THE RIGHT TO LEGAL AID IN NON-CRIMINAL MATTERS THROUGH THE GLANCE OF THE HUMAN RIGHTS RATIONALE

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Submitted to
Central European University
Department of Legal Studies

In partial fulfilment of the requirements for the degree of Doctor of Juridical Science

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Budapest, 2013

ABSTRACT

The present research seeks to identify a theoretical justification for the right to legal aid in non-criminal matters by placing the concept of legal aid within the remit of the human rights rationale. The project by no means sought to elaborate a theory regarding the emergence and development of legal aid, but rather to identify the current status of the institution. It was assumed that one of the modern justifications of the civil legal aid that gives an expansive approach stems from the human rights rationale.

Before revealing and elaborating on the above mentioned theoretical assumption the project starts with an incursion into history in order to highlight how and why legal aid appeared and which social factors and actors stood behind this institution. The analysis of the historical development of the legal aid as a concept and as an institution showed that the rationale for the provision of the legal aid in each period is very closely linked to the social, political and legal philosophy of the time. It goes on to consider early stage of legal aid, the first formal approach and the legal aid in welfare state. The conclusion is that civil legal aid was viewed throughout the history either as a matter of mere charity, or a formal right based on the principle of equality, though quite limited, or a right created either as a tool for eradication of poverty or one that empowers disfranchised people to enforce their social rights.

Then the research proceeds with the identification of the answer given today to civil legal aid by the so-called century of human rights. The human rights ambit is taken as an important area that can provide a modern justification for the right to legal aid in non-criminal matters because it provides, as will be shown in the thesis, an extensive

answer to the issues surrounding the institution under review. The analysis of Chapter two is first taken into a review of different legal principles, which are found in the international human rights law but also in the national systems that either expressly or through means of interpretation, underlie to some extent the state's duty to provide legal aid in non-criminal matters. Reference has been made to the principle of rule of law, equality and fair trial. From the viewpoint of these principles legal aid serves as the basis for individuals to avail to the law and justice and seek observance and enforcement of their rights. It has been argued that one of the justifications for the provision of civil legal aid stems from the states' commitment to these principles. Then the chapter goes on in considering binding and non-binding documents of the United Nations, Council of European and European Union that expressly provide for a state obligation to ensure legal aid in non-criminal matters or those that bear a premise for such an obligation. The analysis made in Chapter two showed that the major human rights instruments stop short in providing for an automatic general right to civil legal aid. Overall these norms, explicitly or implicitly, enhance the rationale according to which provision of civil legal aid to those in need are or could be a matter of a state obligation in the light of its duty to ensure fundamental rights guaranteed by the human rights instruments.

Chapter three continues with an examination of the content of the state obligation to provide civil legal aid and the extent to which international human rights law requires states to provide such aid. The analysis is based on the relevant legal aid standards and criteria developed in the case-law of the relevant United Nations bodies, the European Court of Human Rights and the European Court of Justice. These bodies went considerable way towards securing a basic state duty to provide for a right to legal aid in

non-criminal matters though, in a limited way. States are not under a positive obligation to establish general legal aid schemes for civil cases and that there is no general right to civil legal aid, but they may be sometimes compelled to provide such aid as a matter of guaranteeing an effective right to access to court or where basic needs are at stake. The issue whether the provision of legal aid is necessary may be determined on the basis of the complexity of the case, financial capacity of the litigant and the prospects of success. In addition the state has to ensure that services provided under the legal aid scheme are qualitative. This means that the general obligation to provide legal aid in certain civil matters comes hand in hand with such requirements as adequate and timely appointment of a lawyer, effective conduct of the appointed legal aid lawyer, rapid replacement of the legal aid lawyer in case of necessity, reasoned decision with regard to denial of legal aid, etc. In addition, the international and regional human rights regimes elaborated on many issues regarding the scope civil legal aid by means of soft-law, which does not represent binding documents but nevertheless include valuable guidance. The main rationale behind UN and Council of Europe soft-law is that states have to create comprehensive systems of legal aid to those who need it in order to protect their human rights without any distinction whatsoever between civil and criminal proceedings. The governments have the responsibility to adequately fund legal aid.

One should remember that international human right norms introduce minimum standards and thus, states have discretion in adopting rules concerning legal aid in non-criminal matters. The human rights rationale can serve as a starting point for any government aiming at creating or transforming an existent legal aid scheme into a modern one based on the human rights considerations.

Finally, Chapter four examines the three legal aid schemes created based on the human rights considerations in Bulgaria, Georgia and the Republic of Moldova. The analysis of the domestic transformations in the field of legal aid points to the direct link between the theoretical assumption of this project and the reality. The review of the three legal aid schemes affords an interesting view on the perspectives of legal aid in general and civil legal aid as by-product of the human rights rationale. This approach gave birth to a new model of legal aid schemes called "consumerist type". The three analyzed legal aid schemes fall within the ambits of this model. In all three jurisdictions the analysis points to a number of common elements, the most important of which is the fact that it focuses on the individual that allows for an extensive approach when it comes to various elements of the scheme such as eligibility criteria, legal services covered by the scheme, legal providers, etc. Now the inherent limitations of the right to civil legal aid that stems from the old visions of charity and formal equality disappear. Of course, the achievement of the goals of any type of legal aid schemes is influenced by a number of factors, but the ideological vision behind the schemes will influence the content and the extent of the schemes and will persist and determine their overall direction. The answer given by the human rights rationale to the institution of legal aid in non-criminal matters is extensive and views civil legal aid as a self-standing right.

ACKNOWLEDGEMENTS

The preparation of this research would not have been possible without the valuable contribution of Professor Jeremy McBride, who was my supervisor and a true partner throughout the long path of this project. I owe a debt of gratitude to him for the insightful comments, suggestions, ideas and thoughtful attitude towards myself.

I am grateful to Professor Renata Uitz, who has assisted me from the very beginning of the project. It is with her kind support and that of Professor Suzanne Goldberg that I benefited from the research opportunity at Columbia Law School.

I also want to thank other faculty members of Legal Studies Department at CEU for various support and assistance in bringing out this project.

Finally thanks to my colleagues, friends, parents, brother and his family and my husband for their assistance, but most importantly encouragement and patience.

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PREFACE

"A doorkeeper stands before the law. To this doorkeeper comes a man from the country, and begs for admission into the law. The doorkeeper tells him, however, that he cannot grant admission at this time. The man considers this, and then asks if he will be permitted to enter later. "It is possible", says the doorkeeper, "but not now". Because the door to the law is standing open, as is usual, and the doorkeeper steps aside, the man bends to look inside through the portal. As the doorkeeper notices this he laughs, and says, "If it attracts you so much, try to go in without my permission. But be warned: I am powerful. And I am only the lowest of the doorkeepers. From chamber to chamber there are many doorkeepers, each more powerful than the last. Not even I can bear the sight of the third doorkeeper". The man from the country had not expected such difficulties. He thinks the law should be always accessible to everyone. But when he looks more closely at the doorkeeper in his fur coat, with his large sharp nose and thin black Tartar's beard, he decides rather to wait until he is given permission to enter. The doorkeeper gives his a stool, and permits him to sit down at one side of the door. He sits there for days, and then for years. He makes many attempts to gain permission to enter, and he wearies the doorkeeper with his many requests. The doorkeeper frequently conducts little hearings with him, but the question are impersonal, the questions that great men ask, and the result is always that he is not given permission to enter. The man, who had prepared himself for his journey with many provisions, uses everything, no matter how valuable, in attempts to bribe the doorkeeper. The doorkeeper accepts everything, but says, "I am only accepting this so that you will not think that you did not try everything". During the many years the man observes the doorkeeper almost continuously. He forgets the existence of the other doorkeepers, and this one seems to him to be the single obstacle to admission into the law. In the first year he curses his luck aloud, later, as he grows old, he mumbles only to himself, he becomes childish, and since in the long study of the doorkeeper he has come to recognize the fleas in the doorkeeper's fur collar, he even begs the fleas to help him convince the doorkeeper. Finally his eyes become dim, and he does not know if his eyes are failing him or if it is really becoming darker. But even in the darkness he can see a radiance which comes from the portals of the law. He will not live much longer. Before his death, all that he has experienced in this time merges into one great question which he has not asked yet. He motions the doorkeeper, since he can no longer raise his stiffening body. The doorkeeper must bend down low for the difference in sizes has changed, much to the man's disadvantage. "What do you want to know?" asks the doorkeeper, "you are insatiable". The man says, "Everyone strives for the law. How is it that in these many years no one but me has sought permission to enter?" The doorkeeper recognizes that the man is about to die, and in order to reach his failing hearing, he shouts to him, "Here nobody but you could be permitted to enter, for this entrance was intended only for you. I will go now and close it."

F. Kafka, *The Trial*

INTRODUCTION

Nowadays, many states around the world recognize the need to ensure that their justice systems treat members of their society equally and fairly. It is an axiom. If a formal system of justice cannot be accessed by the individuals because of practical impediments, then the legal system is no longer a "justice system." Thus, access to justice is considered a paramount principle of a legal system. People can be helped in accessing the justice system and meeting their legal needs in many different ways. One solution in making Kafka's "doorkeeper" open the door of law for the "country man" is legal aid. It is asserted that legal aid is an important tool in enabling people, especially those disenfranchised, to gain access to the justice system. "If we do not supply legal aid, we are creating two methods for the assertion of legal rights-one for those who can afford a lawyer and one for those who cannot".[1]

There is no generally accepted definition of "legal aid". Moreover, legal aid may vary from country to country. In some jurisdictions legal aid consists of legal consultation and representation in case of a legal dispute, in others it also includes awareness raising and educative activities. For the aim of this research the term "legal aid" covers only legal assistance in form of rendering legal consultation and advice or representation before courts or other state authorities. This can consist of information giving, including information on the rights, advice, written opinions, drafting relevant documents and consultation, legal representation before judicial and state authorities or opposing private parties etc. This assistance or representation is rendered by a lawyer or other qualified

[1] Gross, P.H., LEGAL AID AND ITS MANAGEMENT, Cape Town, 1970, p. 32

person, without cost or at substantially reduced cost, which is covered either by the state or other entity such as for example NGOs, to certain categories of persons who do not have sufficient financial means. To avoid confusion, the chapter describing international standards regarding legal aid will refer to the concept of legal aid as developed by the relevant standards. The chapter describing national schemes in the chosen jurisdictions will expressly refer to types of legal aid which are provided under the specific legal framework. In general, the term "civil legal aid" used in the present thesis refers to the provision of legal aid in anything other than in criminal cases, though it refers also to legal aid provided to civil parties in criminal proceedings. In addition, it is not limited only to private disputes *i.e.* only between natural or legal persons, but covers also proceedings were public authorities are one of the parties.

A research on civil legal aid could hardly find a more appropriate timeframe, which bears the witness of the creation of completely new legal aid schemes or the reform of the old ones. Nowadays many jurisdictions are experiencing the tendency to expand or on contrary to cut from the legal aid services. All these endeavours bring the need to reconsider the nature and the scope of the obligation to provide legal aid. That is why the state obligation to provide legal aid becomes a very important issue in establishing or reforming of the state systems as it provides the overall rationale for them.

It is clear that justice should not be something that only the better off can afford. Both national and international norms suggest an implied or express state obligation to provide in certain circumstances legal aid in civil cases. Provisions on civil legal aid usually take the form of an intrinsic element of access to justice or fair trial rights. It is said that these rights represent "... 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] Following this rationale civil legal aid should come as a matter of a self-standing value. However, in practice legal aid in non-criminal matters constitutes a constant challenge. Civil legal aid is even often overlooked, though for example, many norms of constitutional value incorporate general provisions of access to justice, which generally incorporates the right to access to courts or defence rights. These provisions rarely expressly distinguish between criminal and civil proceedings. However, many of them were primarily applied to criminal cases. Traditionally consideration of access to justice starts with criminal matters. To some extent this is understandable. Indeed, criminal cases have an inherently idiosyncratic nature, which resides in the idea that the powerful state is against the individual and criminal proceedings result in heavy penalties such as for example deprivation of liberty. However, Scherer highlights that overall the distinction between civil and criminal cases is somehow blurred, as collateral consequences from criminal proceedings might have a direct impact on crucial civil matters such as employment, social welfare, evictions, parental rights issues, and the same facts that give rise to civil matters can lead to criminal prosecutions. So, having a right to legal aid in criminal cases and having no right to legal aid in civil cases, which can involve for example, permanent loss of home or property, benefits, or parental rights, is an invalid distinction.[3]

> "The effect on a poor person of being unable to obtain the services of a lawyer is that much of the civil law is effectively placed beyond his reach.

[2] Hunt, M., Beloff, M., *The Green Paper on Legal Aid and International Human Rights Law*, 1 E.H.R.L.R., 5, 7 (1996).
[3] Scherer, A., The Important of Collaborating to Secure a Civil Right to Counsel, Paper prepared for Partners in Justice: A Colloquium on Developing Collaborations among Courts, law Schools Clinical Programs and the Practicing Bar, New York State Judicial Institute, May 9, 2005, p. 3.

> The ordinary manner of legal redress and enforcement of rights which the affluent can enjoy are unobtainable-this applies even to such matters as breach of contract, claims for maintenance or actions of divorce. It might cynically be contended that these are issues of small import; in reply, it is submitted that to the people concerned these are matters of great significance. Furthermore, the protection of right of private property enjoyed by individuals is one of the fundamentals of the Western legal heritage. If poor people are only to be subject to the duties which the law imposes but are unable to enforce their rights in the law, an attitude of skepticism to the law is created and the dangers which this threatens to social order are manifest. Besides, of what value are the rights of the substantive law, if they are unenforceable?"[4]

It is stated that:

> "The core elements of the argument for criminal legal aid are straightforward: the state cannot deprive someone of liberty without a fair trial and since there cannot be a fair trial without legal representation, fundamental principles of justice require that the state provide a lawyer if the accused cannot afford one."[5]

If one contemplates carefully the same fundamental principles of justice dictate a similar scenario in non-criminal matters, at least when crucial legal interests or basic rights are at stake and when a person cannot afford legal services.

Taking into consideration the problematic aspects of civil legal aid described above but also revealed further on in the body of the thesis, indentifying a place for the right to legal aid in non-criminal matters represents a relevant subject. In general terms this thesis aims to bring some clarity into the current status of legal aid in non-criminal matters, the scope and rationales of its existence within the legal realm. The inquiry is taken to a theoretical part that is dedicated to general considerations regarding the

[4] Gross, P.H., *supra note* 1, p. 32
[5] Manning, D., 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, PILI publication, 2009, p. 61.

concept of civil legal aid, its emergence, historical development from the traditional view to the contemporary concept, and its justification. It concentrates on the clarification of what is understood by civil legal aid, how it has developed over time, and who was behind its development. It continues with revealing the most relevant justifications and rationales of the institution at stake, a special emphasis is put on legal principles and human rights standards. It also includes a detailed analysis of the relevant human rights framework. Theoretically the research represents an attempt to appraise the access to justice problem in a narrower sense by focusing on the civil legal aid institution and to outline in a tentative fashion, the modern justification and rationale that stems from the human rights considerations.

The last part of the research consists of a detailed legal analysis and evaluation of the current state of civil legal aid within the real dimension of the three chosen countries, Bulgaria, Georgia and Moldova. Combining inquiry into the formal sources of international and national law with looking into domestic context and practice behind the text, the thesis tries to demonstrate the necessity of the elevation of the civil legal aid at the level of a norm and to identify the elements of the so called "consumerist type" of legal aid schemes created under the considerations of the human rights rationale.

All this is structurally developed in four chapters, divided, where necessary, into sections and subsections.

The first Chapter deals with the concept of legal aid and its development through history. This introductory analysis is done because understanding the concept and nature of civil legal aid and the reasons of its emergence and finding justifications for its existence has to start with a historical review of the institution in different periods of

time. Such an analysis gives the possibility to trace down the way in which legal aid has developed and also gives an overview of the rationales on which it was based in different periods of time. The path of the legal aid development is very much influenced by certain circumstances and forces. That is why this chapter goes on to consider separately some of the forces behind the emergence and development of legal aid. Namely, by reflecting different theories in the literature it identifies the principal structural forces and key actors that were behind the creation and subsequent development of the legal aid. Departing from the overview and analysis of the structural factors and key actors involved in the process of emergence and development of the legal aid the first Chapter turns to the analysis of the puzzling issue related to a content of a theory (theories) that would plausibly explain the creation and evolution of the legal aid.

Since this thesis by no means aims to elaborate a theory regarding the emergence and development of legal aid but rather to identify a theoretical justification for civil legal aid valid for current times, the historical incursion of the first Chapter is followed by a logical continuum of the second Chapter, which turns to the analysis of the answer and approach to the institution of civil legal aid given today by the so-called century of human rights. The human rights ambit is taken as an important area that can provide modern justifications for the right to legal aid in non-criminal matters because it provides, as will be shown in the thesis, an extensive answer to the issues surrounding the institution under review. This chapter aims at presenting an appropriate conceptual framework. It represents an attempt to make the argument according to which the human rights rationale provides an extensive modern justification for the right to civil legal aid more precise. The bulk of Chapter two is devoted to reviewing the general sources of the

state obligation to provide legal aid. The analysis is first taken into a review of different legal principles, which are found in the international human rights law but also in the national systems that either expressly or through means of interpretation, underlie to some extent the state's duty to provide legal aid in non-criminal matters. Further the analysis is complemented with the review of international human rights standards. The chapter covers relevant norms established under the auspices of the Council of Europe, United Nations and the European Union.

After the indication of principles and international standards that provide for a basis for the state obligation to provide civil legal aid, Chapter three continues with an examination of the content of this obligation and the extent to which international human rights law requires states to provide legal aid in non-criminal matters. In this sense, the analysis is based on the relevant legal aid standards and criteria developed in the case-law of the relevant United Nations bodies, the European Court of Human Rights and the European Court of Justice.

Finally, Chapter four examines the legal aid schemes, with a particular focus on non-criminal matters, existent in Bulgaria, Georgia and the Republic of Moldova today. The research is taken first to an overview of the process of reforming of the national legal aid schemes. Then the research represents a *de jure* and *de facto* inquiry in the current state of legal aid in non-criminal matters in the chosen jurisdictions, looking at the relevant legal provisions and at the same time at the actual fulfilment of the obligation in respect of civil legal aid. These three legal aid schemes were intentionally chosen because all of them were created in the same period, but most importantly their

creation was based on the human rights considerations. This specific architecture pre-determines the content and the nature of such a legal aid type of schemes. How it pre-determines and which are the elements of new "consumerist" type of legal aid scheme is described in a special section of the last chapter. At the same time the last chapter links the theoretical modern answer given to the issue of legal aid indentified in chapters two and three of the thesis with the real model of legal aid schemes, which were conceived under the identified answer. This fact gives the possibility to conclude that the human rights rationale provides an extensive basis for the right to legal aid in civil context and influences the overall scope and content of the legal aid schemes.

