interestingly enough, right of access to court was not expressly stated in the Convention.[136] More precisely, no separate right to commence the proceedings was envisaged.

[132] Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 235 (1998)
[133] PITER VAN DIJK ET AL, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 579 (4th ed. 2006).
[134] Ibid.
[135] *Golder v United Kingdom* (App.No.4451/70), February 21, 1975.
[136] HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 235 (2d ed., 2009).("although there was no express mention of the right of access in Article 6, its protection could be inferred from the text")

One of the Government arguments in *Golder* was that the wording of article 6(1) "*clearly presuppose proceedings pending before a court"*[137] and that, therefore, can only be applied on the ongoing trial. So the principal question was whether there is a separate right to commence the proceedings covered by right to a fair trial.[138] The ECtHR recognized the importance of this matter[139] and devoted much of its reasoning to introduce the right to access within the realm of the Convention. Along these lines McBride rightly points out that in Golder *"the "discovery" of the right of access to justice as an element of the fair hearing guarantee was made".*[140] It is the recognition of this right that opened the door for the legal aid in civil proceedings.

At the outset of its reasoning the ECtHR rejected the Government's contention that Mr. Golder was prevented from instituting proceedings at that time, but was free to proceed with his legal actions upon his release, and that, therefore, he was not prevented from initiating proceedings as such. Instead, the ECtHR made clear that:*"hindrance in fact can contravene the convention just like a legal impediment".*[141] The Court continued to examine whether access to court represents one aspect of the right to a fair trial. In doing so, it applied the Vienna Convention on the Law of Treaties.[142] Further on Article 31(2) stipulates that "*The context for*

[137] *Golder v United Kingdom*, cited above, para.32 ("The Government have submitted that the expressions "fair and public hearing" and "within a reasonable time", the second sentence in paragraph 1 ("judgment", "trial"), and paragraph 3 of Article 6 (art. 6-1, art. 6-3) clearly presuppose proceedings pending before a court.")

[138] Second question posed by the court was that if the right of access to court is guaranteed by the Convention can it be limited in the particular circumstances of this case? For this see *Golder v United Kingdom, cited above, para.25*. We will confine our examination on the first question deliberated by the Court.

[139] *Golder v United Kingdom, cited above,* para.25

[140] See Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 237 (1998)

[141] *Golder v United Kingdom, cited above, para.26,* related to this McBride is noting that since the behavior of prisoner is affecting his remission it is hardly logical to expect him to wait until the end of his sentence to commence the proceeding and clear his name since by that time he would already suffer the negative consequences of false accusations, Ibid, page 257.

[142] Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed at 25.10.2009; See also Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 H.R.L. REV. 57, 58 (2005)
This author is noting that "From the perspective of public international law, the Convention is a multilateral treaty and the principles governing the interpretation of such treaties have been codified in the Vienna Convention on the Law of Treaties 1969" Therefore it is not unusual that the Court employed this method of interpretation

the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes". Accordingly, the Court brought into play the preamble of the ECHR where signatory governments stated their affection to the principle of rule of law as their *"common heritage"*.[143] In addition, the Statute of the Council of Europe[144] also refers to the rule of law as their common legacy[145]. Finally, the Court goes on to say that *"in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts"*.[146]

Another argument the ECtHR raised in favor of access was that alternatively, if there was no such right guaranteed, the Member State could circumvent the courts in determining civil actions by making commencement of the proceedings conditional upon government bodies approval.[147] This would effectively amount to granting the government decision making powers reserved for the courts thus causing *"a danger of arbitrary power"*.[148] Facts of the *Golder* case are rather illustrative in this regard since, in effect, the Secretary of State was the one making a decision regarding Mr. Golders' case, not the court. Finally the ECtHR held that *"the right of access constitute an element which is inherent in the right stated by Article 6 (1) … embodies the right to a court of which the right to access, that is to institute proceedings before courts in civil matters, constitutes one aspect only"*.[149] The Court in *Golder* went beyond the formal notion of

[143] See "Convention for the Protection of Human Rights and Fundamental Freedoms" adopted on 5 November 1950, Paragraph 6 of the Preamble, available at http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG accessed on 24.10.2009

[144] See Statute of the Council of Europe, adopted on 5 May 1949, available at http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm, accessed on 13.04.2009

[145] Ibid in Article 3 stipulates that *"every member of the Council of Europe must accept the principles of rule of law"*

[146] *Golder v United Kingdom, cited above, para.34*

[147] *Golder v United Kingdom, cited above, para 35,* also in this regard Francis G Jacobs, *The Right of Access to a Court in European law: with Special Reference to Article 6(1) of the European Convention on Human Rights and to European Community Law*, 10 I.BULL. 53, 59(1996) available at http://www.interights.org/view-document/index.htm?id=476 (last visited 03.11.2009).

[148] *Golder v United Kingdom, cited above, para 35*

[149] *Golder v United Kingdom, cited above, para 36*

access to court and established that *"the right of access means access in fact, as well as in law"*.[150] From that perspective it did not matter that actually, Mr. Golder was denied "only" to contact a solicitor since the effect of this denial amounts to "*a hindrance in having recourse to the courts"*.[151]

4.1.2 Discovery of civil legal aid

The judgment in Golder, given that it introduced the notion of effectiveness in the area of access to court, cleared the way for recognition of the legal aid in civil matters.[152] The question arose in *Airey v Ireland.*[153] Unlike in *Golder*, there was no explicit action of the authorities that hindered access to court but rather lack of state positive action to enable effective access to court. This could be deemed as a fine distinction between the two cases but it touched the very essence of the Convention which was perceived as an instrument devised for protection of civil and political rights traditionally requiring restraint on the part of the state rather than a positive action. Here the ECtHR, in order to introduce civil legal aid into the realm of the Convention, went one step further beyond the method of interpretation typical for international treaties and employed more creative approach namely the *"practical and effective doctrine"*.[154] The ECtHR went beyond formal notion of access to justice and posed a question if the applicant can make

[150] HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 236 (2d ed., 2009).
[151] See Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 256 (1998)
also see HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 236 (2d ed., 2009).
[152] Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 259 (1998)
[153] *Airey v Ireland,* (App. No. 6289/73), October 9, 1979.
[154] See Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 H.R.L. REV. 57, 60 (2005) (Mowbray is arguing that human rights treaties are different from other international treaties since the main objective of the former are to regulate relations between the sovereign countries and their own citizens. This characteristic made possible creative approach in interpreting human rights treaties "namely the ' living instrument' doctrine and the ' practical and effective' doctrine")

use of the formal guarantees in practice.[155] Mowbray elaborated upon this method by saying that *"the Court's use of the "practical and effective" method of interpretation resulted in judicial attention being focused upon the substance of State (in)action rather than empty formal measures of compliance"*.[156]

The basic facts of the case were that Ms. Airey could not obtain the deed of judicial separation from her violent husband due to lack of financial means. She argued that lack of civil legal laid in her case amounted to denial of access to court. One of the Government arguments was that she could represent herself in the divorce proceedings. However this argument was flawed. After consulting an expert, the ECtHR held that it would be unreasonable to expect Ms. Airey to represent herself because the proceeding in question was very complex and the court fees were beyond her reach. Furthermore the Court held that *"marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court*".[157]

Basically, it comes down to the fact that expecting Ms Airey to represent herself was unreasonable, especially having in mind that the Government could not provide even one example where a person represented itself before a High court between 1972 and 1978. Finally the Court held that the article 6 was meaningless if a person could not have real and effective remedy to a civil dispute and stated that *"The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*"[158] and that the possibility of self-representation does not constitute an effective access to court.

[155] See Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 H.R.L. REV. 57, 73 (2005) ("The (implied) right of access to a court was applied so as to enable Mrs Airey to have a realistic prospect of obtaining a judicial decree of separation rather than a mere formal possibility (by seeking a decree without legal representation as contended by the Government).")
[156] Ibid. at 75
[157] *Airey v Ireland,* cited above, para. 24
[158] *Airey v Ireland,* cited above, para. 24

4.1.3 Financial considerations as a limit of comprehensive civil legal aid

The ECtHR went on to examine state's role in implementing Convention rights where although ready to interpret the ECHR creatively it was careful not to overburden the states financially. This can explain the restraint of the Court in maintaining the standards set in Airey.[159] Anyhow, in Airey the Government contended that Ms. Airey's financial condition cannot be imputed to the Government and that the Convention cannot be used as a tool of economic development[160]

Conversely, the ECtHR had held that the Convention can in some situations, such as the one under discussion, entail positive measures. and that" *The obligation to secure an effective right of access to the courts falls into this category of duty* ".[161] Ultimately, the Court rejected the argument based on the division of rights on civil and political on the one side and social and economic on the other. The fact that one specific civil right crosses this boundary cannot be a decisive argument.[162] In a similar vein Smith argues that legal aid is in fact a" hybrid right".[163] By hybrid right he implies that it is a part of fair trial rights but also entails positive obligation on the part of the state.[164]

However the Court goes on to clarify its stance regarding the borderline situations and limits the possible impact of the judgment on the finances of the Member States. It stated that much depends on the concrete cases and that sometimes the possibility of self-representation can

[159] KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS IIA-120 (3d ed. 2007).
[160] *Airey v Ireland*, cited above, para. 25
[161] *Airey v Ireland*, cited above, para. 25
[162] *Airey v Ireland*, cited above, para. 26
[163] See Roger Smith, *Human Rights and Access to Justice*, 14 INT'L J. LEGAL PROF. 261, 261 (2007)
[164] Ibid

satisfy of access to justice requirement. The state is required only to enable access to court and means employed towards this end are within its discretion.[165]

Further on the Court expressly stated that it will not compel the state to provide free legal aid in each and every case.[166] This reasoning became an underlying notion of the ECtHR's reluctance to provide wider access to court via free legal assistance. The fact that the convention-makers did not envisage free legal laid in civil proceedings set the limits to Court's actions aimed at expanding access to justice.[167]

4.2 Current developments

If we want to determine under which circumstances it would be plausible to assume that the ECtHR will find violation of article 6 we will have to start with the Airey case and follow it up with the subsequent legal aid jurisprudence.

In Airey the Court provided us with the guidelines when legal aid provided by the Government may be necessary for effective access to justice.

In *McVicar* case[168] a famous athlete lodged a defamatory action against a journalist alleging that an athlete used forbidden substances to enhance his performance. Here the emphasis was on the journalist ability to represent himself before a court. Although the proceedings were

[165] *Airey v Ireland*, cited above, para. 26, ("…it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1")

[166] *Airey v Ireland*, cited above, para. 26 (ECtHR held that that would "*sit ill with the fact that the Convention contains no provision on legal aid for those disputes*")

[167] *Del Sol v France* (App. No. 46800/99), February 26, 2002, para. 20. (In that vein the ECtHR in Del Sol held that *"there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which makes no reference to legal assistance")*

[168] *McVicar v United Kingdom* (App. No. 46311/99), May 7, 2002.

complex the crux of the reasoning was aimed towards examining the capacity of an individual to represent himself before a court.[169]

In the case of *Steel and Morris v. the United Kingdom*[170] the ECtHR restated the earlier criteria and modified them to a certain extent. The capacity of the defendants to present their case was once again scrutinized. Unlike in *McVicar,* in *Steel and Morris* the Court found that the differences between the two parties were too great and that the principle of equality of arms was infringed. But in *Steel and Morris* the emphasis was not on the personal traits of the defendants which acted resourcefully and cleverly but rather on the disproportionality of resources between the litigants. [171] *Steel and Morris* will be elaborated later in the text. For now suffice it to say that this is the first case where the ECtHR found violation of the Convention due to lack of legal aid in the defamation proceedings in the UK.

In the case *P,C and S v the United Kingdom*[172] the Court adduced considerable weight to the principle of fairness[173]. P was a women suspected with a history of psychiatric disorder which manifests in inducing or simulating illness in her children to draw attention. UK courts instituted proceedings in order to remove her child (S) from her husband (C) and her. In the middle of the complex proceeding her legal counsel withdrew from the case. The judge was determined to expedite the proceeding and, pursuant to expert recommendation, conclude the proceeding as soon as possible. It seems that the ECtHR was balancing between the necessity of expedition as family law procedural principal and principle of fairness. Considerable weight was

[169] *McVicar v United Kingdom*, cited above, para. 48. the ECtHR held that well educated and experienced journalist could represent his case before the court
[170] *Steel and Morris v United Kingdom* (App. No. 68416/01), February 15, 2005.
[171] *Steel and Morris v United Kingdom*, cited above, para. 61. ("The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively")
[172] *P,C and S v United Kingdom* (App. No. 56547/00), July 16, 2002.
[173] *P,C and S v United Kingdom*, cited above, para. 91

added to the fact that the procedure and legal issues were complex and that the rights at stake for the mother were significant. Bluntly speaking she was expected to conduct complicated litigation just after giving birth and under stress that losing meant depriving her of her newborn. Although noting that necessity for expedition and protection of rights of others could be considered as factors limiting access to justice[174] the ECtHR found that assistance of a lawyer was of crucial importance for the applicants and that a breach of Article 6(1) occurred.

It seems that considering "what is at stake for the applicant"[175] and thus distinguishing the cases of defamation from that of family law has some bearing on the reasoning of the ECtHR.[176] It is difficult to make a clear cut distinction regarding the question what is at stake for the applicant. But, as noted by McBride, in *Munro* case applicant's dismissal could also have adverse effect on him and his children. He is continuing to say that "*There is no doubt that some actions are more important than others but there is clearly a need for a more sophisticated approach to its elaboration".*[177]

4.3 Two strands of Article 6 as a basis of civil legal aid

In considering the ECtHR civil legal aid jurisprudence we can get slightly confused since one cannot easily find consistency among different arguments related to access to court, fair trial and equality of arms. In order to get to the bottom of this we need to reflect upon the relevant case law having in mind these particular notions and then try to make some order between them.

[174] *P,C and S v United Kingdom*, cited above, para. 90
[175] *P,C and S v United Kingdom*, cited above, para. 91
[176] *Munro v United Kingdom* (App. No. 10594/83),decision taken by the Commission on July 14,1987.para. 111. the Commission stated that ("the general nature of a defamation action, being one protecting an individual's reputation, is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family.")
[177] Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 261 (1998)

Starting from civil legal aid aspect of article 6, it should be noted that although the origin of free legal aid is embedded in article 6(1) it bifurcates on access to court on the one side and fair hearing in its narrower sense with the equality of arms at its center on the other.[178] Similarly Shipman argues that civil legal aid can be required under the aforementioned strands of fair hearing but is adding one more option, namely when applicants *"conduct their own case but the court may find that there is a denial of the opportunity to present an effective case"*[179]. This third strand is not altogether clear. It appears that it is not a self standing option but rather connected to either right of access to court or fair hearing in its narrower sense.[180] It seems that the Court did not manage to articulate the precise criteria and detach these situations one from another.[181]

Civil legal aid centered on access to court strand of fair hearing was read into the Convention in the *Airey* case. On the other hand we can trace civil legal aid based on fair trial in its narrower sense with the equality of arms at its center strand of Article 6(1) even earlier.[182] Namely in two cases against Germany back in the 1960s[183] the Commission's reasoning was centered on equality of arms point by acknowledging that legal aid in civil proceedings even if not explicitly envisaged in the Convention can be indispensable for ensuring a fair hearing.[184]

[178] See Murray Hunt & Michael J. Beloff, *The Green Paper on Legal Aid and International Human Rights Law*, 1 E.H.R.L.R 5, 7 (1996)
[179] Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 8 (2006)
[180] Ibid at 8
[181] Ibid Shipman is stating that "it is not clear from the court's judgment (*Steel and Moris*) that it has maintained its position that the opportunity to present an effective defense relates to the fairness of the hearing, since the court's discussion appeared to centre on the right of access to a court (although some references appear to be based on whether legal aid provision is necessary to ensure a fair hearing" page 8. For further elaboration of the Court's case law, the principal rationales of its reasoning and inconsistencies within them regarding civil legal aid see Shipmans case comment on Steel and Moris case.
[182] See Mauro Cappelletti and James Gordley, *Legal aid: Modern Themes and Variations*, 24 STAN. L. REV. 347, 382 (1971-1972)
[183] See *X v Germany* (App. No. 2857/66), decision of the Commission, May 22,1969. para. 59-60. and *G.S. v Germany* (App. No. 2804/66), decision of the Commission, July 16, 1968. para 54.
[184] See Mauro Cappelletti and James Gordley, *Legal aid: Modern Themes and Variations*, 24 STAN. L. REV. 347, 382 n.234 (1971-1972)where Cappeletti is arguing that "Both decisions held that legal aid must be provided in civil cases whenever it is necessary in order to place a party on a substantially equal footing with his adversary."

For the purpose of this debate we should be thinking of equality of arms as defined by the ECtHR with regard to civil disputes.[185]

4.3.1 Permissible limitations

Although both notions are grounded in fair trial guarantees access to court is more limited than fair trial in that fair trial is absolute and restrictions cannot be justified.[186] In contrast, the state is given some latitude in ensuring access to court via margin of appreciation.[187] and can set up a method of case selection in order to filter the cases eligible for legal aid.[188]. So, the ECtHR in the case of *Ashingdane v the United Kingdom*[189] articulated the following test. The criteria applied must not restrict the essence of the right under consideration, it has to pursue a legitimate aim and there should be a relation of proportionality between means and ends.[190]

So far several measures employed by the state in filtering cases have been identified by the ECtHR and the Commission to be in accordance with the ECHR. These are means test[191],

[185] *Dombo Beheer B.V. v Netherlands* (App.No. 14448/88),), October 27, 1993. para 3.3 (“"equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”)

[186] Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 9 (2006)

[187] *Airey v Ireland*, cited above, para. 26. See also *W. v United Kingdom* (App. No.10871/84), July 10, 1986, para.85

[188] See *X v United Kingdom* (App. No. 8158/78), Decision of the Commission, July 10, 1980, para. 16 (“it is self-evident that where a state chooses a "legal aid" system to provide for access to court, such a system can only operate effectively, given the limited resources available, by establishing machinery to select which cases should be legally aided.”)

[189] *Ashingdane v United Kingdom* (App. No. 8225/78), May 28, 1985.

[190] Ibid. para. 57 (“the right of access to the courts is not absolute but may be subject to limitations..... In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention’s requirements rests with the Court, it is no part of the Court’s function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field... , the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired... Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”)

[191] See *X v United Kingdom* (App. No. 8158/78), Decision of the Commission, July 10, 1980, para. 16 and *W. v United Kingdom* (App. No.10871/84), July 10, 1986, para. 86. Also see Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 259-60 (1998) (“there is still uncertainty as to the point at which a person's financial resources make the provision of legal aid necessary. The cases have simply proceeded on the agreed basis

merits test[192] and barring civil legal aid for certain categories of proceedings.[193] The main rationale behind the means test is that financial circumstances of the applicant are to be taken in consideration while selecting cases in order to "minimize the drain on public resources".[194] It is well established that states are permitted to set the financial threshold of legal aid eligibility.[195] Merits test entails that legal aid applicant needs to have a case with a "reasonable prospect of success". It was not established by the ECtHR what reasonable prospect of success actually entails. Instead the emphasis is put on the quality of the decision taken, namely on the obligation that the decision must not be arbitrary. In this sense McBride explains the notion of non arbitrariness in the following manner *"any decision-making would have to be subject to the ultimate and effective supervision of an independent and impartial tribunal"*.[196] This decision maker, all things considered, does not have to be court of law and it would be most appropriate to follow Shipman which noted that *"arbitrariness is determined on the facts and circumstances particular to the case before the court"*[197] In this regard the ECtHR held that, in case of refusal

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that the applicants did not have the means to pay") , See Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 13 (2006) ("In assessing Art.6(1) compliance, the court must ensure that the income or capital assessment of applicants for legal aid is set at a realistic level.")

[192] See *Munro v United Kingdom* (App. No. 10594/83),decision taken by the Commission on July 14,1987,also see *Steel and Morris v United Kingdom* (App. No. 68416/01), February 15, 2005, para. 62.

[193] See *W. v United Kingdom* (App. No.10871/84), July 10, 1986, para. 86. The same position is reiterated in other cases case of *Munro v United Kingdom* (App. No. 10594/83),decision taken by the Commission on July 14,1987.

[194] See Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 13 (2006)

[195] *Glaser v United Kingdom* (App. No. 32346/96), September 19, 2000, para.99, see also A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 101 (2004)

[196] Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 260 (1998)

[197] Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 14 (2006);This standpoint is corroborated by the following case law. In the case of X v the UK application no 8158/78, decision of 10 July 1980, para 16,17 the Commission did not considered arbitrary the decision on the reasonable prospects of success made by Legal aid committee. Conversely in *Aerts v Belgium*, (App.No. 25357/94), July 30, 1998, para.60 the Court held that it "It was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue" Finally in *Del Sol v France* (App. No. 46800/99), February 26, 2002, para 25,26 the Court adduced significant importance on the composition of legal aid office and the. that an appeal could against the decision of the board could be lodged to the

of legal aid due to lack of merits, applicant should be provided with opinion on prospects of success in written form.[198]

Finally, excluding certain type of proceedings altogether from the legal aid system was considered to be in line with the Convention until recently. This matter came under the lens of the ECtHR in the cases brought against the UK regarding exclusion of defamation proceedings from the national legal aid scheme.[199] In W v UK the Commission considered that *"given the limited financial resources of most civil legal aid schemes, it is not unreasonable to exclude certain categories of legal proceedings from this form of assistance"*.[200] Nevertheless, the Court retained the prerogative to examine each particular case and determine whether the exclusion of the defamation proceedings from civil legal aid system complies with the Convention requirements.[201] The repercussion of this approach surfaced when Court, notwithstanding its earlier stance, in *Steel and Morris* found the violation of article 6(1) due to unavailability of legal aid in defamation proceedings.[202] Although Shipman argues that "*the decision of the court in the Steel case makes it logically impossible to argue in future proceedings that the blanket exclusion on legal aid provision in defamation proceedings is justifiable"*[203] the ramifications of this judgment remain to be seen. Apart from these factors clearly expressed by the Court and/or the Commission some other considerations regarding availability of legal aid may have some

president of the Court of cassation. Therefore the quality of the legal aid scheme is a decisive factor in concluding if a particular decision satisfied the standard of non arbitrariness.

[198] *Staroszczyk v. Poland* (App. No. 59519/00), March 22, 2007, para.135.

[199] Actually in the UK legal aid was excluded for defamation cases from the very outset of legal aid back in 1949

[200] See *W. v United Kingdom* (App. No.10871/84), July 10, 1986, para. 86.

[201] *Munro v United Kingdom*, cited above, para.104 ("it is for the domestic authorities to decide upon the way in which the obligations imposed by the Convention are to be respected. The Convention organs retain the ultimate control whether the chosen method which the domestic authorities use complies with the Convention in a particular case")

[202] Truth be told we need to note here that the question of exclusion of certain type of proceedings was not deliberated in Steel and Morris as such. However, this is the first case where violation of article 6(1) has been found in the cases against the UK related to defamation proceedings.

[203] Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 14 (2006)

bearing on the court's reasoning. These are significance of the litigation for the applicant, appropriateness of self help and even the background of the litigation.[204] Therefore, as long as criteria established by the state are in line with the "Ashingdane test" the state is in line with the Convention.

4.3.2 "McLibel" case

The relation between access to court approach and that of fair trial in its narrower sense can be observed by examining the cases before the ECtHR brought by the defendants in the so called "McLibel case".[205] As widely known, case of *Steel and Morris* concerned libel action brought by McDonalds against a London based NGO. But somewhat less known is that the same applicants regarding the same set of circumstances turned to the ECtHR before the commencement of the UK proceedings.[206] The applicants argued that "*they are being denied effective access to court under Article 6 of the Convention to defend their right to free speech."*[207]. It is clear that they founded their claim under access to court strand of fair hearing. On the other hand the Commission reiterated that means for providing access to court are within state's margin of appreciation. Excluding defamation proceedings from legal aid scheme, it was said, has not been shown to run counter to the Convention.

The Commission commended the resourceful defense of the applicants thus concluding that in spite of all the difficulties they were not denied access to court.[208] Conversely in Steel and

[204] See Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 260 (1998)
[205] See the judgment of the UK Court of Appeal Steel & Anor v McDonald's Corporation & Anor" [1999] EWCA Civ 1144 (31 March 1999) available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1999/1144.html&query=McDonalds+and+Corporation+and+1999&method=Boolean
[206] See *H.S. and D.M. v United Kingdom*, (App. No. 21325/93), May 5, 1993.
[207] Ibid. at 5
[208] Ibid. at 13

Morris the ECtHR found that there was a violation of article 6(1).[209] Although the ECtHR was raising issues of access to court[210] it seems that it centered its discussion on fair hearing in its narrower sense especially on equality of arms point.