Methodology

The key goal of the project is to provide a possible modern justification of the issue under scrutiny by providing accounts of the elements and mechanism that could place civil legal aid in the human rights remit. The answer given to the civil legal aid institution is portrayed as a by-product of progress and of the human rights rationale. This is a tactic of explaining a legal institution by attributing it to a "social, economic, or political 'need' shared in common by the countries involved."[6] Thus, it is acknowledged that the countries and communities in which such an answer can operate have a democratic government based on the principle of rule of law.

In addressing the main question of the project *i.e.* "What is the place of the civil legal aid institution at the moment?" the methodology of this project combines the inquiry into the identification and examination of the doctrines and theoretical meanings

[6] Cappelletti, M., Garth, B., Access to Justice and the Welfare State: An Introduction, in ACCESS TO JUSTICE AND THE WELFARE STATE, Milan: Dott A Giuffre, 1981, pp. 1, 6.

of the concept under scrutiny and the implications of these meanings in the real dimensions of the chosen jurisdictions. In this sense, legal, philosophical and sociological literature as well as multiple legal materials is analyzed.

An important starting point for this research is a review of available evidence on the present topic. There is a growing literature on many aspects of legal aid. A thorough, detailed review from the perspective of the chronological emergence and development of the legal aid, from the perspective of legal principles or international human rights norms on legal aid and from the perspective of the unique elements of a particular legal aid scheme within a jurisdiction helped in conceptualizing and contextualizing the research around the main idea *i.e.* the identification of a modern answer to civil legal aid. In this sense, this research uses a wide variety of sources in an attempt to explore the legal aid institution in non-criminal matters.

Comparative legal analysis served a valuable tool in identifying different answers given to the concept of legal aid in different periods of time, under different settings and jurisdictions.

The present array of methods was at some extent complemented also by interdisciplinary approaches of law and sociology, especially for example when analyzing the link between legal aid and social exclusion phenomenon. In this context, the analysis is mainly based on the existing literature, but also reports and available data.

Coming back to the main focus of this research *i.e.* to place civil legal aid within the remit of the human rights rationale the doctrinal analysis is also supported by a study focused on the human rights law prescriptions embedded in relevant pieces of legislation

and jurisprudence of the international tribunals. Civil legal aid is analyzed in the context of principles and international human rights norms with regard to the general state obligation to provide legal aid in non-criminal matters and the scope of such an obligation.

In addition, the last part of the research continues with a detailed analysis and evaluation of the current legal aid schemes within three jurisdictions: Bulgaria, Georgia and Republic of Moldova. Whereas the main goal of this part of the research is to assess the current state of civil legal aid in the chosen jurisdictions it naturally requires usage of the positivism approach. The particular method takes the inquiry into the relevant formal sources of domestic law. Overall, the method engaged here is partly descriptive summarizing the existing domestic provisions related to legal aid in non-criminal matters and partly evaluative at the point when analyzing the content of the legal aid schemes through the glance of the human rights standards.

It should be also noted that this part of the project is academic research that is conducted by using a special assessment tool. This assessment tool consists of a *de jure* analysis and a *de facto* evaluation of the current state of civil legal aid.

The *de jure* part is focused on a country's domestic relevant laws on legal aid. In achieving the aim of the *de jure* assessment all appropriate binding and non-binding authority, including provisions of domestic pieces of legislation, governmental plans, and strategies in the field of legal aid are reviewed. The *de jure* assessment mainly concentrates on discovering the legislative realities regarding civil legal aid.

The *de facto* assessment is an attempt to monitor the process of realization of the standards regarding civil legal aid within the real dimension of a country. The *de facto* analysis aims at tracking a country's hands-on efforts and measures regarding the application of the legal aid provisions in practice. In this sense, the assessment is based on various available data and, where applicable, statistics provided by reliable sources. Unfortunately, a full picture of the *de facto* implementation of the right to legal aid in non-criminal matters is hindered by the inherent limits of the research as it is based only on limited data available. Moreover, all three legal aid schemes are new creations thus the *de facto* application is limited, reflecting a quite short period of time. For example, in Georgia provisions in respect to state guaranteed legal representation in non-criminal will start operating for civil matters in 2015. In the Republic of Moldova civil legal aid started functioning at the beginning of 2012. Therefore, the analysis in this regard is quite limited it terms of data. To redress this limitation a tentative analysis of the prospects of success of the said schemes is done.

Finally, it has to be noted that this part of the research does not aim at identifying the best approach regarding civil legal aid delivery which "can be fitted with an adaptor and plugged into"[7] jurisdictions, rather it seeks to reveal common findings, discover common problems, drawbacks and difficulties, common patterns, common solutions and recommendations (where possible and appropriate). But most importantly this part of the research reveals the content of the new type of legal aid called "consumerist" designed under the considerations of the human rights rationale and thus, makes a link between the

[7] Gledon, M. A., *et al.*, Cristopher (ed.), COMPARATIVE LEGAL TRADITIONS, West Publishing Co., Sty. Paul 1994, p. 10.

theoretical part of the thesis, which is dedicated to the identification of a modern answer to the civil legal aid, and the last part of the research.

CHAPTER 1: THE CONCEPT OF LEGAL AID AND ITS DEVELOPMENT. A GLANCE AT HISTORY

In order to understand the concept of civil legal aid and to find justifications for its existence it is necessary to locate it historically and see what were the approaches and forces behind the institution. The analysis of the development of the legal aid is revealed by using a dichotomy. Firstly, the development of the legal is explored chronologically. It considers legal aid through the glance of three periods of time covering the early stage of legal aid, the first formal approach and the legal aid in welfare state.

Secondly, factors or/and state of affairs that have had an impact on legal aid are examined. This part of the analysis aims at identifying distinct forces, factors and developments within societies that had an impact or determined the creation or development of legal aid in different periods of time. The analysis concentrates on structural factors (such as industrialization, divorce, religion, legal systems etc.) and key actors (such as the legal profession, clients, judiciary, trade unions etc.). This gives the opportunity to understand how and what influenced the creation and development of legal aid.

As will be showed, albeit intertwined, each answer given in a certain period of time to legal aid has its own distinctive history and is based on different discourses that shaped its content. This led to the fact that through the history different theories tried to explain the nature of the legal aid and the reasons of its emergence. The last section goes on in addressing the puzzling issues related to theories that would plausibly explain the

creation and evolution of the legal aid and the approach that such theories should adopt when reflecting on legal aid.

1. The chronological development of legal aid

The emergence, understanding and the provision of legal aid has always had a troubled and quite a long history. Though it is seen as a product of the first-phase modernization[8] its origin dates back to the ancient times. As Cappelletti correctly mentioned, an understanding of modern ideas of legal aid requires at least a cursory view of older ideas that they have supplanted.[9] The analysis of the development of the legal aid is explored through the following periods: the early legal aid, the first formal structure of legal aid and the legal aid in welfare state.

It is worth mentioning that each of these periods recognized to some extent the problem of providing legal aid for those in need, grappled with it, and produced distinct institutional solutions.

1.1 The early legal aid

The origins of the concept of legal aid go back to the ancient times. According to Cappelletti:

> "throughout a major portion of Roman history, legal services were brought within the reach of the poor through the clientela system, which flourished during the Republic and early Empire. Under this system the weak and impoverished attached themselves to a powerful man, a patronus, and in return for certain services and political support the patron assisted them in many of their difficulties, including litigation. The obligation of the

[8] Fleming, D, Legal Aid and Human Rights, Paper presented at the International Legal Aid Group Conference, Antwerp, 6-8 June 2007, p. 2.
[9] Cappelletti, M, *Legal Aid: Modern Themes and Variations, Part One: The Emergence of a Modern Theme*, Vol. 24, No.2 Stan. L. Rev. Jan. 1972, at 348.

> patronus seems to have extended beyond simple legal assistance to include all the extralegal help necessary to prosecute a case against a powerful opponent in a Roman court"[10].

However, there was no extensive litigation in those times and people delivering legal services "were merely oratores and neither part of an organized legal profession nor trained lawyers."[11] In practice the existent litigation was "a political struggle in which wealth and power weighed heavily in the balance". Indeed it seems that "in such an environment the political solution of the clientela was perhaps the most effective answer that could be given."[12]

Medieval world with its own

> "moral and intellectual forces of the age, of which the Christian faith was by far the greatest, provided a different approach to the legal problems of the poor. Legal aid, like other assistance to the *miserabiles personae* of Christendom, was a form of charitas. It was given by the Church and by Christian men as a pious work, in much the same way as they honoured the Peace of God during war, built hospitals for the sick, or furnished bread during famine."[13]

According to Cappelletti a somewhat organized solution to access to justice for the disadvantaged during the Medieval era was to command magistrates to forgive the court fees of poor litigants and sometimes assign a private lawyer to help them for free. The author recounts this experience on the basis of some relevant examples namely, those of the:

> "French lords and kings who frequently charged their judges to appoint counsel in such cases, the most notable attempts being those of Louis IX, Charles V, and Charles VI; royal attempts to reduce the poor man's court fees continued until the Revolution. In England, the maxim that the poor

[10] Cappelletti, M, *supra note* 9 at 349.
[11] *Ibid* at 348.
[12] *Ibid* at 351.
[13] *Ibid*.

> should not pay for writs was accepted by the time of Henry III, and the tradition of seeking justice for the poor culminated in 1495 in a statute of Henry VII"[14], "who decreed: 'The Justices . . . shall assign to the same poor person or persons counsel learned, by their discretion, which shall give their counsel, nothing taking for the same: . . . and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons. . .' From these words a very powerful and complex system of legal aid evolved to advance court access for the lower classes."[15]
>
> "A similar system was adopted in several parts of Italy including Milan, Tuscany, and Naples, after the Middle Ages had drawn to a close. In Germany, the medieval practice of assigning poor men counsel culminated in the Reichskammergerichts-ordnungen of the late 15th and the 16th centuries, and was maintained by the laws of various German states until unification."[16]

Under this charitable model, coping with the needs of the poor people was considered to be a moral obligation. The lawyers who were providing legal assistance for free did so for God, thus the obligation was rooted mostly within the strong moral forces of the time. This rationale also penetrated the legal realm. For example, in Scotland as early as 1424 an act[17] was passed which provided for appointment by the judges at the indication of the king of lawyers to represent the poor.[18]

Nevertheless, the solution given by the Middle Age period to legal aid was quite narrowly construed. In this context, Cappelletti points out that "neither the employment of a poor man's advocate nor the elimination of court fees, however, can be confused

[14] Cappelletti, M., *supra note* 9 at 351.
[15] Penfold, M., *The Access to Justice Bill and Human Rights Act of 1998: Britain's Legislative Overhaul Leaves the System Scrambling to Mend the Safety Net*, 6 Buff. Hum. Rts. L. Rev. (2000), at 183.
[16] Cappelletti, M., *supra note* 9 at 352.
[17] Poor's Roll of 1424, Scotland: "and gif there bee onie pure creature, for faulte of cunning, or expenses, that cannot, nor may not follow his cause, the King for the love of GOD, sall ordain the judge to purwey and get a leill and a wise Advocate, to follow sik pure creatures causes".
[18] Paterson, A., *Legal Aid at the Crossroads*, C.J.Q. 1991, 10 (Apr), 124-137, at 124.

with the modern idea of state aid, an idea that would not even have been intelligible before the modern state emerged".[19]

However, the Medieval response to legal aid should not be completely underestimated. This period brought a new element to legal aid, namely the strong concept of charity, which was absent in the Ancient legal world.

1.2 The first formal structure of legal aid

The appearance of an organized and formal solution occurred "with the French Revolution when the repudiation of courtly culture and the espousal of secular political theory destroyed the forces supporting the medieval answer of charitas."[20] Namely, the idea according to which justice was a matter for everyone, while charity, a concept on which legal aid was based in the previous period, was a matter of grace marked the beginning of the next stage. The seeds from which a new answer to legal aid grew were embodied in the new political theory of the social contract, based on the natural law schools of the 17th and 18th centuries. Under the new theory of the social contract the state was bound to guarantee to its citizens "natural rights". Moreover, this presupposed that these

> "rights were to belong equally to all the governed; the state was to impose no barrier to their free exercise and was to make no distinctions among its citizens on the basis of wealth, rank, or privilege. Justice was seen as a process by means of which the state preserved each citizen's rights from encroachment by the government or his fellow citizens; hence the securing of justice received major attention in both the American Bill of Rights and the French Declaration of the Rights of Man. It was from this new vision of justice that a new attempt to answer the legal problems of the poor

[19] Cappelletti, M., *supra note* 9 at 352.
[20] *Ibid* at 354.

> developed. The vision demanded that courts of law be equally accessible to all citizens."[21]

Cappelletti exemplifies the attempts to ensure that all citizens could be heard by making reference to the American constitutional guarantee of the right to counsel provided by Sixth Amendment and the French principle of the "gratuité de la justice".[22] However, these provisions were limited in scope. Neither the right to counsel, enshrined in the American Constitution, nor the French principle were concerned with:

> "the legal problems of the poor, they were neither designed to provide the poor man with the lawyer he could not afford. Originally, the American provision simply prevented the state from denying counsel to one who could afford it and "despite the unambiguous language of the Sixth Amendment, which states "in all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense," up until the 1930s, only people charged with crimes punishable by death had the right to counsel."[23].

The same narrow scope was present in the French provision which was designed only "to eliminate the fees demanded of litigants by the judges of the *ancien régime*. Thus, despite the new vision, lawyers still demanded fees that the poor could not pay."[24]

Notwithstanding the narrow approach towards the provision of legal aid it was namely "the French Revolution that brought up the idea that access to justice for everyone should be a fundamental right rather than an act of charity".[25] The author basis its analysis on the fact that the philosophy brought by the French Revolution gave the possibility to put forward the idea that access to justice was based on the rationale that

[21] Cappelletti, M., *supra note* 9 at 355.
[22] Article 1 of the French Law of August 16-24, 1790 (Loi des 16-24 Aout 1790) in Duverger, M., CONSTITUTIONS ET DOCUMENTS POLITIQUES, Presses Universitaires De France, Paris 1991.
[23] Ritchey, J.G., *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 Wash. U. L. Q., (2001), at 318-319.
[24] Cappelletti, M., *supra note* 9 at 355.
[25] Kilian, Matthias, Civil Legal Aid and Access to Justice in Germany, Paper prepared for International Legal Aid Group, 2003.

courts of law be equally accessible to all citizens. Though access to justice was not yet perceived as a formal right and it did not entail provision of legal aid in civil cases for those who could not afford, still there was a huge shift in the perception of these institutions at some extent in comparison with the vision promoted in the Medieval times, where there was no clear concept of rights and equality at all. The latter concepts were obviously a product of the Revolution. Despite the appearance of such new revolutionary legal concepts as equality and citizens' rights, this era adopted a very formalistic response in relation to legal aid. The rationale of such a formalistic answer to legal aid stands on the principle of formal equality, which was valued so highly in those times. The philosophy of formal equality dictated that all citizens were equally free to enjoy the political rights that were the fresh product of the times. The logic behind is based on the idea that these rights

> "were preserved when the state did not act to infringe them and refused to allow encroachment by the actions of others. As a result, legal aid to the poor was problematic; on the one hand, the poor needed lawyers if they were to enjoy access to the courts and the right to counsel; on the other hand, providing a lawyer required the affirmative state action that contemporary political thought regarded with hostility. Thus the question was bypassed in the ringing declarations of rights that began the age and was operationally resolved in the 19th century statutes by a hybrid solution. This solution gave the poor access to the courts by the provisions of positive law providing them counsel. At the same time, the "charitable" component of the solution made affirmative state action unnecessary by relying on the gratuitous services of the legal profession."[26]

For example, in France this "hybrid solution" was adopted and the relevant legislation provided for the removal of the

[26] Cappelletti, M., *supra note* 9 at 359.

> "financial barriers encountered by the poor in the normal course of litigation in the courts and by having lawyers appointed to serve gratuitously in the cases of the poor. The process was further refined by an amending act of 1901, establishing a national system of bureaux to make determinations of eligibility."[27]

The same "hybrid solution" was present in the legal aid scheme established in Germany by the first German Code of Civil Procedure of 1878. The Code allowed judges to assign a lawyer and forgive costs if the litigant could prove that he/she is poor and that the matter is a serious one. It was regarded as "*munus honorifucum"* of a lawyer to work for free as there was usually little hope that the client would ever be able to pay the lawyer's fees. Sometimes, the lawyer had to pay the client's expenses out of his own pocket.[28] This phenomenon is explained by Kilian with the reference to the German thinking which was "undoubtedly influenced by the fact that until the 1860s lawyers in Germany's largest state, Prussia, were not members of a free profession but civil-servants in public service."[29] Thus, "with legal aid regarded as a matter of administration of justice to the poor, the lawyer's active participation in this process was regarded as a logical element of the system".[30] This was valid "until the amendments early in the 20th century allowed the state to pay for certain expenses of litigation … Since 1919, the state has paid for the client's expenses and since 1923, the lawyer has received remuneration for his legal aid work from sate funds."[31]

Developments in the common law world during this period were similar to those described above in France and Germany. The United States attained a comparable result,

[27] Kilian, Matthias, *supra note* 25.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

but as Cappelletti notes "in a manner that contrasts less with the continental pattern. In 1892, federal court judges were authorized by statute to assign attorneys to represent poor persons with sufficiently meritorious cases."[32] The Act of 1892 did not exempted the person who received legal aid from paying court costs and fees but merely provided that he need not prepay them or give security for them. Moreover, the judge was not strictly required to assign lawyer to a qualified applicant, the Act providing only "that the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial ...."[33] In 1910, the Act was extended to apply to criminal as well as civil matters, to defendants and plaintiffs, to appellate as well as lower courts' proceedings.

In England

> "... the *in forma pauperis* procedure was liberalized in 1883 by raising the maximum capital requirement for receiving aid to £25 from the absurdly low level of £5 where it had remained since 1495, and by opening the procedure to all litigants rather than plaintiffs only. The use of the procedure in appeals cases was modernized in 1893. In 1914, the system was radically altered by abandoning the assignment of counsel by judges and eliminating the requirement that an applicant present a solicitor's letter attesting the merits of his case. Instead, a Poor Persons' Department was established which used the voluntary and gratuitous services of private lawyers for investigating applications and for representing applicants in court. In 1925, the government further refined this system by entrusting its administration to the Law Society, which established Poor Persons' Committees to perform these functions."[34]

In essence the British legal aid system, as that in Germany and France, depended on the assignment of private lawyers to represent qualifying persons for free.