Shipman notes that in Steel and Morris the ECtHR failed to clarify the ambiguity between access to court and equality of arms, particularly the point that restrictions applicable to access to court are not appropriate in fair hearing.[211] As to the earlier refusal of application regarding the same applicant and the same set of facts the Court noted that at that time *"the length, scale and complexity of the proceedings could not reasonably have been anticipated"*.[212] This argument is not altogether convincing since the significant disparities between the parties were evident from the very outset of the proceedings. A promising explanation is that the ECtHR used two different approaches in looking into the case where denial of access to court could be justified and denial of fair trial, if established, could not.[213] Put differently, the state cannot be pardoned for conducting an unfair trial.

This conclusion on its face raises a number of issues. First of all it seems that the applicant after being denied legal aid could, by conducting unsuccessful litigation, make itself eligible for higher standard of review. This eventuality is not in itself a practical one since the state would then have to bear multiple costs.[214] Second, it fosters double standards of access to justice. Finally, we can imagine that sometimes it is rather hard for the Court to predict

[209] *Steel and Morris v United Kingdom* (App. No. 68416/01), February 15, 2005, para. 70. ("the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's")
[210] Ibid. in para. 59 and 62 the Court reiterated principles of the Airey case and Ashingdane case.
[211] Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 12 (2006)
[212] *Steel and Morris v United Kingdom* (App. No. 68416/01), February 15, 2005, para. 72.
[213] Shirley Shipman, Case Comment, *Steel & Morris v United Kingdom: legal aid in the European Court of Human Rights*, 25 C.J.Q 5, 10 (2006)
[214] By this I mean costs of the unsuccessful litigation conducted in the teeth of significant inequality of arms, damages awarded to the opposing party, and costs incurred before the ECtHR.

prospective inequality between the litigants. However in straightforward cases, like Steel and Morris, the potential inequality is more or less identifiable by way of analyses of the circumstances of a concrete case.

4.4 Final assessment of civil legal aid case law

So finally, what stance should the states take in order to comply with the ECtHR jurisprudence? A pragmatic solution could be to retain its eligibility systems centered on access to court and complement it with the test centered on the fair hearing with emphasis on the equality of arms. Of course, means testing is necessary so as to avoid squandering of public resources. Similarly, merits test should still be applied in order to avoid meritless cases being taken to court only because they are directed against considerably stronger opponent. It goes without saying that the merit test should comply with the principle of non arbitrariness. Basically, the national legal aid selection criteria should be modified to take into consideration prospective inequality of arms between the litigants As a final point we should consider what are the criteria that the ECtHR is considering while examining cases. From the considered case law we can make several conclusions:

The first criteria is complexity of procedural and legal matters. However considering *McVicar* and *Steel and Morris* it seems that the standard regarding complexity of the case is very high.[215] Nonetheless the ECtHR was examining these cases against the background of the established position that exclusion of an entire category of proceedings from the legal aid system does not run counter to the Convention requirements. The complexity issue in the legal aid context is related to ability of lay person to conduct proceedings effectively by himself. We

[215] A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 103 (2004)

should distinguish this from the situation where complexity of the proceedings in itself can be a factor impeding access to justice.[216] The second criteria is what is at stake for the applicant. Special regard should be given to family law cases.[217] Thirdly, whether legal representation is compulsory. Fourthly, the background of the applicant and his ability to effectively represent himself. Finally, whether the principle of fairness was infringed. Similarly, the Court will examine whether the minimum requirements of the equality of arms have been satisfied.

5. CHAPTER IV
FREE LEGAL AID IN CIVIL PROCEEDINGS IN THE EU

Question of the EU's relation towards access to justice and legal aid is a complex one. Access to justice is usually perceived through human rights discourse as part of the fair trial rights. Having that in mind, one question begs for answer. How come that the EU, organization predominately concerned with economic issues, is interested in regulating access to justice and legal aid?

It seems that the EU observes access to justice through more than one lens. We cannot forget that despite its purely economic origins the EU is based on democracy, human rights, and particularly rule of law. One of the essential elements of the rule of law is access to justice. The EU also became the organization based on human rights. Here we will examine the origins of the

[216] Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 C.J.Q. 235, 266 (1998)

[217] The rationale is that the stake for the applicants in these cases is considered to be very high, since it often involves vulnerable individuals and children. In this regard some authors particularly emphasize that the importance and the consequences for the individual should also be taken into consideration for the later see JOSEPH M. JACOB, CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS, 153 (2007). This author gives considerable significance to the point of consequences for individual "including most particularly whether the individual is liable to a term of imprisonment (or extra imprisonment)" While acknowledging that imprisonment is characteristic for criminal proceedings he is noting that "it arises also in civil matters where punishments, including imprisonment for contempt, are considered."

EU's involvement with human rights, recent developments such as adoption of the Charter of Fundamental rights of the European Union (hereinafter the Charter) from the access to justice perspective. We will elucidate the human rights conditionality imposed on the candidate countries regarding access to justice and legal aid systems and touch upon what Alston and Weiler defined as *"element of schizophrenia that afflicts the Union between its internal and external policies"*.[218]

The EU's contribution to the issue of access to justice predominantly addresses the problem of cross border litigants. It seems that the rationale behind this involvement is based on the classical prerogatives. Namely, the absence of the cross border legal aid scheme can impede development of the common market and free movement of persons. For example if there is no legal aid available in the country other than EU citizens' country of residence he would feel more vulnerable and might decide not to go to seek work in this Member State. Of course, this could play some role in the decision making process of EU citizen only if he is of limited funds. On the other hand, job seekers usually are. Similarly, cross border legal aid plays a significant role in the consumer protection.[219] If a person purchases damaged good from another Member State it is much harder to seek redress.[220] The unavailability or ineligibility for legal aid in the Member State where is the location of competent court can significantly impede purchase of goods from

[218] Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 664 (1998) By this the authors have in mind insisting on higher standards of human rights in international relations then within the EU

[219] See Green paper presented by the Commission "Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market" C0M(93) 576, adopted on 16 November 1993 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0576:FIN:EN:PDF, last access on 31.10.2009

[220] Ibid at 11.The expansion of the cross border shopping was anticipated in the 1993 Green paper of the Commission. This proved to be try since Special Eurobarometer 252/Wave 65.1 "Consumer protection in the Internal Market", European Commission, 2006, available at http://ec.europa.eu/consumers/topics/eurobarometer_09-2006_en.pdf, last visited 21.09.2009.documented that "Overall, in the past year, 26% of all Europeans have performed a cross-border purchase elsewhere in the Union"

another member state. All things considered, the approach undertaken by the EU in this respect is predominantly instrumental.[221]

Another aspect of the EU's position towards legal aid is that legal assistance is identified as means of social inclusion. While examining the EU endeavors towards combating social exclusion we will have to drift apart from conventional EU legislating methods and look at the so called "new method of governance" where emphasize is on the notions such as mutual learning, adopting best practices and peer review.

5.1 Rule of law as origin of access to justice in the EU

Principle of the rule of law is one of the fundamental principles of the EU. It is enshrined in the Article 6 of the TEU.[222]

For a common observer it would seem natural that this principle was built into the foundation of European integration at the very beginning. Awkwardly enough, that was not the case. Principle of the rule of law was incorporated into Community law by the ECJ. In the seminal decision *Les Verts* ECJ held that*:*

> *"It must be first emphasized in this regard that the European Economic Community is a Community based on the rule of law, insomuch as neither its member states nor its*

[221] See Green paper presented by the Commission "Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market" C0M(93) 576, adopted on 16 November 1993 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0576:FIN:EN:PDF, last access on 31.10.2009 p. 12.(the Economic and Social committee urged the EU leaders to work on access to consumer justice back in 1991 by stating that European political leaders will have to address the problem of the settlement of cross-frontier disputes if they are not to produce an imperfect, inconsistent economic system.) Also see Christopher Hodges, *Europeanization of Civil Justice: Trends and Issues*, 26 C.J.Q. 96, 97 (2007) (author notes that as regards access to justice in consumer protection "the underlying policy concern of the Commission was, as always, to enhance the European economy")

[222] CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, 24.12.2002 O.J.(C 325) art. 6 (2002) "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

institution can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[223]

So, the principle of the rule of law was incorporated into Community law by the ECJ which envisaged the community judicial system as a perfect circle with no loose ends. It emphasized the availability of judicial remedies in the field of application of community law. In the Johnston case ECJ made clear the *"requirement of effective judicial review under Community law"*[224] Jacobs has written along the same lines stating that

"In the domain of Community law it is a fundamental requirement of the rule of law, according to the case law of the European Court, that all measures whether Community or national having legal effect are subject to judicial review, to ensure their conformity with Community law."[225]

The emphasis in *Les Verts* and subsequent jurisprudence of ECJ was on completing the circle of judicial protection under Community law. Competence is divided between Community courts and national courts through interaction of which the principle of rule of law was to be accomplished.[226]

[223] Case 294/83, Parti ecologiste "Les Verts" v Parliament, 23 (1986)

[224] See Francis G Jacobs, *The Right of Access to a Court in European law: with Special Reference to Article 6(1) of the European Convention on Human Rights and to European Community Law*, 10 I.BULL. 53, 59 (1996) available at http://www.interights.org/view-document/index.htm?id=476 (last visited 03.11.2009).

[225] See Francis G Jacobs, *The Right of Access to a Court in European law: with Special Reference to Article 6(1) of the European Convention on Human Rights and to European Community Law*, 10 I.BULL. 53, 58 (1996) available at http://www.interights.org/view-document/index.htm?id=476 (last visited 03.11.2009).

[226] See Koen Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 COMMON MKT. L. REV. 1625, 1626-27 (2007) ("The "Complete" system of judicial protection means that sufficient legal remedies and procedures exist before the Community courts and the national courts so as to ensure judicial review of the legality of the acts of the institutions, with the result that when the review of the legality of a Community act cannot be carried out directly by the Community courts for reasons of inadmissibility, it must somehow be possible to be brought before the national courts which will then make a reference for a preliminary ruling on the validity of such act.")

Problems concerning *locus standi* for individuals before Community courts envisaged under article 230(4) of EC gained much attention from the commentators of EU law.[227] The strand of ECJ jurisprudence interpreting direct and individual concern stipulated in article 230(4) in such a way to disallow access to court was heavily criticized. The Lisbon treaty is answering these criticisms by liberalizing standing rules for individuals and, hopefully, finishing the perfect circle of judicial protection.

But what stands behind the term "rule of law"? Ward is arguing that rule of law in not an end in itself but rather a means aimed at facilitating an ultimate value - equality.[228] Although the author was not referring to access to justice as such he powerfully encapsulated the limited notion of the rule of law. The spotlight of rule of law in the EU was pointed towards establishing rather formal and limited notion of access to justice.

If we look at the case-law of the ECtHR we can see quite different course of events. In *Golder* case[229] impediment to access to justice was a ban imposed on the prisoner and in Airey the plaintiff's financial situation was decisive. In both cases situation is drifting apart from the formal approach of access to justice and "complete system". System in and of itself was not a problem, other obstacles were preventing the applicants from accessing the court.

Bottom line is, as Harlow suggests, that

[227] Takis Tridimas & Sara Poli, *Locus standi of individuals under Article 230(4): the return of Euridice?, in* MAKING COMMUNITY LAW THE LEGACY OF ADVOCATE GENERAL JACOBS AT THE EUROPEAN COURT OF JUSTICE 77 (Philip Moser & Katrine Sawyer eds., 2008).:Elspeth Berry & Simon Boyes, *Access to justice in the Community courts: a limited right?,* 24 C.J.Q. 224 (2005)

[228] See Ian Ward, *Europe and the "principles" of article 6*, 11 K.C.L.J.105, 109-10, (2000) "equality means a whole lot more that the rule of law and the Union must come to acknowledge this. A rule of law is something, but in the grand scheme of a coherent and integral public philosophy it is certainly not everything"

[229] *Golder v United Kingdom* (App.No.4451/70), February 21, 1975.

"It would be wrong to let the discussion of the rule of law to stop short at the level either of principle or of procedure without any consideration of social inequality…if access to the courtroom is a human right, then so must access to legal services be."[230]

But all the energy of the Union is focused on formal access to courts. In the centre of the attention is individual and hypothetical possibility of his to challenge acts of the EU or Member State that runs counter to EU law. How can an individual in need of legal aid do that? Through national legal aid scheme using reference procedure Art 234. But he cannot directly challenge Community institution act through national legal aid scheme since they are not dealing with proceedings before the Community courts[231].

Here legal aid before the Community courts comes into play. Court of First Instance (hereinafter CFI) is now competent to deal with individual submissions.[232] Truth be told, there are no court fees or other expenses related to the proceedings.[233] There are some exceptions stipulated when a party would have to incur some costs, but they cannot be considered prohibitive.[234] Applicant needs to be represented by a lawyer.[235] The legal aid scheme is well elaborated in the CFI rules of procedure.[236] But there is no second instance review of the

[230] Carol Harlow, *Access to Justice as a Human Right: The European Convention and the European Union in* THE EU AND HUMAN RIGHTS 187, 189 (Philip Alston et al. eds., 1999).
[231] See European Judicial network in civil and commercial matters web site with the overview of all national legal aid systems (except Denmark). Namely, some of the national systems like in England and vales and Northern Ireland are stating that they are providing legal aid in the reference proceedings before ECJ, for example Gibraltar is specifically stating that it is not providing legal aid before the Court of First Instance while other Member States are not mentioning proceeding before CFI at all. Available at http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ec_en.htm last access on 22.10.2009.
[232] See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 24.12.2002 O.J.(C 325) art. 6 (2002)
[233] See RULES OF PROCEDURE OF THE COURT OF JUSTICE O.J. (L 383) art. 72 (1992) and of the RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE O.J. (L 317) art. 90 (1991)
[234] Ibid. For further explanations see Tom Kennedy, *Proceedings before the European Court of Justice-costs and legal aid*, 36 J.L.S.S. 139, 141 (1991)
[235] See STATUTE OF THE COURT OF JUSTICE O.J. (L 24) art.19 (3) (2008)
[236] See RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE O.J. (L 317) art. 94-97 (1991)

negative decision on legal aid.[237] However, it seems that the biggest obstacle to access to justice is that there is no outreach activity of the Community courts to the public. Information available at the ECJ web site can hardly suffice. How can EU citizens know that they can address CFI and that there is a legal aid scheme available if they are not informed?[238] Similarly, an individual cannot even get preliminary legal advice regarding the possibility of commencing proceedings before CFI.[239] This appears to be a significant gap in access to justice system established in the EU and Member States.

It seems that the EU institutions were far more concerned regarding the procedural "completeness" of the judicial system rather than its "effectiveness". The same could be said about the scholarly works of academicians. There is a significant gap in the literature on legal aid system available before the community courts.[240]

[237] See RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE O.J. (L 317) art. 96 (6) (1991)
[238] See Tom Kennedy, *Proceedings before the European Court of Justice-costs and legal aid*, 36 J.L.S.S. 139, 146 (1991). ("the availability of legal aid is not widely known, a fact which may, in part, explain the relatively small number of applications for such assistance")
[239] Tom Kennedy, *Proceedings before the European Court of Justice-sots and legal aid*, 36 J.L.S.S., 139, 146(1991) as Kennedy notes ("legal aid will not be granted…nor will it extend to a request for legal advice with a view to establishing whether proceedings might be appropriate.")
[240] For the purpose of this paper I was only be able to find only two, relatively outdated articles: Kennedy, *Proceedings before the European Court of Justice-sots and legal aid*, 36 J.L.S.S., 139, (1991) and Kennedy, "Paying the Piper: Legal Aid in Proceedings Before the Court of Justice"(1988), 25, CML Review

5.2 Legal aid and access to justice in the EU from the human rights perspective

The EU was not fashioned as an organization that will champion human rights.[241] None of the treaties establishing three communities bring up human rights.[242] By contrast, respect for human rights become one of the EU's foundational principles.[243] Moreover the new treaty gave legal validity to the Charter and opened the possibility of accession to the ECHR.[244] So how did it come about that European community started to deal with human rights? Basically, it was the consequence of the principle of supremacy of EC law over the law of the Member States. If a Community act cannot be annulled on basis of human rights challenge by the constitutional court of the Member State and ECJ is not dealing with human rights then the individuals are left without any protection against violations of their human rights in the field of EC law. The initial ECJ rights jurisprudence was intended to solve this discrepancy.[245]

[241] Main rationale of European integration could be summarized by the endeavor of France as well as other founding members to integrate post war Germany into the system and thus prevent escalation of prospective hostilities. On the other hand it was clear from the beginning that this would not be another Versai system since the rules would be equally binding for all the members. This quality made it attractive for Germany as well. Another aspect of the story is that European states, united, could play a prominent role on the global scene, since individually, they lost the ability to significantly influence the global events. Finally, beside the underlined political motive, economical development was at the center of the European integration from its inceptions stage. For this see….JOHN PINDER, THE EUROPEAN UNION: A VERY SHORT INTRODUCTION 1-4 (2001)

[242] For this see Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 665 (1998)

[243] CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, 24.12.2002 O.J.(C 325) art. 6 (2002)

[244] CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION as amended by the Treaty of Lisbon, 9.5.2008 O.J.(C 115) art. 6 (2008) [hereinafter TEU amended by Lisbon]

[245] see Joseph H. H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1119 (1986) ("The "surface language" of the Court in *Stauder* and its progeny is the language of human rights. The "deep structure" is all about supremacy.)

5.2.1 Moving towards the human rights discourse

Before 1969 ECJ refused to accept rights recognized by domestic law of Member States in cases brought by individuals. From 1969, this position changed. First case was *Stauder*. The applicant invoked human dignity, the right radiating through the entire German legal system, but nevertheless unknown to the Community law. For the first time ECJ introduced a new source of law "*the fundamental human rights enshrined in the general principles of community law and protected by the Court."*[246] ECJ elaborated upon the new approach in the *International trade company case* and held that the authority of Community law act cannot be affected by contentions that it runs counter to national fundamental rights or principles but it can only be judged in the light of Community law, namely *"the general principles of law protected by the Court of Justice."*[247] These principles differ from Member States national law although they are "*inspired by the constitutional traditions common to the Member State*."[248] Finally in the seminal *Nold case* ECJ added another source of inspiration for the general principles of community law *"international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."*[249]

So, after outlining the beginnings of the human rights protection before the ECJ it would worth a while to highlight again that human rights protection was not introduced by the ECJ because respect for human rights was perceived as a value in itself, but to achieve a different end. This end is acceptance of the principle of supremacy by the Member States. Weiler captures this point by stating that *"Accepting supremacy of Community law without some guarantee that this supreme law would not violate rights fundamental to the legal patrimony of an individual*

[246] Case 29/69 Erich Stauder v City of Ulm – Sozialamt 7 (1969)
[247] Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel 4 (1970)
[248] Ibid.
[249] Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission, 13 (1974)

Member State would be virtually impossible."[250] Nevertheless, respect for human rights grown to be one of the hallmarks of the EU.

5.2.2 EU human rights policy a daydream or a reality

Alston and Weiler are proposing that the EU should introduce comprehensive human rights policy. This policy should give way and join departmental actions of various EU institutions in the field human rights. Moreover, it should diminish the discrepancy between EU's internal and external human rights dealings. Although, their work did not have much resonance in the circles of EU policy makers[251] some of their proposals aimed at enhancing access to justice within the Community legal order deserve deeper consideration. They find overreliance of community institutions on judicial remedies not fruitful. Although an essential element of access to justice, in and of themselves, they are not sufficient. Different programs should be introduced that would allow individuals to defend their rights in spite of circumstances that "*render them illusory*".[252] To that end appropriate legal aid scheme for human rights cases supervised by the Directorate-General for Human Rights (hereinafter DGHR) was suggested by the authors.*[253]*

DGHR is envisaged as a body focusing on human rights and coordinating efforts of the Commission thereof. Addressing human rights issues, devising and implementing policy aimed

[250] Joseph H. H. Weiler, The Transformation of Europe, 100 YALE LJ. 2403, 2418 (1990–91)
[251] Miguel Poiares Maduro, *The Double Constitutional Life of the Charter of Fundamental Rights of the European Union, in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS-A LEGAL PERSPECTIVE 269, 294 (Tamara K Hervey & Jeff Kenner eds., 2003).
[252] Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 710 (1998)
[253] Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 710 (1998) ("Access to justice is often defeated by lack of the resources required to bring meritorious cases or test cases even where procedurally such action would be possible. The Directorate-General for Human Rights should be authorized to oversee an adequate legal aid scheme to facilitate the funding of meritorious cases in the field of human rights. Since such cases might be directed at the Commission itself, independent intermediaries must also be found to oversee the allocation of such funding without, however, having their hands tied by conflict of interest.")

at enhancing the state of human rights would be just some of its activities.[254] The proposed role of the DGHR in facilitating legal aid scheme, thus enhancing access to justice within the Community legal order in the field of human rights, is praiseworthy. It should be emphasized that the proposed scheme would fund human rights cases. The present cross border dispute scheme established by the Legal Aid Directive relies on national legal aid schemes and, ultimately, its beneficiary is a "market citizen". Similarly, there is a legal aid system within the ECJ and CFI established by the rules of procedure of these respective courts that predominately reflects idea of the rule of law and complete judicial protection. By this I have in mind formal availability of legal aid before the community court without any reference to human rights aspect of a concrete case. Hence, hypothetically, the case concerning basic human rights will be perceived in the same manner as, say, the case dealing with the free movement of goods.[255] Another problem is that there is no scrutiny of legal aid schemes before the Community courts. One of the reasons for rejection of legal aid before the CFI is that the claim is "*manifestly inadmissible or manifestly unfounded*"[256] The decision on legal aid application shall be made by

[254] Ibid. at 697,698

[255] By this observation I do not want to underestimate the European Court of Justice jurisprudence regarding the free movement of goods that contributed significantly in enhancing the common market. I just want to highlight the importance of human rights cases since the persons affected are, most often, among the most vulnerable population in one society. Similarly, what is at stake for them is much more crucial than in other cases.. For example, one cannot doubt that what was at stake for a person in a recent Elgafaji case C-465/07 (that being repatriation to Iraq and consequently his life and that of his wife) is of, literally, existential importance. Consideration to the issue of importance of the particular case for the individual has been adduced by the ECHR see the Munro case, and it was recognized in the Legal aid Directive. In a wider context of the role of the ECJ in the EU, Van Bogdandy is noting that "there is crucial difference between the basic freedoms case law and the human rights case law" in that that, unlike the human rights case law, the basic freedoms case law "does not put the issue out of reach of the normal political process". For this see Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1326-27 (2000) Judging on this statement we can presume that human rights case law is different in that it binds the Member States and, as in the internal legal systems, puts human rights issues beyond the reach of the political process. This testifies in itself on the importance of human rights judgments made by any court. The question that arises is why this is not recognized while deciding on the availability of legal aid before the Community courts?

[256] See RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE O.J. (L 317) art. 94 (3) (1991)

the President of the court[257] and will be final.[258] This provision can raise some concerns from human rights perspective. Namely, only one person can make a decision which is not appealable.

As much as I do not like to widen the scholarly debate regarding the future of the EU's human rights face I need to mention another scholar who is advocating solutions quite opposite to the ones' of Weiller and Alston. In a nutshell, Von Bogdandy is rejecting comprehensive EU human rights policy by stating *inter alia* that

> *"the vision of reconstructing broad policy fields from the perspective of human rights might in the long run even corrupt the concept of rights as such, because the very essence of right is that it is accorded by the immediate protection by the court"*[259]

He discusses that the Union institutions are too detached from the citizens to be able to design and implement comprehensive human rights policy.[260] In order to reconcile different standards in the EU's internal and external policy he suggests approach based on the so called "*triple human rights standard*".[261] First standard is the lowest and should address the human rights issues in the third countries. Second standard is intermediate and should address general respect for human rights in the Member States. Finally the highest standard is to be kept for the Member States while applying EU law. His basic idea is that the ECJ cannot take on the role of the strong constitutional court if for nothing else then for its aloofness from the central affairs within the respective Member States. The core of human rights, therefore, should be kept within the realm of national judiciary.

[257] Ibid. 96 (2)
[258] Ibid. 96 (6)
[259] See Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1316 (2000)
[260] Ibid at 1317
[261] Ibid. at 1319

Further on Von Bogdandy argues that EU policies and key decisions are being deliberated through political avenues. It follows that ECJ is not equipped and ready to settle political disputes on the legal grounds. Therefore involvement of ECJ in the political process via central position of human rights adjudication in Europe would not be appropriate. Finally, this author although initially skeptical towards transforming European law to a "*legal order that focuses on the protection of individual*"[262] admits that in specific legal areas such as, *inter alia*, access to justice this transformation is most adequate and should be further examined. Hence, in one approach we have an attempt to overcome legalistic notion of access to justice[263] and in another the possibility of placing the respect for individual rights in the center of the European legal order is found suitable for the field of access to justice.[264]

Therefore, even among the divided academic views access to justice has its place in the future human rights policy. In fact it is one of the not so many undisputed rights, hence it should take a prominent place in the EU's human rights future whatever that future might be.