Analyzing solutions given to legal aid in the above referred period one may legitimately raise the question "to what extent these solutions represent a genuine

[32] Cappelletti, M., *supra note* 9at 357.
[33] United States Act of July 20, 1892, Chapter 209, 27 Stat. 252 (codified at 28 U.S.C. § 1915 (1964)).
[34] Cappelletti, M., *supra note* 9 at 357.

departure from medieval concepts and an evolution toward a new idea of legal aid"?[35] In searching for an answer Cappelletti draws attention that *prima facie* the approach towards legal aid adopted by the new political thought of laissez-faire would be that it represents no such departure. He adds that the statutes enacted in this precise period "were based on the same mechanism as so many medieval decrees: the assignment of private lawyers to the needy."[36] They are based like their medieval predecessors, on the same element - no remuneration for lawyers providing legal aid services. The charitable nature of the legal aid was definitely as preserved and promoted. However, it would be irrational to limit ourselves only to the charity component of these statutes. As the author notes the mere idea and philosophy of charity present in Middle Ages was now accompanied

> "by pages of concrete legislative and administrative planning, and by a concern for defining the benefit to be given and the class to receive it. To avoid a complete dependence on the good will of the bar, these acts have either made the representation of the poor a legal rather than a mere moral obligation, or they have established some administrative mechanism deemed sufficient to provide a poor applicant with a suitable attorney. In short, the medieval task seemed finished when a decree had been issued expressing the pious intentions of the sovereign; 19th century legislators seemed to regard their task as finished when positive law had been enacted creating a legal route by which the poor man with a good case could obtain a lawyer. The implications of this difference are far-reaching. The poor now were brought under concrete positive law; they no longer were to receive the "mercy" that the medieval mind carefully distinguished from "justice."[37]

The solution given to legal aid by this period represents a shift, maybe not in ideology as such, but there were definitely some important developments. Except the inherited nature of charitable ideas regarding legal aid, the institution was placed within

[35]Cappelletti, M., *supra note* 9 at 357.
[36] *Ibid* at 357.
[37] *Ibid* at 358.

the legal realm by creating a precise formal right to legal assistance in certain cases and under the satisfaction of certain legally regulated criteria. According to Cappelletti:

> "the 19th century answer to the legal problems of the poor accordingly was a hybrid solution. It retained older, notably reliance on services rendered gratuitously by private lawyers, but combined with them a new attempt to provide a route to legal services guaranteed by the force of positive law for all members of a defined class of poor. While legal aid remained conjugate to charity, it nevertheless became akin to a legal right, a curious relationship that Americans described as "privilege" and Europeans as the legal profession's "nobile officium" or "honorific duty."[38]

1.3 Legal aid in welfare state

With time the ideological base of laissez-faire world was eroded, being replaced by a new vision of welfare state. In the face of this development the older view of legal aid as a hybrid solution, in some ways as a political right in other ways as a charity, had ceased to satisfy the reality. According to Mattei, the welfare state in Western societies was seen as a point of arrival in civilization, and access to justice was the device through which communities could provide law as a public good.[39] Following the same line of rationale Goriely emphasizes the dual relationship between legal aid and the welfare state. On the one hand legal aid is welfare provision on the other hand a mechanism that might make the welfare state work.[40] Flood and Whyte argue that legal aid has to be taken in tandem with the provision of welfare services.[41] Regan argues that welfare states were an essential pre-condition of the post-War legal aid schemes, that they shaped

[38] Cappelletti, M., *supra note* 9 at 358.
[39] Mattei, U., *Access to Justice. A Renewed Global Issue?*, EJCL, vol. 11.3, December 2007, p. 2.
[40] Goriely, T., Making the Welfare State Work: Changing Conceptions of Legal Remedies within the British Welfare State in THE TRANSFORMATION OF LEGAL AID, COMPARATIVE AND HISTORICAL STUDIES, Oxford, 2002, p. 89.
[41] Flood, J., Whyte, A., *What's Wrong with Legal Aid? Lessons from Outside the UK*, C.J.Q Vol. 25, (Jan) 2006, p. 81.

important features of 'in litigation' services.[42] Abel and Titmuss also include the growth of the welfare state as a factor that had an impact on the development of the modern legal aid.[43] In fact in the most countries of the European continent legal services for the poor have been a latecomer to the growth of the welfare state. Furthermore,

> "while Scandinavian countries, West Germany and the Netherlands ranked highest in the world as far as expenditures for their systems of social security go, only one of them (the Netherlands) has built up an infrastructure of legal aid institutions which could be compared to that of Great Britain, the Commonwealth and to that in many parts of the Unites States".[44]

Abel recognizes that the "post-War legal aid reforms were a part of a profound transformation of the role of governments from often minimal intervention to actively promoting society's well-being".[45] This was achieved by funding a range of welfare programmes, including health, housing, education and legal aid. It was namely in this period of the welfare state when legal aid schemes were significantly generous and comprehensive. According to Regan

> "funding legal aid overcame the problems of the charitable schemes which failed to assist all who needed help due to relying upon private legal profession volunteers, which was a definite drawback. The welfare state schemes, by contrast, paid lawyers to represent citizens, especially the poor, in an era where legal aid became part of rights of citizenship".[46]

Taking Great Britain as an example of one of the biggest welfare states it is important to note that the establishment of the 'classical welfare state' in the period 1945-

[42] Regan, F., Why do Legal Aid Services Vary Between Societies? Re-examining the Impact of Welfare States and Legal Families in THE TRANSFORMATION OF LEGAL AID by Regan, F. et al eds., Oxford 2002, p. 184.
[43] Abel, R.L., L*aw without Politics: Legal Aid under Advanced Capitalism*, 32 UCLA Law Review, 474, February, 1985, at 336; R. TITMUSS, *Welfare Rights, Law and Discretion* in B. ABEL-SMITH, K. TITMMUSS eds. THE PHILOSOPHY OF WELFARE: SELECTED WRITINGS OF RICHARD M. TITMUSS, London 1987.
[44] Blankenburg, E, *Comparing Legal Aid Schemes in Europe*, C.J.Q. 1992, 11 (APR), at 106.
[45] Abel, R. L., *supra note* 43 at 474.
[46] Regan, F., *supra note* 42, p. 185.

1951[47] brought the formation of a legal aid scheme funded by the state along with many other such as national health and insurance schemes. At this point legal aid was an example of the new publicly funded post-War welfare programmes. The legal aid scheme was a product of the recommendations of the Rushcliffe committee's report published in May 1945.[48] The spirit of those times dictated that "the basis of the welfare state was not to be minimum benefits for the few but equal benefits for all."[49] The above mentioned report promoted this rationale by pointing that legal aid should extend beyond those 'normally classed as poor'.

> "When the legal aid scheme started in 1950 it covered almost 80 per cent of the population... the Law Society secured a commitment that the means test would not be raised to include anyone with a gross income of over £750 per annum, without a mandate from the profession."[50]

However, when introduced the legal aid scheme, due to lack of financial resources, was first limited to legal representation before the High Court and it was extended to cover county courts six years later. In 1959 it was extended to legal advice as well. In 1960 when the scheme was extended to cases not involving litigation and to civil magistrates' courts and courts of quarter sessions, the operation of the legal aid scheme as established under the 1949 Act was completed.[51]

Over the next two decades the character of the welfare state changed and inevitably this led to an ideological shift and to further reform of legal aid schemes and

[47] Regan, F., *supra note* 42, p. 185.
[48] Report of the Committee on Legal Aid and Legal Advice in England and Wales (1945; Cmd. 6641; Chair, Lord Rushcliffe).
[49] Goriely, T., *Rushcliffe Fifty Years on: The Changing Role of Civil Legal Aid within the Welfare State*, Journal of Law and Society, Vol. 21, No. 4 (Dec., 1994), p. 546.
[50] *Ibid*, p. 547.
[51] Dworkin, G., *The Progress and Future of Legal Aid in Civil Litigation*, The Modern Law Review, Vol. 28 No. 4 (Jul. 1965), p. 432.

infrastructure. The emphasis shifted "from the responsibilities citizens owed to the state to the rights the state owed to individuals".[52] Goriely notes that:

> "the *1960s and 1970s* [emphasis added] saw increasing demands that individuals should have rights against those ostensibly concerned with their welfare. An active welfare rights movement inspired increasing legalization of the welfare state. Citizens were given new remedies to enforce directly against welfare providers".[53]

In the period of 60s and 70s legal aid was a tool put in place in order to help individuals enforce their welfare rights. The welfare state was seen

> "as the ransom paid by the ruling class for social stability and the maintenance of a capitalist society, with social services as the material expression of the social rights of citizenship status in response to the social consequences of capitalism".[54]

The government policy in this period was based heavily on equality rationale. This approach triggered an expansion of some aspects of social rights[55] and as a consequence an ample legal aid reform that decisively shaped the content of legal aid schemes. Reform advocated for the extension of the eligibility criteria and for the inclusion of the most of the population and most legal needs under the coverage of the legal aid schemes. Extension of benefits was conceived as a right of all individuals, rather than that of the "helpless and hopeless of the population".[56] During this period many governments used the poverty reduction rationale to trigger legal aid reform. The Australian reforms, for example, occurred in 1970s during a period of substantial welfare reforms responding to a rediscovery of poverty. Similarly, legal aid reforms in USA were

[52] Goriely, T., *supra note* 40 p. 90.
[53] *Ibid*, p. 91.
[54] Harris, J. *State Social Work and Social Citizenship in Britain: from Clientelism to Consumerism*, 1999, 29 British J. of Social Work, at 916.
[55] Sommerlad, H., *Some Reflection on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid*, J. of Law and Society, Vol. 31, No.3 September 2004, p. 353.
[56] Marshall, T.H., SOCIAL POLICY, Hutchinson, London, 1965, p. 97.

part of Johnson administration's 'War on Poverty' in the mid 1960s.[57] At the same time, the Canadian reforms also occurred in a period of welfare reforms designed to address the problems of the poor.[58] Cappelletti and Garth show how the rationale on which the respective programme was carried around the world led to a 'wave' of legal aid reform at the beginning of 1970s in different countries of the world: 1972 brought new legislation for England, France, Sweden, Germany and Quebec; in 1973 the Australian Legal Aid Office was established; in 1974 the first legal aid bureau in the Netherlands appeared.[59] Legal aid acquired a broader approach.

Reich's scheme which he laid out in the 1960s under the name of the "new property"[60] might be of assistance when trying to trace down the legal aid ideology of this period. The scheme articulated the view that people had property rights in government decisions and that people should not be abused by state discretion. This was particularly crucial in the case of welfare, where individuals would be powerless against the state. The US Supreme Court upheld Reich's idea in *Goldberg v. Kelly* when it said that welfare rights were property within the meaning of the Constitution and could not be cut off without due process, a judgment delivered in 1970.[61] In other words the welfare recipient should have a right to a hearing before his welfare rights are terminated. This approach was subsequently criticized by many. For example, Flood and Whyte came to the conclusion that "if we take this view, imbuing welfare and legal aid with the status of embedded rights will inevitably create demands for large amounts of resources that

[57] Regan, F., *supra note* 42 p. 186.
[58] *See* Zemans, F., PERESPECTIVES ON LEGAL AID, London 1979.
[59] Cappelletti, M., Garth, B., eds., *supra note* 6.
[60] Reich, C., *The New Property*, Yale L.J., Vol. 73, No. 5 (Apr., 1964), p. 733.
[61] *Goldberg v. Kelly*, 397 U.S. 254 (1970) (a state's termination of public aid, without affording the beneficiary a hearing prior to termination, violates notions of procedural due process as set in the Fourteenth Amendment's Due Process Clause).

governments will not be able to satisfy with credible fiscal policies."[62] And it was at the beginning of the early 1980s that the prediction made by Flood and Whyte came true. It was the demise of the welfare state that started proliferating in 1980s that determined the change of the global ideological picture. According to Mattei:

> "neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain, the crib of the welfare state, and imported on a much weaker institutional background in Reagan's America, were based on the very basic assumption that the welfare state was simply too expensive. A Western capitalist model, busy to outstep the Soviet block in order to win the cold war had to save resources by privatizing as much as possible of its welfare services. Public shelter, health, education and justice for the poor were natural "victims" of such budget cuts. By the end of the 1980s, with the "successful" outcome of the cold war, this policy of "privatization" had overcome the boundaries of the Anglo-American world, as well as those of the traditional political right. At the "end of history", redistributional practices, both direct and indirect, could not be structurally afforded in the domain of the shelter and health, let alone those, secondary in survival importance, of education and justice."[63]

Thus, Stockman's statement, who was the Director of the Office of Management and Budget in the Reagan administration, did not come as a surprise at that point:

> "I don't believe that there is any entitlement, any basic right to legal services or any other kind of services and the idea that's been established over the last ten years that almost every service that someone might need in life ought to be provided, financed by the government as a matter of basic right, is wrong".[64]

Simply put Stockman's statement tells that rights proved to be too expensive. Indeed the creation of new welfare rights and legal remedies, which were put at the disposal of individuals for the realization of the individual enforcement, put enormous

[62] Flood, J., Whyte, A., *supra note* 41.
[63] Mattei, U., *supra note* 39.
[64] Abel, R. L., *supra note* 43 at 479.

pressure on the legal aid schemes. Baldwin makes a reference to the empirical studies made in England which showed that individuals needed more advice and assistance to take advantage of their new rights.[65] Regan notes, that in social democratic Sweden and the Netherlands 70% of the population came to depend on the state for 'in litigation' services for the most legal problems.[66] This is true in a way, as the welfare state produced a large number of welfare rights and unfortunately was the prisoner of its own success. This shift in the ideology of the welfare state brought changes in the content of the legal aid schemes. Legal aid schemes became unsustainable in several countries.[67] The new strategy which had to grapple with scarcity of financial resources but still aiming at improving the complaint system and making it accessible to a wider range of people had to search to broaden the circle of providers in order to be able better to respond to the demand. Also all these considerations decisively shaped legal aid eligibility criteria and the range of services delivered under the schemes.

The 1990s brought the next shift in the welfare state's ideology. Goriely notes that "the word 'welfare', far from implying the positive aspiration of the 1940s, was now seen as essentially negative – becoming associated with dependency, passivity and unaffordable expense". [68] This is not to mean that legal aid was seen purely as a financial burden, but rather this shift sought to change the approach towards legal aid by searching alternative methods of delivery and reorienting the court-dominated and very legalistic models. New mechanisms for complaints were established as an alternative to court

[65] Baldwin, J., Consumers Access to Justice: Small Claims procedure in the County Courts, in Office of Fair Trading, Development in Consumer Redress – Report on a Symposium, 27 September 1995, London.
[66] Regan, F., *supra note* 42 p. 186.
[67] *See* Yuille, K., *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42(3) Col. JTL 863, 2004.
[68] Goriely, T., *supra note* 40, p. 103.

enforcement, which were dominantly present in the individual enforcement procedures. In this context, the Australian legal aid scheme can serve as an example. Regan points out that although Australian legal aid had lower levels of eligibility and expenditure than the Swedish scheme, it had significant strength. Namely, it offered a greater choice of providers, and a wider range of services. Much more emphasis was placed on information and education.[69]

Conclusion

The approaches regarding legal aid have been defined throughout history on several different moral, social, political and legal bases. We witnessed the evolution of the approaches through the glance of three shifts, one based on the idea of charity, one based on formal entitlement and finally one based on the modern idea of welfare rights. Each shift determined the trajectory of the legal aid and shaped its structure and content.

A rather primitive provision of legal aid dates back to the ancient and medieval times. This early concept of legal aid was mainly seen in relation to legal assistance in courts proceedings, which was left usually at the latitude and charity of non-state actors such as lawyers, churches but not the state itself. It was the appearance of the concept of formal equality, which in it turn brought a broader concept of access to justice and with it a statutory recognition of the right to legal aid, however quite limited and too formal. In contrast to the formal approach to legal aid of laissez-faire century, the welfare state promoted the ideological vision based on the principle that "the state must act affirmatively to redress social and economic wrong by genuinely and effectively touching

[69] Regan, F., Are There "Mean" and "Generous" Legal Aid Schemes in the Post-Welfare State Society, paper presented International Conference on Legal Aid, The Hague, 13-15 April 1994, at 29-30.

the lives of its citizens instead of merely providing them with formal machinery."[70] Protection of these new rights necessitated effective state action. That is why, the legal aid schemes established during this period can be perceived as being created as a response to the demands made by a rights-oriented individualistic society. Almost all remnants of charitable element present in the early concept of legal aid were extinguished and replaced by publicly funded assistance for a wide range of legal needs. Legal aid in this context appeared as a mechanism that secured the promises of the welfare state by providing access to the enforcement of new social rights granted by the state, being itself conceived as a right which definitely was not simply a formal one, as in the previous period, but rather backed up by the state's purse. At the same time, legal aid was a mechanism that could protect citizens from state's interference. The biggest challenge at this point was the possibility to enable citizens to express their desires and grievances effectively to those with power and authority over their lives. In this context, the welfare state equipped its citizens with the means to voice their legal needs and legitimate interests. The welfare fundamental characteristic and rationalities embodied in the legal aid realm remained and prevailed till nowadays.

2. Forces behind the development of legal aid

Behind the creation of legal aid schemes in each historical period of time there were some forces that are considered separately in the present section of the chapter. A separate consideration of the forces is done in order to trace their precise role and impact and obtain a clear and full picture on the development of legal aid. This part of the analysis draws on the identification of distinct forces, factors and developments within

[70]Regan, F, *supra note* 69 at 361.

societies that had an impact or determined the emergence, development or reform of legal aid in different periods. There is a broad array of data available and thus a starting point will be to acknowledge that many of the factors that would be triggered by the analysis do not explain entirely the process of creation or development of legal aid. However, the intention is to reveal those forces, values or policies that directly determined the content of legal aid. These particular factors expressed in a society's legal aid scheme are not accidents and should be taken into account. Thus, the theoretical approach adopted will follow that of Alcock who sought "to locate the social basis of the phenomenon of legal aid in the variety of practices historically involved in its formation".[71] Alcock's approach on the development of legal aid does not treat any one factor as determinative, but rather "treats all phenomena as the result of the interrelationship of the social factors comprising them, none being the sole causational factor, but all together acting as the structural cause of the existence of the phenomena".[72]

The analysis will concentrate on both structural factors (such as industrialization, divorce, religion, legal systems etc.) and the role of key actors (such as the legal profession, judiciary, trade unions etc.).

2.1 Structural factors

2.1.1 Industrialization

Blankenburg mentions that legal aid movements generally emerged as a response to social issues.[73] Cappelletti's study of legal aid[74], for example, was based on the

[71] Alcock, P., *Legal Aid: Whose Problem?*, British Journal of Law and Society, 4:151, 1976, at 163.
[72] *Ibid* at 164.
[73] Blankenburg, E., *The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid* in THE TRANSFORMATION OF LEGAL AID, (Oxford 2002), p.116.

assumption that the development of legal aid was tied to the modernization of societies. Accordingly, those states which did not have extensive legal aid schemes were seen as 'Anachronisms in the Modern World'.

In this context, modernization and industrialization can be brought into attention as encapsulating many social factors which had a direct impact on the emergence and development of legal aid. In accordance with this theory the legal system and the law is playing a specific role in the development of capitalism. According to Kerr "the industrializing societies has shaped their legal systems so as to encourage economic growth through protection of private property, development of rights and obligation of those involved in labour relations."[75] Industrialisation led to the creation of favourable conditions which determined the formation of legal aid schemes and an increase in demand for legal aid as a response to changes within society. Some of these changes included, for example, the appearance of different social classes, the creation of new categories of rights and entitlements, the appearance of new industrial relations, urbanization, the increase in immigration etc.

Blankenburg comes with a similar path of arguments. He associates legal aid with the appearance of what, in the 19th century, would have been called "dangerous classes"[76]. According to him, one such example is that of the working class or "lumpen proletariat" created by industrialization. At the end of the 19th century, for example, Germany was experiencing industrialisation and the rapid rise of the numbers of workers.

[74] *See* Cappelletti, M., Gordley, J., Johnson, E. Jr. eds., TOWARDS EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES, New York 1975.
[75] *See* Kerr, C., et al., INDUSTRIALISM AND INDUSTRIAL MAN, Oxford University Press, 1964.
[76] *See* Blankenburg, E., INNOVATIONS IN THE LEGAL SERVICES, ed. 1980.

The German industrialisation was characterized by the alliance of big landlords, big industry and the state. Both workers' unions and workers' parties were repressed by economic as well as legal means. When in 1878 Bismark outlawed "all associations which aimed at overturning the order of the state and society by social democratic, socialist or communist means", this was only the highlight of the legal repression of the workers' movement. At about the same time, however, he introduced the illness insurance law in 1883, the accident insurance law for industrial workers in 1884, and insurance for retired and handicapped people in 1889. All these were attempts to prevent the industrial proletariat from organizing in socialist parties and unions by paternalistically solving some of their social problems.[77]

Another aspect of industrialisation is the fact that it brought massive urbanization and regional or international migration. These factors had an important impact on the emergence and further development of legal aid, which was initially more a matter of self-help than state provision. Blankenburg notes that the earliest legal aid associations in the United States, founded at the end of the 19th and beginning of the 20th centuries, were directed at European immigrants in major cities such as New York and Chicago. On the other hand, he notes, that the passage of legal aid legislation in Britain in 1949 and the Netherlands in 1957 anticipated by more than a decade the wave of immigration from their former colonies. However the author further observes that the growth in the 1970s of law centres in Britain and law shops, legal collectives, and legal aid Buro in the Netherlands did coincide with that migration wave. The creation of OEO Legal Services in 1965 in the US was a response to the migration to northern cities of Blacks from the

[77] Blankenburg, E., *supra note* 73 p. 116.

southern part of the country and Latinos from the Caribbean and Latin America. A similar relationship may exist between the ethnic diversification of relatively homogeneous populations in Canada and Australia in the 1970s and expansion of legal aid. Nevertheless, Blankenburg points out that large-scale migration, determined by industrialisation, does not always stimulate legal aid schemes. In this context, he brings as examples Germany and Sweden which have both absorbed significant numbers of guest workers, yet only Sweden created a legal aid program. Although France experienced a substantial immigration from its former colonies in North and West Africa and Southeast Asia in the 1960s, it introduced even a minimal legal aid program only in 1972.[78]

From the perspective of the Marxist analysis the role of the legal aid is seen as a tool that assists the legitimization of capitalist society and helps in disguising the class tensions generated by industrialisation. Marxist theory relates social and political inequality and injustice to the division of society into economic classes. Chouinard, for example, presents an interesting study of the development of legal aid and legal clinics in Canada by building her conceptual framework on a Marxist theory of state law, which treats class and sub-class conflict over legal relations and rights as a central cause of changes in the capitalist state and political life within capitalism. She argues that changing economic and political relations during era of crisis in intensive Canadian capitalism contributed to the expansion of state regulated legal aid programmes from the

[78] Blankenburg, E., *supra note* 76.

late 1960s. The author places the emergence of legal aid in Canada as an outcome of struggles to increase access to legal regulation of social relations and practices.[79]

Though it could be quite hard to determine the overall role of industrialisation when it comes to legal aid and to what degree it influenced its development, but it could to be acknowledged that this process increased the complexity of the society by creating new relations, social categories and new rights. All these factors led to the creation of favourable conditions, which determined the adaptation of the legal aid institution to the new realities and to the increasing demand for legal aid as a response to societal changes.

2.1.2 Divorce

According to Cousins, changes in family structure might provide a promising explanation. He points out that the assumption that marriage signified a lifetime union between a male breadwinner and a female child rearer was substantially undermined during World War II and the decades that followed. He argues that divorce has had the major impact in the development of legal aid,[80] whose rates drastically increased after the divorce laws were liberalized. Alcock[81] points out that this is undoubtedly true in some countries, for example, the United Kingdom where the early development of legal aid was inextricably linked to the rise in divorce. Goriely notes:

> "that in 1945 divorce remained a formal, expensive, difficult and highly adversarial procedure. It was politically unacceptable to simplify divorce procedures. Although the government made some efforts in that direction, the combined opposition of church and lawyers was too strong. At the

[79] Chouinard, V., *Transformations in the Capitalist State: The Development of Legal Aid and Legal Clinics in Canada*, Transactions of the Institute of British Geographers, New Series, Vol. 14, No. 3, pp. 329-330.
[80] Cousins, M., *The Politics of Legal Aid – A Solution in Search of a Problem*, C.J.Q. 1994, 13 (APR), 111-132, at 118.
[81] Alcock, P., *supra note* 71.

> same time, it was equally unacceptable to deny divorce to the increasing numbers of couples seeking it. Legal aid was the way in which the government reconciled these opposing forces. Divorce was to stay expensive, but applicants were to receive state help in meeting the cost."[82]

The development of legal aid in Ireland is also closely linked to the growth of marital breakdown and family litigation. [83] Though divorce was not the direct motive for the introduction of the legal aid it nevertheless played an important role. In 1977 the European Court of Human Rights ruled in *Airey v. Ireland*[84] that the applicant did not enjoy an effective right to access to court because of the failure of the government to provide legal aid in divorce proceedings, which proved to be quite complex. As a consequence of this judgement the Irish government introduced a scheme for civil legal aid and advice.

It has been suggested by Abel that:

> "the centrality of divorce may explain the correlation ... between the presence of legal aid in Protestant northern Europe (and North America and Australia) and its absence in Catholic southern Europe (and Ireland and Latin America), which, until recently has not permitted divorce".[85]

Also Cousins notes that further examination of divorce rates shows that it does not explain several features of the development of legal aid. For example, the divorce rate in France at the time of the development of legal aid in the United Kingdom and the Netherlands was comparable to the divorce rate in either of the two latter countries and yet no comprehensive legal aid scheme was established in France until the 1970s. Belgium, which is a northern Catholic country, has a relatively high divorce rate but it

[82] Goriely, T., *supra note* 40 pp. 97-98.
[83] Cousins, M., *Legal Aid Reform in France and the Republic of Ireland in the 1990s* in THE TRANSFORMATION OF LEGAL AID by Regan, F., et al eds., Oxford 2002, p. 171.
[84] *Airey v. Ireland*, ECHR, Series A no 32, judgment of 9 October 1979.
[85] Abel, R.L., THE POLITICS OF INFORMAL JUSTICE, Academic Press, 1982, p. 380.

has no comprehensive legal aid scheme. In addition, divorce has been existed in Italy for several decades and was preceded by a long period during which, although there was no divorce, there was considerable marital breakdown. Yet legal aid in Italy was based on legislation passed in 1920s and there has been no important expansion of legal aid in response to the introduction of the divorce procedure. Thus, as Cousins notes, it appears that divorce may lead to a development of legal aid in some countries but not in others. The author points out that divorce definitely, can explain the appearance of legal aid in liberal and generally protestant countries but not in conservative Catholic ones (or at least there the development of legal aid was slower). This can be seen within the United Kingdom itself where legal aid developed much later than in Northern Ireland with its mixture of conservative Protestant and conservative Catholic culture. [86] According to Goriely civil legal aid in United Kingdom has been dominated by divorce from the start. The 1914 "poor person's procedure" came as a response to the fact that certain categories of people could not afford a High Court divorce proceeding and thus, the government "set up a procedure whereby the very poor could receive charitable help from lawyers to obtain a High Court divorce." [87]

2.1.3 Political conflict

Cousins suggests that in certain specific circumstances such as political conflict and violence may give rise to increase in legal aid expenditure and demand. Thus, according to the author:

> "in Northern Ireland, legal aid expenditure has increased due to the violence because individuals require legal aid in relation to civil disputes

[86] Cousins, *supra note* 80 at 118-119.
[87] Goriely, T., *supra note* 49 p. 550.

> arising from the violence. A similar situation can be seen in Germany in the early part of the 20th century. Here, as is well known, the German government combined a policy of repressing socialist and social-democratic parties with an advanced social policy, including the establishment of comprehensive social security schemes. This led to a demand for advice and assistance in relation to social security which was initially catered for by radical trade unions. This soon led to the establishment by the State of well funded public legal aid services in order to contain such problems within a politically acceptable context."[88]

Though political unrest may indeed influence the amount of money spent on legal aid or the coverage of certain matters by the scheme it does not represent a factor that would determine the creation of the right to legal aid.

2.1.4 Legal Systems

Many of legal aid researchers such as Cousins[89], Blankenburg[90] and Regan[91] studied the relationship between legal aid schemes and the type of legal systems. The differences between the two legal systems *i.e.* civil and common law are extensive. Distinctive features are produced by differences in their procedure, origins and traditions, and the role of judges and legal profession.

Historically, according to Blankenburg, common law countries started out with the idea that parties and their lawyers mobilize their rights, and that adversarial presentation produces just outcomes. On the other hand civil law countries started out with the idea that justice is something like truth, which is there to be found by the best judge possible. Lawyers are there to help judges find the true justice, having thus a less active role in the whole process. This distinction, according to the author, means that

[88] Cousins, *supra note* 80 at 120.
[89] *Ibid* at 111-132; Cousins, M., *supra note* 83 p. 172-175.
[90] Blankenburg, E., *supra note* 73 p. 121-129.
[91] Regan, F., *supra note* 42 p. 193-199.

legal aid is more vital in common law countries, where adversarial procedures lay the full responsibility for identifying, investigating, and arguing issues to lawyers. By contrast, on the continent, judges are more active in searching out the facts of a case. Thus, it fits more easily common law adversarial thinking that access to law rests on representation by a lawyer. As a consequence of these features, Blankenburg concludes, that "common law countries spend more on a variety of lawyer services to provide to parties with equal arms. Civil law countries, by contrast, have developed legal aid around formal right to counsel provisions".[92]

However, Cousins concludes that it is quite difficult to ascertain a direct and definite relationship between a particular legal system and legal aid. Thus for example, in the case of common law system on the one hand there are countries with very high level of legal aid in civil matters, such as the United Kingdom, and on the other hand very low levels, such as the United States. Looking at the other countries included within the common law system such as for example, New Zealand, Australia, Canada it can be acknowledged at first sight that they generally have low to medium levels of development of legal aid, only the United Kingdom, as already mentioned, has an exceptionally high spending in this area. Studies reflecting data from 2000/01, 2006/07, 2007/10 shows that New Zealand, Australia, and Canada spent over 10 Euros per capita on legal aid compared with England and Wales where the spending was around five times that level.[93] As for countries pertaining to the civil legal system they are generally

[92] Blankenburg, E., *supra note* 73 p. 125.
[93] Bowles R., Perry A., International comparison of publicly funded legal services and justice systems, University of York, UK Ministry of Justice Research Series 14/09 October 2009; International Comparisons of Public Expenditure on Legally Aided Services. Ad hoc Statistics Note, UK Ministry of Justice, 8 October 2011.

countries with quite low level of legal aid spending, the Netherlands being an exception.[94] There is no clear distinction between levels of expenditure under common law and civil law systems. Cousins notes that there might be a correlation between a certain legal system and expenditures for criminal legal aid at some extent but none in case of civil legal aid.[95] Equally, the author shows that there is a blurry relationship between the overall level of litigation in a country and the development of legal aid.[96]

Blankenburg also studied the relationship between the case-loads in civil law countries. He points out that the Netherlands has a low case-load, and as mentioned already it is a leader in legal aid spending. In contrast countries with much less extensive legal aid schemes, such as Belgium and Germany, have high case-loads.[97]

2.2 Key Actors

The state, the courts, and the lawyers as deliverers and interpreters of legal aid have at various times played different roles regarding the development and promotion of legal aid schemes.[98] Along with these key actors there can be indentified and other interest groups that had an impact on the emergence and development of the content of legal aid schemes.

[94] Bowles R., Perry A., *SUPRA NOTE* 93, in the Netherlands spending per capita for legal aid constituted 25 Euros in 2008.
[95] Cousins, M., *supra note* 80 at 120.
[96] Cousins, M., *supra note* 83 p. 172.
[97] *See* Blankenburg, E., *Civil Litigation Rates as Indicators of Legal Cultures*, in COMPARING LEGAL CULTURES by Nelken, D. eds., Aldershot: Dartmouth 1997.
[98] *See* Goriely, T., *Law for the Poor: the Relationship between Advice and Solicitors in the Development of Poverty Law*, 3 Int. J. Leg. Prof. 215, 1996.

2.2.1 Legal profession

Starting with the role of the legal profession played within the process of creation and development of legal aid it was argued that legal profession had the greatest interest in such programmes. However that interest developed gradually. In many instances the profession did not initiate proposals to establish legal aid but only reacted to them, although they quickly demanded a major voice in managing such programmes in many jurisdictions. In general legal profession has definitely played an important role in shaping legal aid schemes, though with different variation and intensity.

In Britain, the first country to establish state-funded legal aid in 1949, lawyers resisted the idea throughout the 1920s and 1930s. They were preoccupied with developing their monopolies of litigation. Nowadays, according to Blankenburg, the British legal aid system, being still one of the most extensive, presents a legal profession successfully generating substantial income from the system. Here a fairly strong lawyer lobby has managed to exploit legal aid, and has institutionalized the profession as a part of the welfare system.[99] That is why, the important role of the lawyers in developing the British legal aid scheme can be acknowledged. And even though the level of spending for legal aid is below that of other costs,[100] government-subsidized legal aid depends on professional lobbies whose legitimate interests in adequate remuneration determine at great extent the costs of legal services.[101] Thus, the legal profession has an obvious interest in developing publicly funded legal services and also in ensuring that funds are

[99] Blankenburg, E., *supra note* 73 p. 129.
[100] In 2008 legal aid expenditure constituted 2.2 billion Euros in England and Wales, *see* International Comparisons of Public Expenditure on Legally Aided Services. Ad hoc Statistics Note, UK Ministry of Justice, 8 October 2011, p. 6.
p. 6.
[101] *Ibid* p. 131-132.

concentrated in areas of work which are of interest to the profession. This, according to Cousins "may go a considerable way to explaining the heavy concentration in most countries on providing traditional legal services, *i.e.* advice and representation in court, rather than any education or law reform role".[102]

The legal profession has also played an active role within the area at stake in France. In this context, Cousins notes that:

> "the decision to reform the extremely outdated and underfunded scheme was largely forced on the government by lobbying from the legal profession - including strike action. In addition, in the course of introducing the recent legal aid act, the legislation was amended to give the French profession increased control over the provision of legal advice. The French Ministry of Justice appears to have conceded a quasi-monopoly in legal aid and advice to the profession in return for low levels of payments".[103]

Thus, it can be concluded that in the French case, the government was, effectively, forced to act in 1991 because of the great dissatisfaction and under huge pressure from the representatives of the legal profession, the last being influential both in the decision to establish the scheme and in its structure.

On the other hand there are jurisdictions where lawyers had a less important role in the creation of the legal aid scheme. For example, in

> "the Netherlands, the profession-caught between the Ministry and the non-governmental sector-has played a less dominant role. However, it has achieved a major increase in payments from July 1993. This has corresponded with a sharp increase in the level of contributions to be paid by legal aid clients."[104]

[102] Cousins, M., *supra note* 80 at 123.
[103] *Ibid.*
[104] *Ibid.*

Still it is important to note that the most consistent advocates of legal aid in the Netherlands have been law students and teachers. Law students in the Dutch town of Tilburg set up the first law shop in 1969, and the idea quickly spread to all the other university towns, stimulated partly by an influential issue of the national law student journal Ars Aequi.[105]

In Ireland legal profession was quite inactive. Cousins, reveals the noticeable absence of the Bar in the debates on the 1995 Legal Aid Bill. However, he argues that there are some justifications for this particular course of action:

> "… this arises from the fear amongst certain sections of the law Society that a growth in legal aid amongst the private profession would lead, first to a dragging down of overall civil legal costs, and secondly, to a greater level of involvement by the state in the operation of the private profession".[106]

In the United States the legal profession had an asymmetric involvement in the emergence and development of legal aid scheme. For a long time most of the lawyers remained unconvinced or unconcerned with the issues surrounding legal aid. Hostility was most pronounced among those who view it as an immediate economic threat. According to Abel, in a sample of older American solo practitioners, forty-five percent said that legal services had hurt their practices. When the Office of Economic Opportunity (OEO) Legal Services Program first was established, the professional

[105] Abel, R. L., *supra note* 43 at 499-500.
[106] Cousins, M., *supra note* 83 p. 176.

organizations dominated by solo and small firm lawyers were the most uncompromising in their resistance. [107]

Legal aid was a diffused movement till 1919, when Reginald Heber Smith an advocate with the Boston Legal Aid Society published a groundbreaking study "Justice and the Poor" which gave way to some outstanding ideas. Smith noted with frustration in his study that "the majority of our judges and lawyers view the situation with indifference. They fail to see behind the denial of justice the suffering and tragedy which it causes".[108] In his work Smith exposed vast differences in the quality of justice available to rich and the poor. His study led to endeavours to narrow the wide gap, including the first association of legal aid providers - National Association of Legal Aid Organizations.[109]

Rhodes notes that the American Bar Association did make some efforts to address the situation. In 1917, it passed a resolution urging state and local bars to "foster the formation and efficient administration of Legal Aid societies … for the worthy poor," and appointed its own legal aid committee in 1920. But the response, according to the author, was less enthusiastic. Further she refers to Smith's 1919 study which found that fewer than 10% of the lawyers in any surveyed city contributed support, and in some metropolitan areas, the proportion was only twenty forms willing to donate at least $250 for legal services; the New York Legal Aid Society's 1934 effort yielded support from only 229 of the city's some 17.000 attorneys. In the other metropolitan areas bar

[107] Abel, R. L., *supra note* 43 at 499.
[108] Smith, R. H., JUSTICE AND THE POOR, Carnegie Foundation for the Advancement of Teaching, 1919, p. 9.
[109] Ginsburg, R. B., *Access to Justice: The Social Response of Lawyers. In Pursuit of Public Good: Access to Justice in the United States*, Washington University Journal of Law & Policy, 2001, at 5.

associations contributed only small amounts, on the order of $100. As late as 1950, only about 9% of legal aid funding came from the legal profession. A 1951 comprehensive bar survey showed that no substantial progress in expanding services has occurred since Smith's study in 1919.[110]

However, the American legal profession was less passive when in the early 20th century judges, bar leaders, and social activists launched a series of reform efforts. Rhode describes the role that lawyers played in establishing public defenders offices throughout the country. Such systems were proposed for American courts by Clara Shortridge Foltz, one of the nation's first female trial lawyers. Los Angeles County launched the first office in 1914, and with years, other major metropolitan areas followed the suit. Rhodes notes that to early advocates, including Reginald Heber Smith, this approach appeared a "complete solution". The legal aid scheme received an organized form with an independent private office, salaried lawyers working full-time on the problems of clients, however concentrated almost solely on criminal matters.