[262] Ibid. at 1336

[263] See Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 668 (1998) "Judicial protection at the instance of individuals is an important, even foundational, dimension of an effective human rights regime. But while it is necessary, it is not sufficient. Effective access to justice requires a variety of policies that would empower individuals to vindicate the judicially enforceable rights given to them. Ignorance, lack of resources, ineffective representation, inadequate legal standing and deficient remedies all have the capacity to render judicially enforceable rights illusory."

[264] See Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1336 (2000)

5.2.3 Charter of fundamental rights and civil legal aid[265]

Bearing in mind these two opposed approaches to EU human rights future we should look at provisions of the Charter dealing with access to justice where mentioned approaches by and large coincide. Article 47 of the Charter is, inter alia, envisaging that *"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."* On the face of this provision we can notice that it makes no distinction between civil and criminal legal aid. This is a good solution since interpretation that "one is over another" cannot occur Namely, as the criminal legal is expressly worded in major human rights treaties there is a tendency to give predominance to criminal legal aid since "*a more extensive obligation has been recognized in the case of criminal legal aid*"[266]. Consequently, in the system of jointly budgeted civil and criminal legal aid the latter, as Hynes picturesquely notes "*bites into the civil legal aid budget*".[267]

Further on we can dwell upon the possible meaning of the word "effective". If we consult the Explanations of the Charter[268] we can see that it invokes the *Aire* judgment where effectiveness doctrine was introduced. Having this in mind we should read it as departing with the formal access to justice concept and moving towards the concept where circumstances and inequalities of each case are taken in consideration. That is why one can argue that Charter is

[265] the EU in the year 2000 finally got its "bill of rights"-The Charter of Fundamental Rights in the EU. The entire process of drafting the Charter was a novelty in European constitutionalism and signals the significance given to this endeavor by all the relevant EU stakeholders. See generally J. SCHÖNLAU, DRAFTING THE CHARTER RIGHTS, LEGITIMACY AND PROCESS 76-122 (2005).

[266] See Murray Hunt & Michael J. Beloff, *The Green Paper on Legal Aid and International Human Rights Law*, 1 E.H.R.L.R 5, 7 (1996)

[267] See Steve Hynes, *Legal aid -- a flawed diamond*, L.S.Gaz., April 2009, at 1,1.also see Daniel S. Manning, *Development of a Civil Legal Aid System: Issues for Consideration*, *in* MAKING LEGAL AID A REALITY: A RESOURCE BOOK FOR POLICY MAKERS AND CIVIL SOCIETY 61, 68 (PILI 2009) available http://www.pili.org/images/pdf/making-legal-aid-a-reality-06-02-2009-web.pdf, last visited 02.11.2009

[268] See Explanations Relating to the Charter of Fundamental Rights, (2007/C 303/02), 14.12.2007, explanation on Article 47, para.3, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF ,last access date 08.11.2008.

bringing something new into the Community legal order as far as access to justice and legal aid are concerned. Lisbon treaty is giving legal validity to the Charter transforming her into the full flagged bill of rights. This cannot be undermined even by the reservations of the UK, Poland and probably Czech Republic and its inherent limitations regarding field of application. Obviously the EU has moved into human rights discourse.

5.2.4 Access to Justice under the spotlight of the Fundamental Right Agency

Access to justice has become of interest for the newly founded European Fundamental Rights agency (hereinafter FRA). Probably the most important competence of the Vienna based FRA is to advise and assist community institutions as well as Member States when taking actions in their respective competencies in order to "*fully respect fundamental rights*".[269] One of the thematic areas where FRA will perform its mission is, at least for the period 2007-2012, "access to efficient and independent justice".[270]

One cannot but notice that role of FRA by and large coincide with the Weilers and Alstons role assigned to Human Rights Monitoring Agency.[271] However, its substantial counterpart-the DGHR is lacking. FRA has significantly less political and legal weight than DGHR. Similarly, FRA can give its opinion only when invited to do so in the course of the legislative activities of the institutions.[272] Furthermore, not only that the EU institutions can

[269] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, O.J. (L 53) art.2 (2007)
[270] See Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, Article 2, par. 1(i).
[271] See Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 711-15 (1998)
[272] See Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, Article 4(2).; Also see Editorial *The nebulous authority of fundamental rights in EU law*, 32 E.L. Rev. 155, 155-156 (2007) It can be argued that this, although limited, involvement in legislative process of the FRA is in fact policy making power.

ignore the FRA opinions but they can even avoid their prospective legislative acts being *ex ante* scrutinized from the fundamental rights perspective. Bogdandy and Bernstroff are arguing that the impact of the FRA on prospective legislative act depends upon establishing close relations with the Commission, Council and EU Parliament.[273] In any case, access to justice has found its place among the tasks highlighted for the period 2007-2012 and we shall see the performance of the FRA in the respective field.

5.2.5 Accession Conditionality and legal aid

Let us now examine the strategy employed by the EU in the accession process towards the aspirant Member States regarding access to justice and legal aid. Human rights are put to the fore in the enlargement process via the so called "Copenhagen criteria".[274] These criteria were weighted up against the practice of the respective candidate countries.

As widely known the progress of the candidate countries is being examined on the periodical basis.[275] This report is divided into chapters covering all segments of the domestic legal system. Smith argues that the EU's role in the field of access to justice was to bring these countries in line with the requirements of the ECHR since the executive mechanism of the

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This runs counter to the Weilers and Aliston vision of the Monitoring agency. They proposed that the agency should not have any policy making powers since that should be the role of the Directorate General for Human Rights. For this see Philip Alston & J. H. H. Weiler, *An ever closer union in need of a Human Rights Policy*, 9 EJIL. 658, 715 (1998)

[273] Armin Von Bogdandy & Jochen Von Bernstorff, *The EU Fundamental Rights Agency Within the European and International Human Rights Architecture: the Legal Framework and some Unsettled Issues in a new Field of Administrative Law*, 46 COMMON MKT. L. REV. 1035, 1055 (2009)

[274] The"Copenhagen criteria", are set of requirements pronounced by the European Council in Copenhagen in December 1993. They stipulate that necessary preconditions for joining EU are: stable institutions that guarantee democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy, as well as the ability to cope with the pressure of competition and the market forces at work inside the Union; the ability to assume the obligations of membership, in particular adherence to the objectives of political, economic and monetary union.

[275] On the progress reporting see the web page of the European commission available at http://ec.europa.eu/enlargement/how-does-it-work/progress_reports/index_en.htm, last accessed on 31.10.2009. also see *Christophe Hillion, The Copenhagen Criteria and their Progeny, in* EU ENLARGEMENT: A LEGAL APPROACH 1, 13-14 *(Christophe Hillion ed., 2004).*

latter[276] could not answer this task. This development opens yet another question. Since the EU has no competence to regulate legal aid in the Member States does this intervention opens the question of double standards in the EU internal and external policy? This question was posed concerning minority protection but it has some bearing in the field of legal aid as well. Williams is arguing that setting higher human rights standards in the external than in internal policy is undermining the EU's human rights face. Further on he argues that the policy of the EU towards candidate countries, as far as human rights are concerned, cannot be named different but as being based on "central discrimination"[277] Alternatively, one could argue that in the accession process the Union behaved above all pragmatically. If it cannot influence human rights issues internally, it is better to exert some pressure on the candidate states so that they do not add weight to the human rights situation in the EU when they become fully fledged members.

We can speculate on possible motives of the EU in this regard. One of the main preconditions for membership is adoption of acquis communitare and the ability of its application. The problems that might occur is that misapplication of acquis could pass unnoticed in the new Member States since they continue to suffer from lack of genuine civil society through which individuals could report the infringements of EU law[278] From this perspective, legal aid systems could contribute to higher detection of EU law violations by the new Member States.

In any case, the new Member States would need to have domestic legal aid schemes in place in order to implement Legal Aid Directive. Overall insistence on legal aid schemes could

[276] See Roger Smith, *Human Rights and Access to Justice*, 14 INT'L J. LEGAL PROF. 261, 275 (2007)
[277] See Andrew Williams, *Enlargement of the Union and Human Rights Conditionality: a Policy of Distinction?*, 25 E.L. Rev. 601, 617 (2000)
[278] See Ulrich Sedelmeier, *After Conditionality: post-Accession Compliance with EU law in East Central Europe*, 15 J. Eur. Public Policy 806, 818 (2008) ("the weakness of post-communist civil society could be a structural obstacle to the effectiveness of the EU's decentralized compliance system in the EU8, which relies on complaints from aggrieved parties")

be regarded as a "side effect" of acquis conditionality. Namely it would be cynical of the EU to insist only on the fields of law covered under the Legal Aid Directive and to disregard benefits that legal aid system could provide the nationals of acceding countries. This is even more true having in mind that these schemes are in place in the all of the EU countries and that, even if not formally requested, in practice are necessary for compliance with the ECtHR case law.

5.3 Cross border aspect of civil legal aid in the EU

By virtue of novel provisions, introduced by the Treaty of Amsterdam, the EU gained the competence to adopt "*measures in the field of judicial cooperation in civil matters having cross-border implications… in so far as necessary for the proper functioning of the internal market*"[279] These measures *inter alia* include "*eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States*.[280] The overall idea of legislating in the area of judicial cooperation was part of a larger plan of establishing the "*area of freedom, security and justice"* stipulated in the article 61.[281] Basedow observes that actually *"the Treaty of Amsterdam has shifted the responsibility for legislation concerning the judicial co-operation in civil matters from the third pillar of the European Union to its first pillar, i.e. the European Community*".[282]

[279] See EC TREATY art 65 (1).
[280] Ibid. art 65c
[281] These provisions are grouped under Title IV of the EC TREATY "Visas, Asylum, Immigration and Other Policies Related to *Free Movement of Persons*"(emphasis added). Therefore at the outset of this discussion we should keep in mind that the overall design of judicial cooperation in civil matters is intended to facilitate free movement of persons. This simple observation should help us understand further developments taking place in the area under discussion. For analysis of further implication of article 61 and 65 introduced by Treaty of Amsterdam and its interaction with other provisions of the EC treaty see generally Jurgen Basedow, *The Communitarization of the conflict of laws under the treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687 (2000)
[282] Ibid. at 691

Articles 61 and 65 gave the EU competencies to engage in unification of private international law within the EU.[283]

But these new powers conferred were not limitless. As mentioned, three limitations are in place. Namely, the overall actions should facilitate free movement of persons, proper functioning of internal market (this limit is maybe redundant since it's the entire title IV is aimed towards enhancing free movement of persons which is one of the constitutive element of the internal market) and have a cross border aspect.[284] So, against this background we should study further developments in the matter considered.

5.3.1 Green paper platform

Cross border dimension of legal aid in the Union was addressed by the 1999 Tampere European Council where the Council and the Commission were invited to regulate cross border aspect of legal aid in order to facilitate better access to justice in Europe.[285] Next step in achieving that end was taken when the Green paper on legal aid in civil matters (hereinafter the Green paper) was revealed.[286] In the Green paper the Commission summarized the current state of affairs regarding cross border aspect of legal aid, examined various problems facing cross border litigant and offered possible solutions. The Green paper was intended to serve as a broad public debate platform on the methods of regulating legal aid in cross border context. Since its canvas is too broad for the current discussion I will just focus on few observations.

[283] See Oliver Remien, *European Private International Law, the European Community and its emerging Area of Freedom, Security and Justice*, 38 COMMON MKT. L. REV. 53, 60 (2001)
[284] Ibid. at 74,75 On the overview of material limitations of article 65
[285] This should be done by establishing "minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation" See Tampere European Council 15 and 16 October 1999, Presidency conclusions, para. 30.
[286] See Green Paper From The Commission, Legal aid in civil matters: The problems confronting the cross - border litigant COM(2000) 51 final [hereinafter the Green Paper]

The Green paper brings up several international conventions having an impact on legal aid in civil matters most important being the ECHR. It goes on to say that standards set by the ECtHR regarding legal aid in civil proceedings are rather unclear and as such not of much help in the cross border aspect.[287]

The Green paper suggests that the problem of the cross border litigants could be solved by general recognition of the Hague Convention XXIX of 25 October 1980 on international access to justice by the Union Member States.[288] However this solution was not endorsed by the Council and Member States.[289]

[287] Ibid. at 9-10.