An interesting research was made by several authors related to the correlation between the number of existing lawyers within a jurisdiction and legal aid. The research shows that in some jurisdictions the increase in the number of lawyers is a direct result of the increase in the legal service market; however this could work vice-versa as well. Cousins reaches the conclusion that legal aid spending appears to bear little relationship to the number of lawyers in a country. According to him, the Netherlands which has one of the lowest numbers of lawyers per capita in the European Union (2,500 people per

[110] Rhode, L. D., ACCESS TO JUSTICE, Oxford University Press 2004, p. 59-60.

lawyer) has one of the highest levels of spending on legal aid.[111] However, a Report made by the British Department for Constitutional Affairs shows an opposite conclusion. According to this report the

> "rapid growth in legal aid expenditure has been matched by a dramatic increase in the overall number of legal practitioners and the pool able to provide legal aid services. 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%".[112]

Hence, it appears that the increase in the number of lawyers might affect the size of the legal services market and as a subsequence it can trigger an increase in legal aid spending. The same conclusion was reached by Goriely when she referred to criminal legal aid acknowledging that the number of lawyers is a driver that contributes to increasing legal aid spending.[113]

In general referring to the legal profession as a driving force behind legal aid it seems that lawyers were never completely passive in any jurisdiction when legal aid was at stake. A powerful lobby from legal profession usually inevitably resulted in higher levels of legal aid funding. Cousins, at the same time, finds a drawback in an active involvement of the legal profession within the area of legal aid namely, such an involvement "will mean that legal services are concentrated in traditional areas and that little emphasis will be put on a broader role for legal aid."[114] However, one can measure a

[111] Cousins, M., *supra note* 83 p. 172.
[112] A Fairer Deal for Legal Aid, Report presented to the Parliament by the Secretary of State for C. Af. and Lord Chancellor by Command of Her Majesty, Department for Constitutional Affairs, Justice, Rights and Democracy, July 2005.
[113] Goriely, T., The Development of Criminal Legal Aid in England and Wales in THE PROFESSIONALISATION OF CRIMINAL JUSTICE, Legal Action, Bridges, L., p. 7-9.
[114] Cousins, M., *supra note* 80 at 124.

developed legal aid infrastructure by referring to whether it helps or not to solve the problems people experience in accessing lawyers. This, according to Blankenburg:

> "makes the active involvement of the legal profession a necessary condition for successful legal aid development. The professional involvement might be triggered by ideological movements (such as student movement of the 1960s and '70s) it might originate in political strategies, as occurred in the post-Bismark era. But nowhere can it survive without satisfying some long-term interest of the legal profession itself".[115]

2.2.2 Judiciary

On the other spectrum of legal realm is judiciary. However, as Cousins notes, the judges have had little involvement in the area of legal aid[116] sometimes even opposing the extension of the right to legal aid to civil matters. An important achievement was made by the Irish[117] and US Supreme Courts which have held that there is a constitutional right to criminal legal aid under their respective constitutions. In 1963, the US Supreme Court issued a landmark decision in *Gideon v. Wainwright*, holding that the Sixth Amendment of the Federal Constitution guarantees all individuals facing felony charges a right to counsel.[118]

> " But *Gideon v. Wainright* leaves a gap between the right to counsel in criminal and civil cases which clashes the very language of the due process clause. "The Fourteenth Amendment extends the protection ... to property as well as to life and liberty".[119]

[115] Blankenburg, E., *supra note* 73 p. 118-119.
[116] Cousins, M., *supra note* 80 at 123.
[117] *See State (Healy) v. Donoghue* [1976] I.R. 325.
[118] *Gideon v. Wainwright* (1963) 372 U.S. 335.
[119] CF Note, *The Indigent's Right to Counsel in Civil Cases,* citing Justice Roberts from *Betts v. Brady (*1942), Yale L. J., Vol. 76 No. 3 (Jan. 1967), p. 548.

Unfortunately, a right to civil legal aid lacks till today the status of a right under the US Constitution. For example, the US Supreme Court denied a certiorari in *Sandoval v. Rattikin*,[120] where an indigent family had sought to reverse a civil judgment on the basis of the fact that the state has failed to appoint a lawyer in violation of Due Process and Equal Protection Clause of the US Constitution. The family and their nine children has lost their home in which they lived for almost 20 years. In US only a few state courts have interpreted the constitutional guarantees of Due Process and/or Equal Protection Clauses as requiring the appointment of free counsel in several narrow types of civil cases involving the threatened loss of parental rights (*e.g. State v. Jamison* (1968)) or in law suits aiming at determining the parentage of minor children (*e.g. Salas v. Cortez* (1979)). Currently, publicly appointed lawyer is provided on the basis of several statutes in federal courts and in state courts as an adjacent right to the right to proceed with civil proceedings, but the appointment is discretionary with the court reviewing the case and not always exercised.[121] On contrary the Swiss Supreme Court found a right to counsel in civil cases via the interpretation of the Article 4 constitutional guarantee that "All Swiss are equal before the law".[122] Actually in the 1971 the US Supreme Court slammed the door on any hope that it would follow the lead of the Swiss Supreme Court or anticipate the European Court of Human Rights and declare a right to lawyer in civil cases under the American Constitution. In *Lassiter v. Department of Social Services* the Supreme Court ruled that the Fourteenth Amendment of the American Constitution does

[120] *Sandoval v. Rattikin*, 395 S.W. 2d 889, (Tex. Civ. App. 1965), *cert. denied*, 35 U.S.L. Week 3138 (U.S. Oct.18, 1966).
[121] Duniway, B.C., *The Poor Man and the Federal Courts*, 18 Stan. L. Rev., Vol. 18, No. 7, Jun., 1966, at 1277-80.
[122] Sche gegen Appenzell A. Rh. Ragierungsrat, Judgment of 8 October 1937, BGE 63 I 209.

not require courts to appoint counsel for indigents in every parental status termination proceeding. The finding was quite surprising as the court basically concluded that the Constitution permits a poor woman to lose her parental rights in a trial where she could not afford legal assistance.[123]

In 2001, thanks to the development of the international human rights standards, in South Africa the Land Claims Court reached an important conclusion in the case of *Nkuzi v. The Government of the Republic of South Africa and the Legal Aid Board*[124] dealing with eviction. The decision of the court was relatively brief, but there were several sentences that capture the essence of the rationale for a right to legal aid in civil cases. The court stated that "there is no logic basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand".[125]

2.2.3 Trade unions

The literature indicates that trade unions at a point in the historical development of legal aid have had an important impact on it. Actually in many jurisdictions, for example, the US, Great Britain, Germany, the Netherlands, Belgium, Italy, and Mexico, trade unions represented a strong drive force in legal aid provision. Trade unions provided their members with legal assistance and advice, either through lawyers employed by the union itself or thorough referrals to outside counsel who work for little

[123] Johnson, E. Jr., Justice and Reform: A Quarter Century Later in TRANSFORMATION OF LEGAL AID by Regan, F. et al eds., (Oxford 2002), p.11-12.
[124] *Nkuzi Development Association v. The Government of the Republic of South Africa and the Legal Aid Board*, LCC 10/01 (Land Claims Ct. S. Afr. 2001).
[125] *Ibid.*

or no fee so that they can retain the union's paying business. For instance, trade unions in Germany invested in a network of legal advice and consultation bureau, instituting the first legal advice centres for their members as early as 1890.[126]

At the same time Abel emphasizes that:

> "trade unions are hostile to state legal aid programs that threaten to supplant the unions' functions. Thus, the labour movements in Britain, the Netherlands, and Italy actively opposed the establishment or expansion of state legal aid. And in Germany, the new legal advice law of 1980 allows the Länder (state legislatures) to deny assistance in social welfare and labour law matters. Those Länder dominated by the Social Democrats have done so; those controlled by the Christian Democrats have not."[127] In contrast "when legal aid programs pose no threat to union loyalties, organized labour can be strongly supportive. For example, local and district trades councils in Britain have been instrumental in establishing a number of law centres".[128]

2.2.4 Political parties

Another actor involved in the development of legal aid represent political parties. For example, the tenure of particular political party such as Democratic in the United States, social democratic in the United Kingdom, the Netherlands, and Australia is associated closely with the rise and demise of legal aid.

However, according to Cousins, there is relatively little indication that political parties have had any great impact on the development of legal aid. In the United Kingdom, for example,

> "in the period 1920 to 1942 the Lord Chancellor's Office, the Treasury and the legal profession-rather than political parties-dominated ideological discussion about the nature of legal aid. The initial introduction of a comprehensive legal aid scheme in 1949 was broadly supported by all

[126] Blankenburg, E., *supra note* 73 p. 115.
[127] Abel, L. R., *supra note* 43 at 537.
[128] *Ibid*.

> political parties with relatively minor differences as to the approach to be taken."[129]

According to Abel's research the development and level of legal aid can be determined by making reference to the dominance of the major political parties. He concludes that:

> "those left of centre create and expand legal aid programs; those on the right restrict or eliminate them. The Labour Party initiated the Australian Legal Aid Offices; the (conservative) Liberal Party abolished it. The Democratic Party founded the OEO Legal Services Program in the United States and increased its funding to the highest levels; Republicans sought to dismantle it and, failing that, to limit it quantitatively and qualitatively. Labour Lord Chancellors in Britain have supported the law centre movement; Conservative local authorities have attacked the law centres within their jurisdictions."[130]

Nevertheless, the author emphasizes, that

> "the generalization that conservatives attempt to restrict or abolish legal aid programmes is not without exceptions. Before his resignation, one of President Nixon's last acts was signing the bill creating the Legal Services Corporation. Similarly, Conservative local authorities in England have helped establish law centres."[131]

Moreover, in the UK "in more recent years, legal aid spending, starting from a comparatively high level, has continued to grow at a higher rate-not only in overall terms but as a percentage of GD-than in most other E.C. countries, despite 14 years of Conservative government."[132]

However, the involvement of political parties in the area of legal aid, especially comparing to their impact on any other social issues is minimal, and according to one commentator:

[129] Cousins, M., *supra note* 80 at 121.
[130] Abel, *supra note* 43 at 527.
[131] *Ibid* at 527-528.
[132] Cousins, M., *supra note* 80 at 121.

> "the reason why few political parties see legal aid as a burning issue may be related to an assessment of its (lack of) functional importance. In addition, legal aid is rarely of benefit to a clearly identifiable group or class of people-other than the legal profession, of which more below-and consequently no group has any clear interest in campaigning for improved services. Because of the diffuse nature of potential users, it is rare for class or social group based campaigns to develop much coherence."[133]

2.2.5 State administration

In comparison to political parties the state administrations have played a very important role in the development of legal aid. Generally speaking, they either undertake an active role in the creation of the legal aid *per se* or are concerned with controlling the cost or management of legal aid. In the case of France, for example, when the government forced to act in 1991 in relation to legal aid because of the dissatisfaction of the legal profession with the existing situation, the report of the Conseil d'Etat was drawn up by a commission consisting of civil servants and lawyers. Subsequently, this report was largely accepted by the government and formed the basic shape of the Legal Aid Bill. In the case of the emergence of the legal aid scheme in Ireland the key actor was the state through its administrative authorities. The law on legal aid was drafted by the Department of Justice.[134]

As stated above in many jurisdictions the administrations are concerned with controlling the cost and management of legal aid. In this context,

> "the high levels of spending in both the Netherlands and the United Kingdom can, to some extent, be explained by the role of the respective civil services. In the Netherlands, the Ministry of Justice has adopted a very "hands-on" role in relation to the management of legal aid services and it also appears to be committed to providing an extensive legal aid scheme. Thus the Ministry has been able to provide a reasonably

[133] Cousins, M., *supra note* 80 at 121.
[134] Cousins, M., *supra note* 83 p. 175-176.

> comprehensive service without excessive costs by carefully managing the delivery of services and by carefully manipulating the legal profession to keep costs to a minimum.
>
> In contrast the Lord Chancellor's Office (subsequently Department) traditionally adopted a comparatively "hands-off" approach leaving management of the service to the Law Society which obviously had little incentive to keep costs down or deliver a cost-efficient service".[135]

2.2.6 Non-governmental organizations

Another key actor involved in the creation or development of legal aid represents the non-governmental organizations or some specialized legal and quasi-legal organizations interested in the area of access to justice.

It can be noted that non-governmental organizations had different levels of involvement in the emergence and development of legal aid schemes. They were either consulted by the government in the process of drafting the legal provisions on legal aid or were the driving force in lobbying for reform or development of legal aid, or even included within the legal aid scheme.

Thus, for example, in France when the government decided in 1991 to act in relation to legal aid the non-governmental organizations were consulted by the Conseil d'Etat, however there is little indication that they had any significant say in shaping the final outcome.[136] The same is valid for Ireland, when the Parliament was debating the provisions to be included in the Legal Aid Bill of 1995, non-governmental organizations, such as the Free Legal Advice Centres and Coolock Community Law Centre, were very

[135] Cousins, M., *supra note* 80 at 122.
[136] Cousins, M., *supra note* 83 p. 175.

influential in shaping the parliamentary debate.[137] Even though non-governmental organizations

> "have become involved in the debate from time to time, these groups have tended to be specialized bodies made up mainly of lawyers such as the Landelijke Organisatie Buros voor Rechtshulp and the Vereniging van Socale Advocatuur Nederland in the Netherlands, the Legal Action Group and the Law Centers Federation (and its constituent parts) in the United Kingdom and the Free Legal Advice Centers in Ireland. These groups are generally quite small and do not have any level of mass support. They have been extremely successful in setting the agenda for public (chimerical) discussion about legal aid but have generally been much less successful in influencing the real debate (largely controlled by the State and the legal profession)."[138]

On the other hand, in other jurisdictions many of the non-governmental organizations have deeply influenced the realm of legal aid. In the Netherlands, the author states that:

> "non-governmental groups has helped to ensure that welfare law plays a significant role in the Netherlands scheme. There appears to have been a better "fit" between the needs of the administration and the groups involved in that it suited the Ministry of Justice to have an alternative provider so as to put pressure on the legal profession whereas the non-governmental sector adopted a reformist rather than a radical approach and thus could easily be accommodated within the state services".[139]

Conclusion

While factors such as industrialization, modernization and societal development, divorce, political unrest, etc. may and frequently do have an impact on the development of legal aid, as could have been noticed from the analysis above they are not determinative. Thus, for example there is no clear link between the wealth of the state,

[137] Cousins, M., *supra note* 83 p. 175.
[138] Cousins, M., *supra note* 80 at 124.
[139] *Ibid* at 124-125.

the level of industrialization or modernization and the legal aid scheme. Blankenburg emphasizes the same observation:

> "... levels of expenditures on legal aid cannot be explained by a simple correlation with welfare level is demonstrated by the comparison of the Netherlands with the Federal Republic of Germany … There would be no reasons in economic and social structures to expect any significant difference in legal aid expenditures between these two countries, because both rank on similar levels of economic growth as well as welfare state development. However, the Dutch government spends 14 times more in subsidy per head of the population on legal advice than the German government … in 1989." [140]

Cousins notes the same fact, according to him:

> "the wide variation in State spending on legal aid would suggest that there is a weak link between the modernization of society and the development of legal aid. Legal aid appears to be functionally weak in relation to the needs of society's overall development, *i.e.* while factors such as industrialization and modernization do have some effect on the development of legal aid, some highly advanced countries (such as Belgium and indeed the United States) have very low levels of State expenditure on legal aid. Nonetheless, it is clear that no poorer European country has a highly developed legal aid scheme. This might suggest that it is not industrialization or modernization per se which leads to legal aid."[141]

There is also no strong link between the type of legal system within a jurisdiction and its legal aid scheme. At least it must be said that there is a lack of available national analysis that would precisely reflect the development of legal services in countries with a specific type of legal system and the impact it has on legal aid which means that this issue would merit further research and can be considered as a basis for debate rather than the proliferation of a completed theory.

The research also presented a broad range of key actors that were involved in the creation and development of legal aid. For example, lawyers are the actors that

[140] Blankenburg, E., *supra note* 44 at 108.
[141] Cousins, M., *supra note* 80 at 117.

participated either in the conception, development or shaping of the legal aid schemes. And even though at some points in history the legal profession was rather passive or even absent from the scene, it was generally shown that it played an important role, either positive or negative according to the interests pursued. The power and economic interests of the legal profession tend to be of particular significance in the realm of legal aid. Their involvement in this area is crucial since they generate the market of legal services. Many times

> "legal aid has become what lawyers think they can offer to those who have some acknowledgement status of being poor, marginalized and discriminated against. Whatever legal aid recipes have been brought forward, they are shaped by the capacities of what the legal profession has to offer. They are supplied-shaped, rather than demand-led."[142]

Finally, the findings of the analysis show that the state has a great impact on the legal aid. In one sense, the state is the most critical actor in the political realm, for it creates, controls, and can abolish legal aid. Furthermore, the state embodies a great diversity of interests among various government officials and administrative bodies. At the same time, it was observed that in many instances the state does not act autonomously but rather in response to other interested actors, such as lawyers or non-governmental organizations.

[142] Blankenburg, E., *supra note* 73 p. 114.

3. Conclusion

Some theories and approaches pursued in the specialized literature when locating the legal aid phenomenon take account of certain practices and factors historically involved in its formation. Either these refer to a particular social issue or class, or its specific culture, or group interests.

A plausible justification that would reflect the emergence and development of legal aid does not need to treat any one factor as determinative but rather, as Alcock suggested, the issue of legal aid should be treated as the result of the interrelationship of the social factors in certain period of time comprising it, none of them being the sole causational factor, but all together acting as the structural cause of the existence of the phenomena.

The analysis shows that no single structural factor such as industrialization, economic development, divorce, political unrest or key actors may entirely explain the creation and development of legal aid. Moreover, none of these factors or actors were/is determinative. The phenomenon of legal aid is rather the result of the inter-relationship of this complex range of social factors including key actors or interest groups.

If more weight is given to a social factor or an actor and another is disregarded it is perhaps inconsistent, and responses to the question of emergence of the legal aid will not be based on satisfactory explanations. On the one hand, legal aid does develop in most advanced capitalist societies, suggesting the two may be linked. On the other hand,

legal aid appears to be absent in some, and is found in the third worlds as well. Moreover, many times concrete historical circumstances are decisive.