[288] Ibid. at 10. This Convention *"requires nationals of contracting States and persons habitually resident in a contracting State to be treated, for the purposes of entitlement to legal aid in court proceedings in each contracting State, as if they were nationals of and resident in that State."*

[289] Ibid. at 10. In any case this initiative, according to the Green paper, failed back in 1986. The question of accession of all the EU Member States to the *Hague Convention on international access to justice* is somewhat unclear. As stated, the Green paper noted that the joint accession of the Member States was not endorsed. On the other hand the document drawn by the Permanent Bureau of the Hague Conference on Private International Law, Summary of Responses to the Questionnaire of September 2008 Relating to the Access to Justice Convention With Analytical Comments" at 6 (2009) states that "Even though the European Community cannot itself become a Party to the Convention, it has manifested its intention to examine the possibility of acceding through the ratification and/or accession of all its Member States", available at http://hcch.e-vision.nl/upload/wop/2008pd15e.pdf, last access on 02.11.2009. Hague convention on access to justice is solving the problem of trans-border legal aid on the antidiscrimination foundations. One cannot that this was the inferred stance of the ECJ as well. Moreover, the Legal Aid Directive went a step beyond the antidiscrimination aspect and established clear obligations upon the member states on the cross-border aspect of legal aid regarding the EU nationals, but also the third country residents. Also, the Legal Aid Directive (art 20), takes precedence over other bilateral or multilateral treaties of the Member States. Therefore, the only explanation for the prospective accession of all the EU Member States to the Hague convention is that the EU nationals could gain access to legal aid services in the contracting states to the Hague convention, other than EU member states, on the antidiscrimination basis. Even so, the motives of the EU remain unclear considering that all of states where the Hague convention entered into force are candidate or potential candidates for EU membership. Consequently, having in mind that the EU is pressing for the establishment of legal aid systems in these countries, the EU nationals will not benefit from these systems under the Hague Convention on access to justice on antidiscrimination basis simply because they are nonexistent or in the phase of inception. The contracting states to the Hague Convention are Albania, Belarus, Bosnia and Herzegovina, Croatia, Montenegro, Morocco (did not enter into force), Serbia, Switzerland, The former Yugoslav Republic of Macedonia and Turkey (did not enter into force). These data are available at http://www.hcch.net/index_en.php?act=conventions.status&cid=91, last visited 02.11.2009.

The Commission considered different eligibility systems in Member States and how these would reflect upon the cross border litigant. The problem encountered is that of diverse financial thresholds of potential legal aid recipients.[290]

The Commission raised the subject of merit test widely used by the Member States and his impact on cross border litigants.[291] This problem is not predominantly related to the cross border litigants, although it is accentuated in cross border context, and was addressed by ECtHR as well.[292]

The Green paper welcomes different systems aimed at making justice systems more accessible such as CFA and LEI but estimates that state funded legal aid scheme will continue to play a prominent role in achieving access to justice.[293]

Before elaborating upon the Legal Aid Directive[294] I would like to bring to light few significant facts. Firstly, in accordance with Article 12 of the EC treaty[295] and the jurisprudence of the

[290] Green paper points out that "The absence of homogeneity of these conditions within the Member States constitutes a deterrent for anyone who wants to embark upon a cross-border procedure, in particular a person from a high-cost country involved in a dispute in a low-cost country, and is therefore an additional obstacle to effective access to justice."

[291] Ibid, p. 10 and 11" The majority of Member States test the merits of the claim, on the basis of variable criteria leaving room for a broad subjective margin of appraisal. It is asked sometimes whether the request "has a reasonable chance of success", whether there is "a good chance that the applicant is likely to win", whether an "unassisted litigant would risk his own money," or some similar test. This control is relatively formal in some Member States, but in others the test may develop into a genuine pre-examination."

[292] In *Aerts v Belgium*, (App. No. 25357/94), July 30, 1998. it was held that "it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal" Aerts v Belgium, para 60 you can refer them to the relevant page in ECHR chapter

[293] See The Green paper at 5 It is held that notwithstanding obvious advantages of such systems, one of them being their apparent viability, they cannot replace state funded legal aid systems. The paper envisages that it is likely "that all Member States would need to maintain some form of legal aid to cover at least the very poorest" It is said that ongoing reforms of national legal aid systems aimed at introducing the aforementioned systems should not endanger the endeavors of the EU in regulating legal aid in cross border cases. In another words, alternative means should not replace legal aid systems altogether since the later are most appropriate for addressing cross border legal aid issues

[294] For the purposes of this sub-chapter only I will dispense myself from using the wording "Legal aid Directive" and will employ word "Directive"

[295] EC TREATY art. 12 "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited"

ECJ[296] it is clear that persons having residence in one Member State are eligible to apply for and receive legal aid in another. This approach however brings major practical complications most important of which being that relevant rules "*have to be deduced from the case law*[which] *makes them inaccessible to the citizen."*[297] On top of this, practical problems accompanying cross border context such as transmitting legal aid applications, rendering initial legal advice in the applicants' state of residence etc. would not be addressed.

Second, as Yuille correctly observes, even if the recourse to the national legal aid schemes based on article 12 of the EC treaty can be functional, Member States have no obligation to set up legal aid system at the first place.[298] The approach thus is a negative one, stating what Member States cannot do and not stipulating what they should do.

5.3.2 Legal Aid Directive

In what follows, I will endeavor to answer whether the Directive only codifies existing rights or it expands access to justice for EU citizens. It seems that the Directive can be viewed as a compromise between the EU and Member States. The balance is struck between endeavors of the EU with the face of the Commission and Member States with the face of the Council.

Following the Green paper the Commission came up with the Proposal of the Directive on legal aid in the EU.[299] This proposal went beyond the mere regulation of the cross border aspect of legal aid and proposed that some common standards should be established

[296] For the overview of relevant ECJ case-law see the Green Paper at 7-8 "any beneficiary of a Community law right (including a cross-border recipient of services or purchaser of goods) is entitled to equal treatment with nationals of the host country, as regards both formal entitlement to bring actions and also the practical conditions in which such actions can be brought, irrespective of whether he is, or ever has been, resident or even physically present in that country."

[297] See the Green Paper at 10

[298] See Lua Kamal Yuille, *No one's Perfect (not even close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 884 (2003-2004)

[299] Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings COM(2002)13 final

notwithstanding the cross border elements.[300] More exactly, the Commission held that the most appropriate way of regulating legal aid is by setting some common standard applicable to the cross border as well as internal situations. On the other hand the Council did not follow this line of reasoning and held that limitations set by article 65 should be respected.[301] Consequently, this novel solution was not endorsed by the Council.[302] Apparently the Member States were not ready to give in to the Commissions' vision and expand the competences of the EU. This comes as no surprise since some scholars were warning that *"a harmonization or even unification of substantive private law in the European Union applicable to both international and internal fact situations cannot be based upon Article 65."*[303] Interestingly enough this was not the only case where the Commission tried and failed to harmonize substantive legislation of the Member States on the basis of expansive interpretation of cross border aspect contained in article 65.[304]

We can speculate why the Commission endeavored to extend the competence of the Community. It seems that the state of internal legal aid in some Member States is far from satisfactory.[305] It could be that the Commission tried to influence domestic legal aid systems in

[300] Ibid. recital 5 of the Proposal and art 1(2)

[301] See Alan Dashwood, *The Relationship Between the Member States and the European Union/European Community*, *in* A REVIEW OF FORTY YEARS OF COMMUNITY LAW, LEGAL DEVELOPMENTS IN THE EUROPEAN COMMUNITIES AND THE EUROPEAN UNION 37, 43 (Alison McDonnell ed., 2005).

[302] See "2436th Council meeting- Justice, Internal Affairs and Civil Protection Luxembourg, 13 June 2002" C/02/175, at 15 ("the scope of the proposal should be restricted to legal aid for cases with cross-border implications") available at http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/02/175&format=HTML&aged=0&lg=da&guiLanguage=en last visited 26.11.2009. Also see MICHAEL DOUGAN, NATIONAL REMEDIES BEFORE THE COURT OF JUSTICE ISSUES OF HARMONISATION AND DIFFERENTIATION *104* (2004).("The Commission had originally proposed that the Directive should apply to all civil disputes, including those wholly internal to one Member State. But in its final version, the Directive states that it applies only to cross-border disputes, in accordance with the specific objectives for judicial cooperation established by Article 65 EC.")

[303] See Jurgen Basedow, *The Communitarization of the conflict of laws under the treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687, 701-702 (2000)

[304] See Aude Fiorini, *Facilitating Cross-Border debt Recovery: the European Payment Order and Small Claims Regulations*, 57 INT'L & COMP. L.Q. 449, 460-463 (2008)

[305] See Christopher Hodges, *Europeanization of Civil Justice: Trends and Issues*, 26 C.J.Q. 96, 99 (2007)

order to bring the underachieving Member States, as far as civil legal aid is concerned, up to satisfactory level.[306]

Let us now turn to the provisions of the Directive. We shall examine its main features and establish how, or rather if, they contribute to access to justice.

At the outset traditional objectives of the Community are invoked, free movement of persons and development of the free market.[307] In recital 4 of the Preamble the Directive is reminding that all EU Member States are bound by the ECHR and that the principle of equality of arms between the parties in the matters regulated by the Directive will be respected. Underlying aim of legal aid is ensuring "effective access to justice". Moreover article 47 of the Charter is invoked.

Range of legal services provided is quite broad. Prospective recipient is entitled to pre litigation advice, legal assistance and representation and exemption from or assistance with the court fees.[308] Similarly, he can use legal aid during the appeal and enforcement proceedings.[309] However, if the recipient is unsuccessful in court the "loser pays rule" applies, if recognized by the respective Member State.[310] Since in all the Member States of the COE result of the civil

[306] Italy and Greece are at the especially alarming regarding legal aid. See John Flood & Avis Whyte, *What's Wrong with Legal aid? Lessons from Outside the UK*, 25 C.J.Q. 80, 88 (2006)
"although both Italy and Greece (where a new legal aid law was passed in June 2004) have clear legal aid rules in place, there is virtually no legal aid available to the public". See also Sergio Chiarloni, *A Comparative Perspective on the Crisis of Civil Justice and on its Possible Remedies* paras. 30 and 31 available at http://www.jus.unitn.it/cardozo/Review/Civilprocedure/chiarloni99A.html, last access on 26.11.2009 where he *inter alia* states that "In Italy, legal aid is simply a disaster" and "In Greece, the legal aid system is not really effective, due to the unwillingness of counsel to accept *pro bono* work"
[307] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. (L 26/41) recital1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:026:0041:0041:EN:PDF last visited 22.11.2009.
[308] Ibid. art. 3(2a,2b)
[309] Ibid. art. 9
[310] Ibid. art. 3(2)

proceeding has a certain impact on the reimbursement of costs[311] it is clear that this provision replicates the existing situation in the Member States.

The Directive's scope of application is limited to cross border issues covering civil and commercial matters and excluding revenue, customs or administrative issues.[312] However, the implications of the expression "civil and commercial matters" remain somewhat unclear? What falls within these areas, which legal order would be dominant in interpretation: national law or international standards? If one state typifies certain issues as administrative, revenue and custom is it enough for it to fall outside the scope of the Directive?[313] Some commentators are stating that employment, consumer and family matters without doubt fall within the scope of "civil and commercial matters".[314] We can agree that these core issues certainly qualify, but beyond them, as indicated, things might get complicated.

Further on, according to Article 3(1) only natural persons can receive legal aid in cross border disputes. Article 19 stipulates that the Directive is not preventing Member States from establishing more favorable provisions in their respective legal aid regulations.[315] The Directive permits use of mechanisms other than state funded legal aid to facilitate appropriate level of

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[311] See EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), EUROPEAN JUDICIAL SYSTEMS, EFFICIENCY AND QUALITY OF JUSTICE 57 (2008).available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1041073&SecMode=1&DocId=1314568&Usage=2 (last visited May.11.2009). Also see RESEARCH TEAM ON ENFORCEMENT OF COURT DECISIONS (UNIVERSITY NANCY (FRANCE) / SWISS INSTITUTE OF COMPARATIVE LAW), EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), ACCESS TO JUSTICE IN EUROPE 102-03 (2008) available at http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes9Acces_en.pdf last visited 27.11.2009.

[312] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. (L 26/41) art.1(2),

[313] The question of interpretation of certain legal categories occurred before the ECtHR as well regarding the "determination of civil rights and obligations" stipulated in Article 6(1) of the ECHR. On the overview of this issue see Francis G Jacobs, *The Right of Access to a Court in European law: with Special Reference to Article 6(1) of the European Convention on Human Rights and to European Community Law*, 10 I.BULL. 53, 55-57 (1996) available at http://www.interights.org/view-document/index.htm?id=476 (last visited 03.11.2009).

[314] Eva Storskrubb & Jacques Ziller, *Access to Justice in European Comparative Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 177, 201 (Francesco Francioni ed., 2007). ("…the Commission mentions that naturally included are employment and consumer matters, and we can further note that family matters also fall within the scope")

[315] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. (L 26/41) art. 19

access to justice.[316] It appears that this provision is a concession to the Member States that employ privately funded arrangements to enhance access to justice.

There is no common financial threshold of eligibility. The Directive is only stating that legal aid should be granted to individuals that cannot meet the costs of proceedings due to their financial circumstances.[317] These circumstances are to be evaluated in view of criteria such as "income, capital or family situation".[318] Member States are entitled to lay down financial eligibility threshold. But notwithstanding these thresholds applicants will be eligible for legal aid if they can prove that they cannot finance the proceeding due to different standards of living in the two respective Member States.[319]

Procedural aspects are regulated in Chapter IV.[320] The process of cross border correspondence, language requirements, time limits, standard forms of communication and other practical issues are meticulously elaborated and are the strong points of the Directive. Reasons for refusal should be communicated to the applicant and there is a second instance review envisaged.[321]

Legal aid applications related to claims that appear to be manifestly unfounded can be rejected. Similarly, after the pre litigation advice is rendered additional legal assistance can be denied due to lack of merits. When assessing the merits legal aid decision making body has to consider *"the importance of the individual case to the applicant"*. Interestingly the ECtHR held that grant of legal aid will depend inter alia on *"the importance of what is at stake for the*

[316] Ibid art. 5(5)
[317] Ibid art. 5(1)
[318] Ibid art. 5(2)
[319] Ibid art. 5(4)
[320] Ibid In a nutshell, Chapter IV regulates the following: art. 12 is dealing with Authority that is granting legal aid, art. 13 with introduction and transmission of legal aid applications, art. 14 with the competent authority and language and art. 15 and 16 with the processing of application and standard form.
[321] Ibid art. 15(2)(3)

applicant in the proceedings".[322] It seems that the Directive and ECHtR jurisprudence agree on this point. Even if not separately mentioned the body in charge of legal aid in respective Member States cannot avoid but to consider the prospects of success in determining legal aid applications' future. Jurisprudence of the ECtHR regarding this issue is dealt with in more detail in the respective chapter. For now, suffice it to say that the composition of the body delivering the decision[323] and whether the representation by a lawyer is mandatory[324] has some bearing on the ECtHR's reasoning. Therefore, in reviewing the merits of the case by the legal aid body there is at least room for conflict with the ECHR.

Potential beneficiaries of the cross border system of legal aid are the EU citizens and third country nationals with the permanent residence in one of the Member States.[325] Outreach and information services aimed at prospective beneficiaries are covered in Article 18. Internet is heavily used as a means of communication[326]

As we can see the Directive's main contribution to access to justice across the EU is more technical then a substantive one. Civil legal aid in a cross border disputes is made more accessible to EU citizens and third country nationals residing in the Member States.

[322] *Steel and Morris v United Kingdom* (App. No. 68416/01), February 15, 2005, para. 61.
[323] *Gnahore v France* (App. No. 40031/98), September 19, 2000, para. 41.
[324] *Gnahore v France* (App. No. 40031/98), September 19, 2000, para. 41.
[325] Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. (L 26/41) art. 4, recital 13
[326] See
http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ec_en.htm last visited 27.11.2009.
http://ec.europa.eu/justice_home/judicialatlascivil/html/la_information_en.htm last visited 27.11.2009.
http://ec.europa.eu/justice_home/fsj/civil/legal/fsj_civil_legalaid_en.htm last visited 27.11.2009.
http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33184_en.htm last visited 27.11.2009.

5.4 New forms of governance in the EU and legal aid

The EU's lack of competence in the field of private law, including but not limiting to legal aid, is evident. Conventional methods of EU governance proved not to be capable of enhancing access to justice within the Member States competence. But is there an alternative?

To answer this question we need to start with the Lisbon European Council 2000 where the EU endeavored "*to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.*"[327] To that end reform of the European social model and promotion of social inclusion were to be undertaken.[328] Since the EU lacks competence to regulate the area of social inclusion the so called Open Method of Coordination (hereinafter OMC) was endorsed by the Lisbon Council presidency.[329] OMC was made an instrument of fighting social exclusion by virtue of Decision No 50/2002/EC.[330] The Treaty of Lisbon recognized the OMC as a possible tool for tackling common problems in the field of social policy.[331] The Commission has renewed its interest in the OMC as well and restated its commitment to OMC in the field of social protection and social inclusion.[332]

[327] See Lisbon European Council 23 and 24 March 2000 Presidency Conclusions, para.5, available at http://www.europarl.europa.eu/summits/lis1_en.htm, last visited 03.11.2009.
[328] Ibid. para 24 and 32
329 Ibid. para.32 and 37-38 (The Lisbon presidency defines the new method as "a fully decentralized approach … applied in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership")
[330] See Decision No 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion.
[331] CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION as amended by the Treaty of Lisbon, 9.5.2008 O.J.(C 115) art. 153 and 156 (2008) [hereinafter TFEU amended by Lisbon]
[332] See A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion, Communication from the Commission COM(2008) 418 final available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0418:FIN:EN:PDF last visited 28.11.2009.

5.4.1 Open Method of Coordination

I will not write at length upon this method but only flesh out his main characteristics. Scholars usually define OMC as opposed to conventional legislating method in the EU.[333] We can say that OMC is kind of a soft law, a mutual learning exercise between the Member States where they exchange experiences with the aim of setting common objectives, reviewing those objectives and finally adopting best practices. OMC thus does not depend upon the threat of sanction for its efficiency. Then again, effectiveness is altogether uncertain, opponents of this method would argue. Just the same, mutual learning, adopting best practices and peer review are notions frequently related to this process. The Commission acknowledged the usefulness of this method while laying down a number of limitations, one of them being that *"it should not be used when legislative action under the Community method is possible".*[334] One of the advantages of the OMC in social inclusion is that encourages involvement of sub national as well as non state actors.[335]

[333] See Joanne Scott and David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 ELJ 1, 1 (2002) where authors, at the outset define any form of new governance (including OMC) as "any major departure from the classic "Community Method"(CCM)" But see Gráinne de Búrca, *Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union*, 27 FORDHAM INT'L L.J. 679, 707 (2004), She defines the OMC as *"a strategy that blends the setting of objectives at EU level with the elaboration of Member State reports or plans in a reflexive, iterative process intended to bring about greater coordination and mutual learning in the policy fields or issue areas in question. ."* For further reading on OMC see generally Grainne De Burca *The Constitutional Challenge of new Governance in the European Union* 28 E.L. Rev.814 (2003) Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 ELJ 1, (2002); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, 11 ELJ 343, (2005); Kenneth Armstrong & Claire Kilpatrick, *Law, Governance, or new Governance? The Changing Open Method of Coordination*, 13 COLUM. J. EUR. L. 649, (2007)

[334] Commission of the European Communities European Governance a White Paper, COM(2001) 428,final 22, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf

[335] See Decision No 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, O.J. (L/10) the decision encourages involvement of different national stakeholders in giving their input to NAP. These actors are local and regional authorities, NGOs, bodies responsible for fighting social exclusion, universities, social partners, people suffering from social exclusion etc

The soft law approach gained in attractiveness in the last decade. This development was strongly opposed by some scholars saying that application of OMC on the competences outside of EU law scope will undermine forthcoming broadening of Union competencies by means of conventional methods. They advocate against the "*OMC infection*" of current or prospective EU competencies.[336] In any case, we cannot underestimate the potential of OMC in harmonizing some areas of law. To that end OMC was suggested as a platform for implementation of the Charter which was warmly welcomed by some scholars.[337]

Social policy and combating social exclusion where seen to go "hand in hand" with enhancing European economic competitiveness by the 2000 Lisbon European council. In contrast, social policies were traditionally part of national competence. Nevertheless, as acknowledged by some commentators, in today's interdependent Europe, many traditional spheres of competence affect economic stability of Europe as a whole. Namely, major parts of national funds are being fed into social and pension programs for maintaining viable social model and welfare contributions. Keeping these expenditures in check with the available financial resources turns out to be of crucial importance in light of the newly introduced Economic Monetary Union (EMU). That is why tackling area of social expenditure becomes a field of growing EU concern.[338] Against this background we should examine the development of the EU led OMC in the fields of traditional Member State competence.

[336] David M. Trubek and Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, 11 ELJ 343, 355 (2005)
[337] See see Gráinne de Búrca, *Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union*, 27 FORDHAM INT'L L.J. 679, 714 (2004)
[338] For this and other reasons of gradual Europeanization of national social systems see David M. Trubek and Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, 11 ELJ, 343 (2005)

5.4.2 Civil legal aid in the focus of OMC

The 2003 Joint report on Social inclusion[339] addressed access to justice and legal assistance as ways of combating social exclusion. The identified key approach in enhancing access to justice is *"improving access to legal services and justice"* which for example consist of measures like *"subsidized legal assistance, local legal advice centers for people on low incomes, specialist advice centres for asylum seekers"* etc. This approach is something to be build upon. It is striking that almost all the problems that marginalized groups encounter (domestic violence, housing etc). are regulated at national level. Yet again, these are the problems fostering social exclusion. Instead of trying to reach these groups via conventional legislative methods it should be more appropriate to coordinate national policies by sharing best practices and implementing top solutions.[340]

From access to justice perspective social inclusion could be used as a "Trojan horse" through which coordination of legal aid systems is to be introduced. One can argue that if the Member States are rejecting unification of private law it is better to achieve some level of uniformity through experience sharing and peer review in combating social exclusion.[341] Apparently this method is more about guiding the Member States towards best practices and solutions than about imposing specific solutions. But its main advantage can easily turn out to be

[339] Directorate-GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, EUROPEAN COMMISSION, JOINT REPORT ON SOCIAL INCLUSION 46 (2002) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0565:FIN:EN:PDF last visited 27.11.2009. (This report acknowledges that "Access to law and justice is a fundamental right. Where necessary citizens must be able to obtain the expert legal assistance they require in order to obtain their rights. The law is thus a critical means of enforcing people's fundamental rights.")

[340] See generally Kenneth Armstrong & Claire Kilpatrick, *Law, Governance, or new Governance? The Changing Open Method of Coordination*, 13 COLUM. J. EUR. L. 649, 669-76 (2007) (the authors are giving an overview of problems and challenges encountered within eight years of OMC social inclusion process implementation), also see Alexandra Gatto, *Governance in the European Union: A Legal Perspective*, 12 COLUM. J. EUR. L. 487, 511 (2006)

[341] See Gráinne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 28 E.L. REV. 814, 816 (2003) ("*in more substantive terms, the deployment of the OMC thus far suggests that it could constitute a means to develop and promote social and other forms of solidarity in Europe in a context where individual States' capacity to provide for public welfare has been weakened and where the EU lacks the authority, legitimacy and ability to pursue centralised policies of this kind")*

its biggest weakness. Namely, if the whole process starts and finishes with reporting and monitoring without actually adopting best practices chances are good that it will result in no change. Then again OMC proponents are suggesting other mechanism of inducing change such as "*shaming, diffusion through mimesis or discourse, deliberation, learning, and networks.*"[342]

Without going deeper into argumentation *pro et contra* OMC, we can say that, if carefully designed and implemented, OMC is capable of producing positive outcomes. Legal aid can be used as a tool for comprehensive social inclusion of marginalized groups. Good practices from different jurisdictions could be evaluated. For example, it seems that CFA and LEI yielded some positive results in the legal aid systems of the UK and Germany. Sharing experiences on these arrangements could eventually lead to their adoption across the EU. The countries advanced in providing legal aid could take the lead in this process. We should not forget new EU Member States. Their fresh experiences regarding different systems of legal aid could be a valuable asset.[343] Finally we can imagine that the process of sharing experience in the EU is nothing new and that is functioning on informal level. Institutionalizing this process by embedding it into the EU framework and by setting realistic time frames and proper procedure could yield positive results.

[342] David M. Trubek and Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, 11 ELJ 343, 356 (2005)

[343] See Directorate-GENERAL FOR EMPLOYMENT SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES, EUROPEAN COMMISSION, REPORT ON SOCIAL INCLUSION 2005 AN ANALYSIS OF THE NATIONAL ACTION PLANS ON SOCIAL INCLUSION (2004-2006) SUBMITTED BY THE 10 NEW MEMBER STATES 68 (2005) http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/sec256printed_en.pdf last visited 27.11.2009

5.5 Is Lisbon adding value to access to justice in the EU?

Some academic commentators are highlighting the lack of provisions on legal aid in the Treaty establishing a Constitution for Europe.[344] Equal objection can be made about the Lisbon treaty as well. But even if there is no reference to legal aid in the body of the text there are some positive developments.