Thus, any justification should adopt a cumulative approach towards the issue of the emergence and development of legal aid. A cumulative absence or presence of some, many or all of the social factors and key actors will be likely to have an impact on the state of creation and development of legal aid within a state. Yet, in some instances there must be additional reasons leading to the development of legal aid in some jurisdictions, and not in others. Thus, in addition to a cumulative approach that would take into consideration all necessary social factors and actors that might influence the content of legal aid the theory should have a conjectural character taking into account the context in a certain period of time and follow the emergence and development of legal aid according to a particular conjecture. Moreover, from the moment of introduction of a legal aid scheme in a certain jurisdiction usually with time such a scheme adapts to meet changing demands. Society's social and legal needs, economic well-being and development as well as various governments' priorities change, often significantly. Subsequently legal aid is frequently subjected to reform and is refocused to reflect these new priorities and respond to new needs. It evolves in response to political, economic and social environment of the time. It is also necessary to pay due attention to the possibilities that the content of the legal aid scheme might be subject to a certain type of changes according to specific developments.

CHAPTER 2: SOURCES OF THE GENERAL OBLIGATION TO PROVIDE LEGAL AID IN NON-CRIMINAL MATTERS

The analysis made in the previous chapter on the emergence and development of legal aid and of the forces that influenced this process clearly showed that the provision of legal aid in non-criminal matters has been based throughout the last centuries on different rationales. Usually these rationales were having either a purely moral, social or political background or a mixture of them. Chapter one reflects the development of legal aid from a matter of mere charity to a right created either as a tool for eradication of poverty or one that empowers disfranchised people. This thesis by no means seeks to elaborate a theory regarding the emergence and development of legal aid, but rather tries to identify a theoretical justification for civil legal aid valid for current times. Nowadays one of the most advocated modern justifications for civil legal aid stems from the human rights rationale. This rationale changes the perception about legal aid.

The present chapter of the thesis starts with the analysis of different legal principles, which can be found in the international human rights realm but also in the constitutional ambit at the national level. These principles underlie at some extent states' obligation to provide legal aid in non-criminal matters and serve as an interpretative guide. Independently or if read together with relevant human rights international or domestic provisions they point out to some need for legal aid. Many of these principles were employed by the international and national bodies when engaging in considering the

right to legal aid under human rights rationale and served in some instances as a starting point for developing the right to civil legal aid itself.

The second section goes into considering international human rights standards regarding access to justice with a particular focus on standards related to legal aid in non-criminal matters. The main purpose is to identify sources for the state obligation to provide civil legal aid. As, Skinnider notes "the issue of responsibility of the states to provide legal aid becomes important in the restructuring or establishing of legal aid systems as it provides the overall rationale for them." [143] In this context international human rights ambit is taken as an important area that can provide an extensive framework for creating the right to legal aid in non-criminal matters. This section examines the relevant grounds contained in international human rights law of the Council of Europe, UN and EU that provide for a state's general obligation to ensure civil legal aid. In this sense, the analysis is based on relevant international treaties and other instruments that contain expressly legal aid standards and those that though *prima facie* are silent, bear a basis for the state's obligation to provide legal aid in non-criminal matters.

1. Principles underlying the general obligation to provide legal aid in non-criminal matters

Various principles contained in many legal systems and international and regional human rights regimes represent a crucial source for the obligation to provide state-funded legal aid in non-criminal matters. The present section refers to those principles that clearly bring civil legal aid in the human rights ambit. Independently or read together with relevant human rights provisions the principle of the rule of law, equality and fair

[143] Skinnider, E., The Responsibility of the States to Provide Legal Aid, The International Center for Criminal Law Reform and Criminal Justice Policy, 1822 East Mall, Vancouver B.B. Canada, Paper presented for the Legal Aid Conference, Beijing, China, March 1999, p 2.

trial strongly support the existence of the institution of civil legal aid as a matter of a right and as an issue that stems from the human rights rationale. Moreover, they allow for a broad interpretation of the states' responsibility to provide civil legal aid.

1.1 The principle of the rule of law

A full discussion about the concept of the rule of law is far beyond the framework of this section. However, some general reference to the meaning and content of the principle at stake is necessary. Nowadays all constitutional democracies declare their commitment to the rule of law. Moreover "nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government that the observance in the former of the rule of law".[144] In general, the notion of rule of law evokes images and ideals of justice, fair resolution of conflicts, and certain images of institutions that make laws and of those that enforce it. A straightforward legal view on the rule of law says that:

> "The chief meaning of the term is the supremacy of substantive and procedural rights, as administered by independent courts, over both arbitrary executive power and the might powerful private individuals. … Relatedly, it is the mechanism by which the state's monopoly of legitimate force is channelled to protect civil, property and other rights".[145]

The interdependence between the human rights and the rule of law was recognized by the states worldwide with the adoption of the Universal Declaration of Human Rights. And it is true that the protection under the rule of law gives individuals the possibility to avail to the law and seek observance and enforcement of their rights. It has been said that one of the justifications for the provision of legal aid stems from the

[144] Dyzenhaus, D., *Normative Justifications for the Provision of Legal Aid*, in the Report of the Ontario Legal Aid Review, Blueprint for Publicly Funded Legal Services, Vol. 2, p. 475.
[145] Owen, B., Portillo, J., *Economic Incentives in Legal Reform*, Perspectives, Vol. 4, No.2, June 30, 2003.

states' commitment to the principles of the rule of law.[146] The states' obligation to provide for some form of legal aid is heavily based on its dedication to the use of legal rules to organize society and regulate conflict within it.[147] This makes sense in the light of the above enumerated characteristics that come under the umbrella of this principle. For the individuals to avail to law it is necessary that they have a meaningful access to it and that they know the rules comprised in the law. In Dyzenhaus's opinion these two features of the rule of law are particularly relevant in this context. According to him "publicity" condition of law dictates that the legal rules must be fixed and announced beforehand. A "secret law is anathema in a democratic society." Moreover "the promise of a democratic society that each of its citizens will have equal protection under its laws will be empty if that society fails to meet the publicity condition."[148] The second element in the principle of the rule of law, emphasized by Dyzenhaus, is the meaningful access to laws, which according to him is not merely limited to the disclosure of the laws, the individuals must have access to the law in such a fashion that they would be "enabled to understand their obligations or their rights and to plan their affairs accordingly." [149] Here comes the grand rationale that explains the link between the rule of law and the states' obligation to provide legal aid:

> "If a state enacts or develops laws which are so complex that many of those who are subject to those laws cannot acquire equal, or perhaps any, understanding of them, such that they can neither understand nor use them, the laws to which they are subject do not meet the publicity

[146] Dyzenhaus, D., *supra note* 144.
[147] Buckley, M., The Legal Aid Crisis: Time for Action, A Background Paper for the Canadian Bar Association, June 2000, p. 22.
[148] Dyzenhaus, D., *supra note* 144.
[149] *Ibid.*

> condition. There is arguably, a state obligation of some kind to facilitate meaningful access to its laws".[150]

The same logic stands behind the works of the Congress of the International Commission of Jurists held on 5-10 January 1959 in New Delhi where the right to counsel was affirmed in the context of the rule of law, namely it was acknowledged that:

> "Equal access to law for the rich and the poor alike is essential to the maintenance of the rule of law. It is, therefore, essential to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it."[151]

Today the life of people is heavily regulated, non-criminal sphere covering the biggest part of it. Therefore most individuals will need an expert to help navigate through law. The rule of law is definitely undermined if such assistance is impossible because individuals cannot afford it, especially in the light of the fact that the accessibility requirement to law comes together with the equality principle. This is, however, not to be interpreted as an advocacy for an unlimited right to legal aid for people who have hardships in accessing the law. The rationale dictates that the states' obligation to provide legal aid will increase as the complexity of the laws increases and the impact or burdens that the laws can have or impose on individuals who cannot afford to acquire assistance in order to meaningfully access the laws *i.e.* understand what the rules are. In addition, the rule of law rationale covers both criminal and civil law matters equally as it relates to effective access to the law and effective recourse to ensure all human rights.[152] Thus, traditional states' tendency to cover criminal law cases with legal aid and to ignore all or a large range of non-criminal cases is no longer viable.

[150] Dyzenhaus, D., *supra note* 144.
[151] Report adopted at the Congress "The Rule of Law in a Free Society" by the Committee on the Judiciary and the Legal Profession under the Rule of Law, 1959, at 14.
[152] Dyzenhaus, D., *supra note* 144.

The rule of law principle was also used by some international tribunals when dealing with the issues concerning the right to legal aid in non-criminal matters. For example, as it will be showed in details in Chapter three when analysing the case-law of ECtHR, in *Golder v. United Kingdom*[153] the Court when reading-in the right of access to the courts within the ambit of Article 6 (1) elaborated on the "object and purpose" of the Convention. It referred to the passage in the Preamble of the Convention that encompasses the rule of law principle as one of the features of "the common heritage of the member States of the Council of Europe". This principle helped in concluding that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts".[154]

As already stated the rule of law principle also dictates that people should be able to enforcement the rights conferred by the laws. "Legally enforceable rights and duties underpin a democratic society, and access to justice is essential in order to make these rights real".[155] The rationale behind any legal system bears *inter alia* the idea that the members of a society accept the system and submit all their existing disputes to the competent institutions rather than taking the law into their hands in order to ensure or restore justice. Therefore, people tend to see the legal system as central in enforcing their rights. Cappelletti and Garth, in their monumental comparative work on civil justice systems, point out that the emergence of the right of access to justice as 'the most basic human right' was in recognition of the fact that possession of rights without effective

[153] *Golder v. United Kingdom,* Application no. 4451/70, judgment of 21 February 1975.
[154] *Ibid* para. 34.
[155] Blair, T., "Forward" in LAW REFORM FOR ALL, ed. D., Bean, 1996, at xiii.

mechanisms for their vindication would be meaningless.[156] The existence of the rights within a legal framework presupposes their enforcement, and in case a person lacks means to access available enforcement tools the logic commends for creating a legal aid scheme. Legal aid, in this context, is one of the elements that can ensure enforcement of rights, though of course it is not the sole one. Cappelletti and Garth argue that social rights require individual legal enforcement, and individual legal enforcement requires citizens to have access to justice. They see legal aid as an important way in ensuring such access to justice.[157] Marasinge notes that the right to legal assistance "is of such fundamental importance that all other rights which are relevant to the due conduct of a fair trial may be worthless if this right is not respected."[158] Manning also emphasizes the importance of the provision of civil legal aid in the light of the promotion of other human rights and civil rights.[159] It follows that the supporting argument for civil legal aid is the rationale that the presence of legal aid is determinative to the protection and enforcement of a wide range of other rights. Moreover, the realm covered by the non-criminal law represents a legal framework for most of the individuals' activities because of the degree to which this law regulates activities in spheres of everyday life such as the purchase of consumer goods, housing, employment, family relations, relations with state bodies etc. Several studies have demonstrated how pervasive justiciable problems (legal needs) are

[156] Cappelletti, M., Garth, B., Access to Justice - The Worldwide Movement to Make Rights Effective: A General Report, ACCESS TO JUSTICE – A WORLD SURVEY, eds. Cappelletti, M., Garth, B., Vol. I, 1978, p. 5, 8-9. This shift occurred, according to the authors, simultaneous with the emergence, in the twentieth century, of the 'welfare state'.
[157] Goriely, T., *supra note* 40, p. 89.
[158] Marasinghe, C., *The Right to Legal Assistance in International Law, with Special Reference to the ICCPR, the ECHR and the ACHR*, 5 Asian Y.B. Int'l L. 15 (1997), p. 15.
[159] Manning, D.S., *supra note 5* p. 63-64.

in the everyday lives of people in contemporary societies.[160] These studies deal with the notion of "unmet legal needs" when trying to show that access to legal services was differentiated on a social class basis and that many working class (not necessarily only the poor people) had legal problems which were not being catered for by existing legal services.[161] Therefore, as Currie notes, legal assistance can be very important for the well-being of people when problems occur in their normal activities of modern life, especially for the most vulnerable in the society.[162] An ignorant attitude of the government in dealing with such gaps will foster the creation of marginalized and social excluded groups. In this context, civil legal aid can be used as a tool for the prevention of the formation of socially excluded groups from the entitled use of their rights, namely by empowering them to make use of their legal benefits.

There is a vast range of literature concentrated on the issue related to social exclusion and the inability to vindicate and enforce human rights and privileges. For example, Smith argues that the concept of "social exclusion", which has been defined as "what happens when people or areas suffer from a combination of linked problems such as lack of access to services, unemployment, poor skills, low incomes, poor housing, high crime environment, poor health and family breakdown"[163], gives important guidance for

[160] *See* Genn, H., PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW, Hart Publishing, 1999; Pascoe, P. et. al., CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE, LEGAL SERVICES COMMISSION, 2004; Genn, H., Paterson, A., PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW, Hart Publishing 2001.
[161] Cousins *supra note* 80 at 126.
[162] Currie, Ab., Civil Justice Problems and the Disability and Health Status of Canadians, in Transforming Lives: The Impact of Legal Services and Legal Aid, Paper for LSRC 6th International Conference.
[163] Social Exclusion Unit, Purpose, Work Priorities and Working Methods, Office of the Deputy Prime Minister, London, 1997.

the provision of legal aid. "The point of funding civil legal aid becomes to use the law to provide access to services, higher income, better housing, etc" [164] he further argues that:

> "Social exclusion needs to include concepts of civil or citizenship rights. It needs to incorporate notions of empowering citizens to obtain rights and, thus, being included within society. In the context of legal aid, social inclusion has to be seen as having a hard core – the successful assertion of rights of those excluded from benefits, services and opportunities to which they are entitled". [165]

At the same time if social exclusion is described as the inability to participate fully in the normal activities and share in the benefits of the society due to structural inequalities, thus having justiciable problems that remain unresolved may be an indicator of the absence of access to the mechanisms that are put in place to deal with problems of everyday life, and thus an indicator of social exclusion. In relation to this issue, Currie notes that lack of legal aid *per se* can be thought of as an aspect of social exclusion.[166] Silver addresses the deficiencies in the social fabric, as being one of the root causes of social exclusion. Differences in life conditions are a normal part of any society and inequality is not necessarily viewed as illegitimate. However, social exclusion that arises involuntarily through no fault of the individual may be perceived as illegitimate. [167] In her work Silver identifies three paradigms that explain different aspects of social exclusion each grounded on different conception of integration and citizenship. Each of these paradigms attributes social exclusion to a different cause, different political philosophies of republicanism, liberalism and social democracy, different policy implications, and

[164] Smith, R., Legal Aid: The Way Forward, Submission by JUSTICE, October 2004, p. 16.
[165] *Ibid.*
[166] *Ibid.*
[167] Silver, H., Fighting Social Exclusion in SOCIAL EXCLUSION AND SOCIAL INCLUSION, Regency Press, Belfast, 1995, pp. 9-14.

theories of poverty, inequality and citizenship. In each of these areas she points to the enforcement of rights as a part of the solution to social exclusion.[168]

The strategy of situating a discussion of inability to overcome legal needs due to lack of legal aid in the context of social exclusion is important it points out that the benefits of providing legal assistance to resolve unmet legal needs can also extend beyond the legal problem *per se* to beneficial effects on a broader range of related social problems.[169] According to Giddens, exclusion is not about graduations of inequality, but about mechanisms that act to detach people from the social mainstream.[170] Currie notes that the justiciable problem may be the cause in the development of a complex set of problems, or may be a central element in a set of problems emerging from the same set of conditions. If the justiciable problem is a central feature, this opens the possibility that assistance with justiciable problem might be a rational intervention that interrupts the dynamic and ultimately breaks apart the 'gordian knot' of social exclusion.[171] The same view is to be found in a body of opinions in the literature on legal services in England, namely this view points out that the lack of access to legal assistance is a factor in bringing about or maintaining social exclusion. A joint paper by the Lord Chancellor's Department and the Law Centers Federation expresses the following point:

> "A lack of access to reliable legal advice can be a contributing factor in creating and maintaining social exclusion. Poor access to advice has meant that many people have suffered because they have been unable to enforce their legal rights."[172]

[168] Silver, H., *supra note* 167.
[169] Currie, Ab, *supra note* 162.
[170] Giddens, A., THE THIRD WAY, Polity Press, Cambridge (1998) at 104.
[171] Currie, Ab., *supra note* 162.
[172] Legal Advice and Services: A Pathway out of Social Exclusion, Lord Chancellor's Department and Law Centers Federation, Lord Chancellor's Department, 2001, at 11.

Also in describing the benefits of the Community Legal Services in the UK, Stein states that "legal advocacy and advice for the poor and excluded is an effective engine of social inclusion and fighting poverty through insuring and expanding rights to critical benefits and services".[173]

Thus, the necessity to include the right to civil legal aid in a legal system is self-evident. Such a right is heavily interlinked and determinative for the possibility of people to vindicate their rights and privileges that are already embedded in that system. Moreover, a big number of unmet legal needs that cannot be resolved may jeopardize the society by creating certain groups of disadvantaged people that cannot exercise their rights simply because the enforcement of their rights sometimes is a matter of luxury. Such a situation brings not only frustration and deception but a strong distrust in the justice machinery and the state as a whole. Unfortunately in many instances the "… legal system does not provide affordable professional services to a significant segment of the population."[174] It is more than condemnable that "poor people the world over do not have access to the tools they need to protect and promote their rights and interests."[175]

1.2 The principle of equality

Equality is a cornerstone of justice. "Legally this idea is translated into am equality before law and/or equal protection of the law clause..."[176] Equality before law is void if people are prevented from enforcement of their rights. People, when accessing

[173] Stein, J., The Future of Social Justice in Britain: A New Mission for the Community Legal Service, Centre for Analysis of Social Exclusion, London School of Economics, Paper No. 48, London (2001) in *Abstract*.
[174] Krash, A., *The Law Firm and the Public Good*, 9 Geo. J. Legal Ethics 915, 918 (1996).
[175] Yuille, K., *supra note* 67.
[176] Huang-Thio, S.M., *Legal Aid - A Facet of Equality before Law, The International and Comparative Law Quarterly* Vol. 12, No. 4 (Oct., 1963), p. 1133.

justice system, should not be discriminated because of their property, nationality, social status, gender or on any other grounds, these are unacceptable barriers.[177]

> "The civil element of citizenship is composed of the rights necessary for individual freedom – liberty of person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The last one is of different order from the others, because it is the right to defend and assert all one's rights on terms of *equality* with others and by due process of law".[178]

"It is an uncontentious statement in democratic societies that everyone should be equal before the law."[179] The right to be equal is included in many constitutional provisions of the world and represents a cornerstone of most modern legal systems. In many instances the principle of equality before law was interpreted in a way as comprising and guaranteeing the right to legal assistance in non-criminal matters. For example, the Switzerland's Supreme Court in 1937 found the principles of equality as the grounds for the right to legal assistance in civil cases.[180] When the Swiss Supreme Court was asked to rule whether low-income individuals have a right to free counsel in civil cases under the constitutional guarantee "All Swiss are equal before the law", the Court opted for a far reaching decision. It held that poor people could not be equal before the law in the regular civil courts, unless they had lawyers just like the rest of the citizenry. The Court reasoned the constitutional "principle of equality before the law" requires the cantons to provide free lawyer "in civil matters where handling of the trial demands knowledge of law."[181] In subsequent decisions the same court has explained in details and

[177] The limitation of the right to legal assistance in non-criminal matters in the light of the means test, prospect of success threshold etc. does not contravene the principle of equality before law.
[178] Marshall, T.H., CITIZENSHIP AND SOCIAL CLASSES, 1950, p.10-11.
[179] Hudson, A., TOWARDS A JUST SOCIETY. LAW, LABOUR AND LEGAL AID, 1999, p. 87.
[180] Tribunal Federal Suisse 1937, 63 Arrets du Tribunal Federal Suisse [AFT] 1, 209 (Aswitz) in O'Brien, F.W., *Why Not Appointed Counsel in Civil cases? The Swiss Approach*, 28 Ohio ST. L.J. 1, 5, 1996.
[181] *Ibid.*

expanded the circumstances when cantonal governments must supply tax-funded lawyers to poor litigants.[182]

Also, the German Constitutional Court[183] has provided for a right to counsel, interpreting the principle of equality before the law[184] and hearing in accordance with the law[185] enshrined in the German Basic Law. Following the same rationale, many American lawyers[186] advocating for a constitutional entitlement to legal assistance in civil cases construe their argument *inter alia* on the "equal protection of the laws"[187] clause.

The international human rights law also enhances the equality provision. For example, the instruments referred in the next section such as International Covenant on Civil and Political Rights, International Covenant on Economic Cultural and Social Rights and European Convention of Human Rights provide for such guarantees as equality before the law, equality under the law, equal protection of the law and equal benefit of the law, though actually only the UN bodies when interpreting these treaties made reference to this guarantee in the context of legal aid. In order to realize the equality principle *i.e.* both formal (application of the law) and substantive equality (benefits of applying the law) individuals must access equally the justice system. Justice is not a commodity. Therefore, the inability to purchase legal assistance cannot exclude

[182] Federal Tribunal Decision No. 27 of July 9, 1952, English translation in Cappelletti, M.,*et. al. supra note* 70, p. 704-706.
[183] Decision of June 17, 1953 (No. 26), Entscheidungen des Bundesverfassungsgcrichts vol. 2, at 336-41 (1953), English translation in Capelletti, M., *et al*, *supra note* 70 p. 700.
[184] Basic Law of the Federal Republic of Germany, Article 3 (1), Grundgesetz, GG 1949.
[185] Article 103 (1), Grundgesetz, GG.
[186] *See* Scherer, A., *supra note* 3; CF Note, *The Indigent's Right to Counsel in Civil Cases, supra note* 119 pp. 550-553; Stein, A.J., *The Indigent's "Right" to Counsel in Civil,* 43 Fordham L.R., 989 (1975), p. 993-998; Jacoby, S.B., *Legal Aid to the Poor,* Harvard L.R. Vol. 53 (1940), pp. 940 -76.
[187] U.S. Constitution, Amendment XIV para. 1: "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny within its jurisdiction the equal protection of the laws."

an individual from being the beneficiary of justice. This leads to the conclusion that the equality principle dictates that the right to legal assistance be perceived as a prerequisite for those who need access to justice. Legal aid appears as a mechanism that removes any barriers to equal access to justice, especially those created by the inability to access the system due to scarcity of financial means. In this context legal aid will avoid "a two-tiered system of justice: one for those who could pay and one for those who could not."[188] Therefore, "if equality before law is more than an empty promise, governments must accept the task of guaranteeing all citizens and equal opportunity to protect their rights and promote their interests."[189]

1.3 The principle of fair trial

The right to a fair trial is a "key element of human rights protection and serves as a procedural means to safeguard the rule of law."[190] The principle of fair trial comprises an important guarantee, namely that of access to justice, which is a fundamental element of any legal system. Right to legal aid is one aspect of access to justice and the right to a fair trial. The rationale for such an approach is that the complexity of legal procedures and legal system itself demands for a trial to be fair. The concept of the fairness of hearing intuitively bears the perception that "people are entitled to a meaningful opportunity to be heard in court when they face legal problems".[191] In this context, the parties ought to have legal assistance from a person who is knowledgeable about the

[188] Buckley, M., *supra note* 147 p. 16.
[189] Yuille, K., *supra note* 67.
[190] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) in General remarks.
[191] Schere, A., Why People Who Face Losing Their Homes in legal Proceedings Must Have a Right to Counsel, 3 Cordozo Pub. L. Pol'y & Ethics 699 (2006), p. 716.

word of the law and the workings of the justice system. A legal aid scheme is an integral part of justice. Moreover,

> "a society's strengths and weaknesses are measured by the height of the barriers standing before its system of justice. Legal aid as an institution is one of the gateways into the justice system. It opens the door to justice for those whose socio-economic status would otherwise bar entry."[192]

In this context, access to justice must be clearly distinguished from goods that are bought or sold in the marketplace. The cornerstone principle of any legal system is that it should provide and guarantee a meaningful equal access to justice.

> "Yet it is self-evident to judges, practicing attorneys, and thoughtful persons, that in most instance … persons without counsel are not receiving the same quality of justice as those and are effectively deprived of a meaningful access to the courts." [193]

If we turn to the analysis of the structure and essence of a trial itself it can be concluded that the absence of legal aid may jeopardize the whole idea of a fair hearing and the right of access to courts. A party in a trial has the right to be informed about the claim against him/her and the evidence that supports the claim. A party also has the right to present evidence of his/her own and to argue his/her case before the court or decision making body. An efficient use of the above enumerated procedural rights presupposes a certain level of legal knowledge and competence. Important elements are doctrinal knowledge, ability in legal fact analysis and evidence presentation and strategic experience in handling legal claims. Without such expertise, the right to a fair trial might become valueless. If a party lacks the necessary expertise he/she must be allowed representation by lawyers. They sell their services at the market usually at a high price.

[192] Buckley, M., *supra note* 147 p. 6 (citing the Legal Aid Stories, British Columbia Coalition for Access to Justice, Fall 1998).
[193] Brief Amicus Curiae of Retired Washington Judges in Support of the Appellant in *Michael Steven King v. Brenda Leone King*, Court of Appeals of the State of Washington Division One, p. 2.

However, human rights provisions do not accept poverty as a barrier to a fair trial. Consequently, governments are obliged to guarantee as a matter of a right a legal representative to persons who cannot afford it. The concrete solution, according to Johnson, then, is to provide the disadvantaged with lawyers and information "to insure parity between litigants".[194] Many civil trials are long, complex, involve difficult procedures and rules, these characteristics make the requirement of representation of the individual by a person trained in the law indispensable and self-evident. In these cases the participation of a skilled expert becomes a prerequisite necessary for providing procedural fairness.

ECtHR, ECJ and some of the specialised UN bodies also used this rationale to hold that the complexity of the case is one of the elements that might trigger the obligation to provide legal aid. This is developed in Chapter three.

Some of the national courts used the fair hearing requirement to create a right to legal aid in civil matters in certain circumstances. The Supreme Court of Canada held that there was a constitutional right to counsel in the fair hearing requirement of the Canadian Charter of Rights and Freedoms. The Court in *J.G. v. New Brunswick* held that the denial of legal aid to parents whose custody of their child was challenged by the government is a violation of due process guarantee of the section 7 of the Charter. In the circumstances of the present case the cost-reduction rationale which in some cases can serve as an objective sufficiently important to deny a fair hearing did not work.[195] Also, the Italian Corte Constituzionale held that the rights enshrined in Article 24 of the

[194] Johnson, JR., *supra note* 123 pp. 183, 185.
[195] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 177 D.L.R. (4th) 124, 131.

Constitution stating that everyone is entitled "to bring cases before a court of law in order to protect their rights under civil and administrative law" and that "defence is an inviolable right at every stage and instance of legal proceedings", and that "the poor are entitled by law to proper means for action or defence in all courts"[196] are "inviolable and … apply equally to all, regardless of personal and social conditions."[197]

The same justifications, for a right to civil legal aid, which are based on the guarantee of fairness and access to court, are broadly expounded in the literature. According to Manning one approach in designing civil legal aid is the goal of providing equal access to courts.[198] Here we enter the realm of procedural principles. In this case the right to legal assistance in civil matters is perceived as a procedural safeguard, a procedural component of the right to access to justice that guarantees the fairness of the hearing as a whole. Access to justice inheres in the notion of justice. "Courts are essential institutions in democratic societies that should be open to all members of the society."[199] This statement may found its support on the fact that the concept of justice implies fairness and the implicit recognition of the principle of equality.[200] Thus, "poor people are often more dependent on courts than those of greater means. The impossibility to have access to courts for enforcement of the claims due to lack of means for legal assistance would challenge the whole idea of justice."[201]

The principle of fair hearing extensively supports the proposition that there should be a right to legal assistance in non-criminal matters. In this context, legal aid can appear

[196] Constitution of Italy, 1947, Article 24 paras. 1-3.
[197] Decision of Nov. 29, 1960 No. 67, 5 Giurisprudenza Constitutionale 1195 (1960) in Yuille, K., *supra note* 67.
[198] Manning, D., *supra note* 5 p. 63.
[199] *Ibid.*
[200] Rawls, J., A THEORY OF JUSTICE, Harvard University Press, 1977, p. 11.
[201] Manning, D., *supra note* 5 p. 63.

as an important tool in guaranteeing such a right. Moreover, civil legal aid comes as an element that backs up the principle and eliminates the contradiction still present in many modern legal systems namely that the constitutional commitment to equal justice for all *versus* the fact that big portions of the population are barred from having a meaningful access to the justice system, simply because they cannot afford legal assistance in matters that affect their fundamental needs and interests. This logic dictates for an expansive approach to designing a legal aid scheme. However, considerations of efficient governing and administering will shape the scope of the legal aid.

There is another aspect of the fair trial guarantees, namely the equality of arms, which has a very important role in providing for a theoretical basis for a right to civil legal aid. Equality of arms represents a principle which enhances the idea 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 opponents."[202]

No hearing can be labelled as fair without giving the opportunity to the parties to participate in a meaningful trial. This right presupposes a variety of elements and is attached to other rights such as the right to a fair and public hearing by a competent, impartial and independent tribunal established by law. But all these guarantees will lose their meaning if one of the parties lacks equal footing with the other one. As already stated, fairness stays at the heart of justice. The nature of a hearing is like a contest between two roughly equal parties. If there is a huge disparity between the parties, the fairness of the procedure itself and its outcome is uncertain. The outcome of a procedure

[202] *Dombo Beheer B.V. v. the Netherlands*, ECHR (ser. A. no. 274), judgment of 27 October 1993.

is even more uncertain and its fairness is easy to be challenged when one of the parties is represented but the other is not, due to lack of resources. The relationship between legal aid, fairness and equality of arms has been described in the following terms:

> "The procedure … is based on the premise that the truth will emerge from the contest between the two adversaries where each presents its case before an impartial tribunal. Each side will do its best to establish its own case and to destroy the opponent's case. Out of this conflict, truth and justice will surface. Where, however, in fairness and in the circumstances of the case, one of the parties is incapable of self-representation, confidence in the system is threatened. The adversaries must be equal or relatively equal before the tribunal. If they are not, the procedure is in danger of degenerating into one of moral ambivalence."[203]

Moreover, there are so many civil matters were one of the parties is the state, to mention just some - proceedings concerning the state apprehension of children or custody, or proceedings involving access of parents to their children. In these cases, unrepresented parents,

> "most often mothers, can be particularly vulnerable to legal proceedings. The state … in many cases with significantly greater resources, can marshal extensive evidence and rely on expert opinion to attack attributes such as caregiving ability. Without legal representation, parents may be ill-equipped to fairly present their cases, possibly resulting in devastating long term consequences for both themselves and their children."[204]

Indeed "fairness in battle cannot be achieved if only one party is armed. This is not an abstract principle but hard reality."[205] The concrete solution is to provide the disadvantaged with legal aid, where necessary.

The right to legal aid in civil matters has found its most expansive articulation in the decisions of international human rights bodies. Both the ECtHR [206] and the Human

[203] Bastarache, J., dissenting in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1997, 187 N.B.R. 92d) 81 (N.B.C.A.).
[204] Buckley, M., *supra note* 147 p. 8.
[205] *Ibid* p. 7.

Rights Committee[207] have found that the principle of equality of arms also extends to civil cases. A detailed analysis of the relevant case-law is made in the corresponding sections of the next chapter. Here it is important to briefly note that the ECtHR explicitly located the right to civil legal aid under the principle of equality of arms.[208] The Human Rights Committee did not explicitly extend the principle of equality of arms to include a right to legal assistance. However, both bodies adhere to the idea that the principle of equality of arms is central to the concept of a fair trial in legal proceedings because overall, it bears the idea that a party to a trial should have the opportunity to present his/her case effectively and enjoy equality of arms with the opposing party.[209]

Conclusion

The principle of the rule of law, equality and fair trial extensively supports the proposition that there should be a right to legal assistance in non-criminal matters. The rationale behind these principles is quite simple. For instance, when talking about the rule of law and the necessity to create civil legal aid two main considerations come up, namely the possibility of each person to access the law and the possibility of each person to enforce his or her rights conferred by that law. For the individuals to avail to law it is necessary that they have effective access to it, access not being limited only to disclosure and publicity but rather the ability of persons to understand their rights. Legal aid is one the tools that could in real terms facilitate and ensure access to law. At the same time, the

[206] *Dombo Beheer B.V. v. The Netherlands*, *supra note* 202 (procedural disadvantage when one side not permitted to offer testimony on issue at hand); *Feldbrugge v. Netherlands*, Eur. Ct. of H.R. (Ser. A no. 99), judgment of 29 May 1986 (procedural disadvantage when one side not permitted to prove claim against state agency).
[207] *Morael v. France*, Human Rights Committee, No. 207/1986 (equality of arms must be given in bankruptcy proceedings); *Munoz Hermoza v. Peru*, Human Rights Committee, No. 203/1986 (equality of arms in administrative proceedings on dismissal from armed forces).
[208] *Steel and Morris v. UK*, Application no. 68416/01, Judgment of 15 February 2005.
[209] *Ibid.*

existence of rights presupposes their enforcement, and in case a person lacks sufficient means to access available enforcement mechanism the logic dictates that legal aid might be a tool in ensuring enforcement of rights.

The principle of equality on similar considerations as the principle of rule of law provides for a strong base for a right to legal aid in non-criminal matters. This principle dictates that everyone should be equal before law and enjoy its protection. Thus, people unable to secure legal assistance to represent their cause before a court due to lack of financial means could not be regarded as equal before the law, unless they have qualified assistance if necessary just like the rest of the citizenry. This rationale dictates that legal aid can be a key element in providing such assistance.

Finally fair trial is the key principle in providing for an extensive support for the creation of the civil legal aid. Its main guarantees *i.e.* access to justice and equality of arms may be employed, and were actually employed by international tribunals and bodies, to create a right to legal aid in non-criminal matters. The complexity of the legal procedures and legal norms, and especially those that cover the non-criminal realm, may very well impair an effective access to justice if the person lacks means to get qualified assistance. Also if the other party is assisted by a lawyer, this triggers usually a huge disparity between the parties and jeopardizes the fairness principle itself. Again legal aid appears as one of the tools that may ensure fairness in an effective and meaningful way.

Indeed these principles read independently or in tandem with relevant human rights provisions provide for a broad theoretical basis and an extensive framework with regard to creation, and development of the right to civil legal aid. As mentioned above, ECtHR and some of the specialised UN bodies, as well as several national courts, used

the rationale behind these principles to hold that the consideration of rule of law, fairness and equality might trigger the obligation to provide legal aid.

However, it is important to note that establishing a theoretical basis does not tell us exactly what the scope of the right to legal aid in civil matters may be. At the same time, these principles might be used as tools for interpreting various human rights provisions for discovering what actually the scope is and how far the state's obligation to provide legal aid in non-criminal matters goes, an issue developed in the next chapter of the present research.

2. International standards regarding the obligation to provide legal aid in non-criminal matters

The present section aims at revealing the relevant sources of the governments' general obligation to provide legal aid in non-criminal matters. In indentifying the general obligation the research traces down the premises on which such an obligation is based on and reflect what are the minimum guarantees embodied in the regional and international human rights law. In doing so, first the analysis is based on those relevant documents that contain express provisions on civil legal aid. Secondly, the analysis continues with the description of provisions that do not directly deal with a state's obligation to provide legal aid in non-criminal matters, but contain the premises on which such an obligation may be based.

This is not to mean that the minimum threshold secured at the international level is sufficient to guarantee one's right to legal aid at the national level in its full range. Therefore, the governments are free to provide additional guarantees by means of national law. In this context, the international standards regarding the right to legal aid in non-criminal matters represent a starting point and a vector.

2.1 United Nations

2.1.1 Provisions expressly providing for the general obligation to provide legal aid in non-criminal matters

2.1.1.1 Resolutions, recommendations and other non-binding instruments

There are few UN instruments which consider directly the issue of civil legal aid and set down some guiding standards related to the general obligation to provide it in

non-criminal matters. The majority of them are non-binding documents. Nonetheless, these instruments specifically point to the need of providing state-funded legal aid.

During the first UN Conference on Human Rights in Teheran in 1968 the issue of legal aid was discussed. As a result the Resolution regarding legal aid[210] was adopted that calls upon Member States:

> "(a) To guarantee the progressive development of comprehensive systems of legal aid to those who need it in order to protect their human rights and fundamental freedoms;
> (b) To devise standards for granting, in appropriate cases, legal or professional assistance;
> (c) To consider ways and means of defraying the expenses involved in providing such comprehensive legal aid systems;
> (d) To consider taking all possible steps to simplify legal procedures so as to reduce the burdens on the financial and other resources of individuals who seek legal redress:
> (e) To encourage co-operation among appropriate bodies making available competent legal assistance to those who need it."

"This resolution, while not establishing binding legal obligations recognises that the provision of legal aid to those in need would strengthen the protection of human rights". [211] It covers both criminal and non-criminal proceedings.

In 2002 the UN General Assembly again emphasized "…that right to access to justice as contained in applicable international human rights instruments forms an important basis for strengthening the rule of law through the administration of justice"[212] and reaffirmed the responsibility of governments to adequately fund legal aid in order to promote and protect human rights.

[210] UN General Assembly Resolution 2449 (XXIII) Legal Aid 1968.
[211] Skinnider, E., *supra note* 143, p. 12.
[212] UN General Assembly Resolution on Human Rights in the Administration of Justice, 20 February 2002, A/RES/56/161.

UN Basic Principles on the Role of Lawyers[213] address both the state, by mentioning its obligation to fund legal services to the poor, and the associations of lawyers, by providing that they should assist it. Principle 3 of the instrument states:

> "Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources".