The Charter obtained the same legal value as the treaties via new article 6 of the Treaty on European Union.[345] The possibility of EU accession to the ECHR is made possible.[346] One of the outcomes of this development is that legal aid system before ECJ and CFI will become open for the ECtHR scrutiny. Chapter 3 of the Treaty on functioning of the EU in article 81 stipulates that the Union will develop judicial cooperation in civil matters having cross border implications. To that end it will adopt measures aimed at, inter alia, "effective access to justice".[347]

It remains to be seen what will be practical implications of these provisions. In any event, at this point, it is interesting to note that the framers of the Lisbon treaty deliberated that access to justice should be "effective". The Treaty establishing a Constitution for Europe also used the wording "effective access to justice".[348] This term was actually changed by the inter-governmental conference and in its original version it worded "high level of access to justice".[349] We can speculate on which one constitutes a stronger statement. It can be argued that the current

[344] Miriam Aziz, *Implementation as the test case of European Union Citizenship*, 15 COLUM. J. EUR. L. 281, 289 (2009)
[345] See TEU amended by Lisbon Article 6 par.1 which stipulates ("The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007,which shall have the same legal value as the Treaties")
[346] Ibid. Article 6 par.2 ("The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties")
[347] See TFEU amended by Lisbon Article 81 par.4(e)
[348] See Article III-269 par. 2(e) of the "Treaty establishing a Constitution for Europe", Official Journal of the European Union, 2004/C 310, accessible at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:en:HTML last visited 04.11.2009.
[349] See Article III-170 of the "Draft Treaty establishing a Constitution for Europe" 2003, accessible at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf, last visited04.11.2009.

version demonstrates high aspirations of the framers towards ensuring standard higher than just formal access to justice. The current wording is consistent with the wording of the Charter of Fundamental Rights.[350] Maybe it is all too early to conclude that the EU is developing the "doctrine of effectiveness" as regards access to justice in the EU, but we can say that there are indicators pointing towards that direction.

Further on, judicial cooperation in civil matters is separated from the free movement of persons but the internal market requirement remained.[351] The wording employed is significantly softened since instead of "in so far as" it used "particularly when".[352] It is clear that the meaning of the sentence as it stands in the TFEU is more of instructive than restrictive nature.[353] The necessity of the cross border dimension of the case is retained. If we recall that on several occasions the Commission tried to regulate internal situations in addition to those with a cross border element we can say that the position becomes sufficiently clear. Namely, by preserving this requirement the EU implicitly upheld that this provision cannot be used as a ground for unification of internal law of the Member States.[354]

As to formal access to justice, Lisbon addressed the problem of limited standing for natural or legal persons before the Community courts by stipulating that they can bring actions under same conditions as privileged applicants *"against a regulatory act which is of direct*

[350] See Article 47 par.3 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 2000/C 364/01 accessible at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF, last visited 04.11.2009.

[351] See TFEU amended by Lisbon Article 81 par.2

[352] Ibid. ("…the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, *particularly when* (emphasize added) necessary for the proper functioning of the internal market…")

[353] See Aude Fiorini, *The Evolution of European Private International Law*, 57 INT'L & COMP. L.Q. 969, 976-77 (2008). Moreover, the author is arguing that considering "the broad interpretation so far given to Article 65, this terminological amendment is unlikely to add much impetus to any further expansion in practice. "the new provisions will not expand the competences since this ground was used under Amsterdam in a broad manner. p. 976,977

[354] Ibid. at 977

concern to them and does not entail implementing measures."[355] The requirement of individual concern is thus omitted. Similarly, the acts eligible to be challenged are widened. Now in addition to decisions they comprise any *"act addressed to that person or which is of direct and individual concern to them"*.[356] This development can indirectly contribute to effective access to justice within the EU legal order by putting formal access off the agenda and concentrating on the practical difficulties that access to court might entail.

The Treaty of Lisbon is recognizing, although not expressly naming as such, the OMC as a possible tool for tackling common problems in the field of social policy.[357]

6. COMPARATIVE ANALYSIS

We have considered three essentially different levels of decision making: national, supranational and judicial. At the outset we can notice that state of affairs in each of these settings is rather different. In the EU tendency is to regulate the cross border aspect of legal aid. Although the Commission endeavored to harmonize legal aid systems operating within the Member States it simply lacked competencies to do so. Member States vehemently rejected further transfer of competencies in the realm of private law. On the other hand the EU is using the accession conditionality to further access to justice in the prospective Member States. From the human right perspective the Charter explicitly mentions legal aid without making a distinction on civil and criminal. Finally the EU is experimenting with new policies where legal aid is envisaged as means for social inclusion.

[355] See TFEU amended by Lisbon art. 263(4)
[356] Ibid.
[357] Ibid. art.153 and 156

The ECtHR is checking whether the Member States actions are in compliance with the ECHR requirements. Still, the ECtHR did not compel the Member States to create civil legal aid systems which are seen only as one of the possible means towards achieving access to the court. Finally legal aid systems in the national setting are facing major difficulties regarding financial sustainability. Methods complementing publicly funded legal aid are becoming more common and their usefulness is being considered. Overcoming financial restraints is crucial since the key to effective access to justice lies within the national legal orders. Other jurisdictions considered have rather ancillary functions. The role of the ECtHR is that of a watchdog scrutinizing new practices introduced by the states.

Speaking about the limits of the ECtHR and going back to positive obligations doctrine one can note that the consideration of the court not to overburden the states while imposing positive obligations is also its main weakness. Put differently ECtHR's main task is to watch over the states compliance with the convention requirements by saying what cannot be done. Similarly, it can provide some guidance on what should be done via the positive obligation doctrine. But broad policy approach in tackling the key issues by imposing obligations and positive measures upon the States aimed at ensuring access to justice remains out of its reach.

On the other hand this is where the role of the Union looks somewhat more promising. Its approach towards access to justice and civil legal aid was directed towards regulating cross border aspect of legal aid. Although the Commission demonstrated ambition to harmonize substantive law on civil legal aid this was not approved by the Council. It is important to note, that unlike the ECtHR, the EU operates within a supranational setting. Therefore, the possibility of setting common standards in respect of civil legal aid remains open. Furthermore, it can set up funds for gradual transition towards higher standards of access to justice.

6.1 Overarching features

Can we encounter common features overarching these three settings? This thesis proves that we can. First of all, one can conclude that access to justice has been an issue of growing concern in all three legal orders. Attention towards civil legal aid in national settings was to a large extent induced by the other two legal orders. ECtHR legal aid jurisprudence influenced national legal aid schemes and the EU gave strong impetus for establishing legal aid systems in the countries of CEE by means of accession conditionality[358]. Finally, we can notice that privately funded mechanisms such as CFA and LEI are being considered in all three contexts. There is a growing trend of introducing these mechanisms on national level. In case of *A. v UK* the ECtHR held that CFA combined with two hours free legal advice satisfies access to court requirements in the defamation cases. Another challenge for CFA has surfaced, again in defamation context, before the ECtHR. The case *MGN Ltd v UK*, currently pending before the ECtHR, concerns the justifiability of CFA and its following uplifts in the UK against the Article 10 and Article 6 rights. Anyhow, for purpose of this debate it is important to illustrate that CFA is permeating all three contexts considered. Consequently, Art. 5(5). of the Legal Aid Directive is designed so as to permit legal aid alternatives in the cross border framework. Finally the decision of the EU to consider adopting the Hague Convention on access to justice, even if of little practical importance, could be viewed as an echo of a wider devotion towards enabling access to justice by means of legal assistance. Let's look at the main strengths and weaknesses of each of these decision makers from civil legal aid perspective.

[358] This is an ongoing process. The candidate and potential candidate countries of Western Balkans are facing the same condition. See for example Commission of the European Communities, Serbia 2009 Progress Report 14.10.2009 SEC(2009) 1339 available at https://webgate.ec.europa.eu/olacrf/20091014Elarg/SR_Rapport_to_press_13_10.pdf, last access date 10.11.2009.

6.2 Strengths and weaknesses

The government is tied by the current political constellations within the country in terms of financial sustainability and public focus on access to justice. The ECtHR's inherent limitation is one of not going into policy making. The EU is limited with the lack of competence. Also, civil legal aid and, more generally, situation regarding access to justice varies significantly across the wide spectra of Member States. The EU administrative apparatus, as noted by Van Bogdandy, is, generally, detached from particular developments within Member States. In this respect EU can never completely answer the needs of people residing in different Member states. The ECtHR is not bound by political considerations but is looking at a concrete case from a human rights perspective. State is in a position to build civil legal aid systems in a comprehensive manner. It can use legal aid to disperse benefits throughout society, combat social exclusion and enhance its legitimacy by ensuring equality before the law. Furthermore, it has better insight into the domestic circumstances and thus can tailor it's legal aid system to achieve better value for money. The EU has a wider perspective and can use legal aid in cross border setting to enhance the common market and ultimately well being of all European citizens. It has the capacity to encourage positive changes by allocating funds to improve access to justice.

CONCLUSIONS

We have looked at origins of civil legal aid in a wider context of access to justice. We touched upon contradiction of wide array of rights guaranteed and practical inequalities that hinder their effective vindication. Perspective of this thesis has been a comparative one since it examined civil legal aid in the jurisprudence of the ECtHR, the EU and the UK. Special attention has been devoted to contemporary tendencies of providing cost effective access to justice by means of privately funded arrangements. This master thesis consulted work of prominent commentators on access to justice in all three jurisdiction considered, international instruments, acquis communitarre as well as ECtHR and ECJ case law. It endeavored to reveal the contemporary tendencies concerning civil legal aid in international, supranational and national. Focus was on the interactions between three jurisdictions in the field of civil legal aid and on detecting the overarching features among them.

We came to acknowledge that civil legal aid should be protected from criminal legal aid expenditure. This is because national systems tend to perceive criminal legal aid as being more important since obligation to provide it clearly flows from the ECHR. This is yet another example of how international obligations can reflect upon national legal aid systems.

One should recognize the limitations of legal aid alternatives. For example replication of the UK modeled CFA depends upon the general development of the market insurance in a particular country. LEI, on the other hand, necessitates strong middle class that can afford insurance policies.

Access to justice seems to be a meeting point of two otherwise confronted visions of EU human rights policy. It was considered during the adoption of the Charter and has its place within the area of freedom security and justice in Europe as defined by the Lisbon treaty. As the

Lisbon treaty will finally, enter into force on 1 December 2009[359] the Charter will gain the same legal validity as the treaties. Shadow casted over this, by three Member States negotiating an opt out from the Charter, will not diminish its significance since it will bind 24 EU Member States. This suggests that access to justice and civil legal aid will stay high on the EU's agenda and that shift from completeness of judicial remedies towards effectiveness will continue.

Providing impetus to legal aid systems in prospective Member States by accession conditionality in itself this does not run counter to credibility of the Union, although it could use higher standards on access to justice within its own ranks. Moreover this practice is currently being employed towards the candidate and potential candidate states.

Legal Aid Directive is valuable from the organizational point of view even though substantively it is adding little to the existing avenue based on antidiscrimination. On the other hand, it could run counter to the ECtHR requirements. OMC has good prospects to improve access to justice via mutual learning and experience sharing. The key of this development lies with the Commission and its devotion to encourage the cooperation between the Member States. Finally ECJ and CFI legal aid schemes will, after the EU accession to the ECHR became open for scrutiny by the ECtHR. Hopefully this will contribute to establishing doctrine of effectiveness within the EU legal order.

There is ample room for future research in all three jurisdictions. One can examine the state of affairs regarding access to justice after Lisbon treaty enters to force, progress of the OMC in combating social exclusion by means of legal aid. Similarly, one could examine development of legal aid systems in the candidate or potential candidate countries of Western Balkans or track the ECtHR position on CFA in defamation proceedings. Regarding national

[359] See the statement of the Swedish Minister for EU Affairs available at http://www.se2009.eu/en/meetings_news/2009/11/4/green_light_for_lisbon_treaty_to_enter_into_force_on_1_december last access date 11.11.2009.

legal aid systems one can undertake laborious task of comparing the effectiveness of civil legal aid systems in the countries of CEE and that of old EU Member States. This could yield comparative data verifying effectiveness of new solutions and rethinking old legal aid schemes.

As to the practical recommendations this thesis can suggest that appropriate modus of legal aid scheme in each national jurisdiction should fit domestic circumstances. Concerning national civil legal aid selection criteria, states should complement its system with the equality of arms test. The criteria employed could be realistic probability that in the prospective litigation fair trial in its narrower sense might be impeded. So, in these cases the states could lower the bar of legal aid eligibility.

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