Also, the UN Draft Declaration on the Independence of Justice[214] ("Singhvi Declaration") states, in Article 95, that the governments "shall be responsible for providing sufficient funding for appropriate legal services programmes for those who cannot afford the expenses on their legitimate litigation", without any distinction whatsoever between civil and criminal proceedings.

It has to be mentioned that the recent Guiding Principles on Extreme Poverty and Human Rights[215] adopted by the Human Rights Council, a document which represents a practical tool for policy-makers to ensure that policies actually reach the poorest, respect and uphold their rights, and take into account the significant obstacles to human rights enjoyment faced by those living in poverty, specifically refer in the context of the section on right to equal protection before the law, access to justice and effective remedies to the need to provide civil legal aid. Acknowledging that:

[213] UN Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[214] The UN Commission on Human Rights, at its forty-fifth session, by Resolution 1989/32, invited governments to take into account the principles set forth in Dr. Singhvi's draft declaration, The Draft Universal Declaration on the Independence of Justice (the "Singhvi Declaration"), in implementing the United Nations' Basic Principles on the Independence of the Judiciary, which had been endorsed by the UN General Assembly in 1985. See, CIJL Bulletin No. 25-26 (April-October 1990) Special Issue: The Independence of Judges and Lawyers: A Compilation of International Standards, p.38.
[215] Guiding Principles on Extreme Poverty and Human Rights adopted by the Human Rights Council at its 21st session in September 2012.

> "persons living in poverty are often unable to access justice or to seek redress for actions and omissions that adversely affect them. They encounter a variety of obstacles, from being unable to successfully register initial complaints owing to costs or legal illiteracy, to court decisions in their favour remaining unimplemented. Power imbalances and the lack of independent, accessible and effective complaint mechanisms often prevent them from challenging administrative decisions that adversely affect them. Without effective access to justice, they are unable to seek and obtain a remedy for breaches of domestic and international human rights law, exacerbating their vulnerability, insecurity and isolation, and perpetuating their impoverishment".

The guidelines go on by *inter alia* indicating that the governments should "provide, for criminal cases and also civil cases affecting the rights of the persons living in poverty, high-quality legal aid systems and expanded legal services for those unable to afford the cost of legal representation".[216]

2.1.1.2 Refugee Convention and the Stateless Persons Convention

Referring to binding instruments, it should be noted that the Refugee Convention[217] and the Stateless Persons Convention[218] provide for refugees or stateless persons a general right to "free access to courts of law on the territory of all Contracting States".[219] This guarantee is based on the equal treatment principle, that is why the two instruments also states that the guarantee should be enjoyed by the persons covered by the conventions in the country where they have their habitual residence in the same manner as a national "in matters pertaining to access to courts, including legal assistance

[216] Article 68. (b) of the Guiding Principles on Extreme Poverty and Human Rights, *supra note* 215.
[217] Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 , entry into force: 22 April 1954.
[218] Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, entry into force: 6 June 1960.
[219] Article 16 (1) in both Conventions.

…" but in other countries they should have "the treatment granted to a national of the country of [their] … habitual residence".[220] The content of these legal norms entail the institution of legal aid, though only by reference to the provision of such assistance to the nationals. Moreover, it is important to mention that the "formulation of the guarantee and its location in a part of both conventions that is concerned with "Juridical Status" point to it being concerned essentially with civil litigation …"[221]

2.1.2 Provisions that do not expressly provide for the general obligation to provide legal aid in non-criminal matters

The most important UN human rights instruments fall short in providing for an express civil legal aid provision. However, some of the guarantees of the human rights instruments may be interpreted in such a way, as to encompass at least a limited right to legal aid in non-criminal matters. Usually these provisions refer to fair trial guarantees, right to an effective remedy and equality before tribunals and law.

2.1.2.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights[222] represents a starting point for the majority of discussions regarding human rights. Notwithstanding the fact that the Universal Declaration is a non-binding instrument and lacks the force of a convention there is still a strong general perception that it represents a fundamental statement of human rights principles and it aims at setting "universally recognized minimum

[220] Article 16 (2) and (3) in the both Conventions.
[221] McBride, J., ACCESS TO JUSTICE FOR MIGRANTS AND ASYLUM SEEKERS IN EUROPE, Council of Europe Publishing, 2009, p. 68.
[222] Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 10, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810, 10 December 1948.

standards".[223] Indeed the Declaration "has become part of a world-wide culture or ideology of human rights" and "has entered the pantheon of core inspirational utterances of humankind"[224].

In the context of legal aid, Article 10 of the Declaration is mostly relevant and it states "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". This article provides for the right to a fair trial which fairly enough represents one of the most important rights enshrined in the Declaration. The right to procedural fairness is extended both to criminal and civil matters and is applicable to individuals in all cases, both to plaintiffs and defendants. However, a right of access to legal aid in civil cases is not expressly included within the wording of Article 10 of the Declaration. Earlier drafts of the Universal Declaration did explicitly include the right to legal assistance in both criminal and civil matters. For example, Professor Cassin's Draft (Article 20) dealing with the determination of civil matters stated:

> "Every person shall have access whether as a plaintiff or defendant, to independent and impartial tribunals for the determination of his rights, liabilities and obligations under the law. He shall have the right to obtain legal advice and, if necessary, to be represented by a counsel".[225]

With small changes the Drafting Committee accepted Cassin's proposal. At its second session, the Commission created the Working Group on the Declaration to review the Drafting Committee's work. The Working Group recommended and the Commission agreed to combine into one fair trial article (now Article 10) the proposals dealing with

[223] Nowak, M., U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, 1993, xvii.
[224] Weissbordt, D., THE RIGHT TO A FAIR TRIAL. ARTICLES 8, 10 AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 2001, p. 1.
[225] *Ibid* p. 12.

civil and criminal matters. At the same time it was decided that there will be a separate article (now Article 11) that will deal with procedural guarantees in the case of criminal charges.[226] There were also other suggestions from delegates regarding the right to counsel in civil cases, for example Mr. Dukeston, a representative from UK, recommended the inclusion of the words "…qualified [representative] of his own choice… ."[227] However, the debate ended with the exclusion of the reference to the right to counsel. In this sense, the delegations belonging to the United Kingdom and India proposed that the right to counsel be omitted from the language of Article 10[228] and as a consequence the national delegations and the Drafting Committee agreed that such detailed language belonged in a convention rather than a declaration. Consequently, the General Assembly of the United Nations ultimately adopted the more general, final version of Article 10.

2.1.2.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[229] (ICCPR) was conceived as a formal document creating legal obligations on the part of signatories' states. Thus, in ratifying the instrument, the states, according to Article 2 (1), undertake the obligation "to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the … Covenant, without distinction of any kind." Article 14 of the ICCPR incorporates the content of legal provisions of Article 10 and 11 (1) of the Universal Declaration on Human Rights. At the same time, Article 14 of the

[226] Weissbordt, D., *supra note* 224 p. 13.
[227] *Ibid* p. 14
[228] *See* Weissbrodt, D., Hakkendorff, M., *Travaux Préparatoires of the Fair Trial provisions – Articles 8 to 11 – of the Universal Declaration of Human Rights,* 21 HUM. RTS. Q., 1061, 1071 (1999).
[229] International Covenant on Civil and Political Rights (1976) 999 UNTS 171 adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976.

ICCPR is similar to a great extent with the provisions of Article 6 of the European Convention of Human Rights, which is discussed below. Article 14 (1) states that:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…"

This legal provision of the ICCPR addresses to courts in both criminal and non-criminal matters. The provisions explicitly recognize a right to counsel in criminal cases, but are silent in respect to such a right in non-criminal proceedings. Therefore, the provision of such a right in civil cases, or at least in a range of civil matters, is a matter of further interpretation and can definitely serve as a premise. Guidance in this regard could serve the interpretation of Article 6 (1) of the European Convention of Human Rights, which is discussed in the next chapter and is similar to this one. Interestingly enough is the fact that actually the earlier versions of the ICCPR contained specifically a provision on the right to counsel in non-criminal cases. One of the proposals that came from the American delegation had the following content: "In the determination of his rights and obligations, everyone is entitled to … the aid of counsel."[230] This version was put forward before the United Nations Economic as Social Council in 1947.[231] However, the English delegation suggested limiting the right to legal assistance to criminal matters or matters involving the vindication of human rights. [232] Consequently, a subcommittee consisting of UK, the United States and France was set up to revise the proposal at

[230] Weissbrodt, *supra note* 224 p. 45.
[231] *Ibid.*
[232] *Ibid* p. 47.

stake.[233] The subcommittee excluded entirely the reference to the right to legal assistance in civil cases and the revised draft was adopted by the ICCPR Drafting Committee lacking the earlier proposals concerning civil legal aid.

Another important premise for a right to civil legal aid is the right to an effective remedy provided in Article 2 (3) of the ICCPR. Taking as a guide the rationale of the UN General Assembly Resolution 2449 (XXIII) on Legal Aid, discussed above, according to which "the provision of legal aid to those who need it would strengthen the observance and protection of human rights and fundamental freedoms" the meaning of the right to an effective remedy which states that:

> "Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"

could be interpreted in such a way that legal aid might appear as a necessary tool in ensuring government's obligation to provide an effective remedy. However, taking into consideration that Article 2 (3) covers only cases involving violations of the rights and freedoms embodied in the ICCPR, the present rationale will apply only to human rights cases and not necessarily to all categories of non-criminal matters.

2.1.2.3 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Civil and Political Rights along with the International Covenant on Economic, Social and Cultural Rights[234] (ICESCR) form the

[233] Weissbrodt, *supra note* 224 pp. 47-48.

so-called International Bills of Rights. Unfortunately, the ICESCR is also silent in relation to the right to legal aid in non-criminal matters. However, via interpretation of the ICSECR, the relevant UN bodies gave a clear indication to the State parties that legal aid in civil matters is necessary for ensuring social, economic and cultural rights, and also for the achievement of an adequate standard of living promoted under the ICESCR.

2.1.2.4 International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families

Article 18 of the Convention[235] states that:

> "1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
>
> 3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:
>
> … (d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay".

The Convention explicitly refers to the right to free legal assistance "where the interest of justice so require" for migrant workers and members of their families in the context of criminal proceedings. However, in the light of the first paragraph of Article 18 such a right could be extended to cover non-criminal matters as well, especially,

[234]International Covenant on Economic, Social and Cultural Rights adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976.
[235] The International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families adopted by General Assembly Resolution 45/158 of 18 December 1990.

considering the interpretations given by the ECtHR to the access to court guarantee embedded in Article 6 (1) of the European Convention, discussed in the next chapter, which is very similar to the present one.

2.1.2.5 International Convention on the Elimination of All Forms of Racial Discrimination

As seen in the previous section, the principle of equality can be also a focus when referring to the right to legal aid in non-criminal matters as it reflects the paradigm of equality before laws and tribunals. For example, according to Article 5 (1) (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[236] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: "The right to equal treatment before the tribunals and all other organs administering justice." This norm infers that if legal aid is provided in a State Party then it should be provided excluding any discriminatory approaches. This does not go so far as creating a general right, but rather a limited one that depends on the right accorded to the majority.

In addition, Article 6 of ICERD, addressing the remedies available to victims of discrimination states that:

> "States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which

[236] International Convention on the Elimination of All Forms of Racial Discrimination adopted by UN General Assembly Resolution 2106 (XX), 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 and entered into force 4 January 1969.

> violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."[237]

This provision bears the same rationale as the guarantee embedded in Article 2 (3) of ICCPR and could be interpreted under the same considerations as to require from States Parties to undertake positive obligations to ensure access to justice in civil proceedings, legal aid being one of the tools in this regard.

2.1.2.6 Convention on the Elimination of All Forms of Discrimination against Women

A provision concerning equality before law is to be found in the Convention on the Elimination of All Forms of Discrimination against Women[238], Article 15(1), which provides that "States Parties shall accord to women equality with men before the law",[239] read together with Article 1, requires States Parties to grant to women equality with men before the law. For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. In this context, legal aid in civil cases for women which were victims of acts of discrimination can also be considered. However this does not go so far as creating a general right, but rather a limited one that depends on the right accorded to another group – men. The equality provided by the Convention indicates that

[237] Article 6 of ICERD.
[238] Convention on Elimination of All Forms of Discrimination against Women adopted by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.
[239] Article 15(1) of CEDAW.

the scope of the obligations under the document extends, *inter alia*, to legal guarantees. Though, this rationale does not dictate that there should be a legal aid scheme put in place, it dictates that where national law provides for the right to legal aid, the states have the obligation to provide it on equal footing for both men and women.

2.2 Council of Europe

Council of Europe has developed throughout the years a rich *corpus juris* of principles, rules and standards in the field of access to justice and legal aid to help national legislators when dealing with these matters. Similarly to UN, the majority of legal provisions expressly dealing with legal aid are embedded in documents having a recommendatory character, rather than a binding one.

According to the Statute of the Council of Europe:

> "every member of the organization must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I".[240]

In the light of the present commitment, the guarantee of effective access to justice for all and access to legal aid in particular has been of great concern to the Council of Europe and its Member States for a long time.

2.2.1 Provisions expressly providing for the general obligation to provide legal aid in non-criminal matters

2.2.1.1 Resolutions, Recommendations and other non-binding instruments

Throughout the years, and within the framework of the intergovernmental activities of the Council of Europe in the legal field, the questions related to access to justice and legal aid have been dealt with in a variety of ways. For example, access to

[240] Chapter II, Article 3 of the Statute of the Council of Europe adopted on 5 May 1949 and entered into force on 3 August 1949.

justice was the main subject at the 9th Conference of European Ministers of Justice in Vienna in May 1974. A Council of Europe Committee on Legal Cooperation was established to study the economic and other obstacles to civil proceedings. Studies were conducted of Member States' legal aid systems and the results of the questionnaires were later published. Following a pattern observable at national level, a committee experts set up in 1974 gave its main attention to legal aid and advice, publishing a number of resolutions aimed at expressly establishing minimum standards for the Member States. This commitment to the right to legal aid remained throughout the years and in order to attain a greater aim, *i.e.* a proper functioning of the judicial systems and an effective access to justice for all, the Council of Europe continuously advocated for the establishment of an efficient system of legal aid. In this context, the European Ministers of Justice, at their 23rd Conference in June 2000, agreed on the principle that "access to justice should not be impaired by high legal costs" and reiterated "the need for all persons to have an effective access to justice and for States to find cost-effective methods to provide such access to justice."[241] It was recognized "that the principle of the Rule of Law", to which Council of Europe adheres, "can be realized only if individuals have an effective right in practice to enforce their legal rights and challenge unlawful acts."[242] However, lack of financial means can appear as a serious hindrance in realizing the right of each person to challenge unlawful acts or ask for the enforcement of legitimate conferred rights. In this sense, the Council of Europe perceives the establishment of an efficient legal aid system as one of the most important measures in ensuring access to

[241] Resolution No. 1 on "Delivering Justice in the 21st century" adopted by the European Ministers of Justice at their 23rd Conference, 8-9 June 2000, London.
[242] Action Plan on Legal Assistance Systems of the European Committee on Legal Cooperation (CDCJ), adopted on 31 May 2002, CDCJ (2002), Add. III, at 5.

justice. Many instruments adopted by the Committee of Ministers or Parliamentary Assembly reflect this goal and come to set clear guidelines for national legal aid schemes. While conventions are legally binding, resolutions and recommendations are not binding, but have an important political and legal impact as they express the direction in which the governments of the Member States should move, for instance, to improve legislation in a certain area.[243]

The Council of Europe considerers that all persons should have a right to necessary legal assistance, taking into account their financial resources. In this context, Resolution 78 (8)[244] starts with the principle according to which the right of all individuals to legal aid and advice should not be impaired "by economic obstacles when pursuing or defending his right in the court in civil, commercial, administrative, social or fiscal matters."[245] In addition, it goes further on to provide that legal aid should extend to all the costs necessarily incurred by the assisted person, including lawyer's fees, witnesses, experts and translations.[246] The Resolution refers to partial legal aid, stating that the cost can be partial when a person is able to pay partly with the condition that his/her contribution does not "exceed what that person can pay without undue hardship."[247] The document provides for an important guarantee - a denial of legal aid should be subject to review.[248] Also, the instrument states that legal assistance should be provided by a person professionally qualified to practice law in accordance with the state

[243] Esposito, G., Legal Aid for 80 Million Europeans: the Council of Europe Efforts, Paper presented at the Forum on "Giving Legal Assistance to Citizens Across Borders" organized by Euro Citizens Action Service (ECAS) and supported by the European Commission Paris, 30 October 2000.
[244] Resolution 78 (8) of the Committee of Ministers on legal aid and advice, adopted on 2 March 1978.
[245] Article 1, Part I of the Resolution 78 (8).
[246] *Ibid* Article 3.
[247] *Ibid* Article 2.
[248] *Ibid* Article 7.

regulations, and requires that such person is adequately remunerated for his/her work.[249] These principles dictate that legal assistance and advice should be available in civil, commercial and administrative matters.

These principles should be applied equally to all individuals without distinction as to their citizenship. In this context, Resolution 76 (5) recommends that the governments of Member States:

> ”accord, under the same conditions as to nationals, legal aid in civil, commercial and administrative matters, irrespective of the nature of the tribunal exercising jurisdiction:
>
> a. to natural persons being nationals of any member state;
>
> b. to all other natural persons who have their habitual residence in the territory of the state where proceedings take place.” [250]

There is also Resolution (77) 31[251] which concerns solely administrative procedures and it comes to emphasize that legal assistance and representation is one the fundamental principles which should guide the administrative procedures and particularly the necessity to ensure fairness in the relations between the individual and administrative authorities.

Under the recommendations of the Council of Europe legal aid should be made available at all stages of proceedings both in pre-trial phase and in court proceedings. Therefore, if necessary, all individuals in need should be able to obtain pre-litigation

[249] Artilce 5, Part I of the Resolution 78 (8).
[250] Resolution (76) 5 of the Committee of Ministers on legal aid in civil, commercial, administrative matters, adopted on 18 February 1976.
[251]Resolution (77) 31 of the Committee of Ministers on the protection of the individual in relation to the acts of administrative authorities, adopted on 28 September 1977 at the 275th meeting of the Ministers' Deputies.

advice in civil, commercial and administrative matters. Recommendation 1639 (2003)[252] recommends the Member States and Observers to include family mediation in their national legal aid systems.

Recommendation No. R (81) 7 insofar as most relevant provisions states that:

> "No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory". [253]

Recommendation No. R (93) 1 was adopted in order to facilitate access to legal advice and legal aid for the very poor, in its most relevant parts recommends the governments of Member States to facilitate access to the law for the very poor by promoting legal advice services for the very poor. The Recommendation indicates that the Member States might facilitate effective access to the courts for the very poor by the following means:

> a. extending legal aid […] to all judicial instances (civil, criminal, commercial, administrative, social, etc.) and to all proceedings contentious or non-contentious, irrespective of the capacity in which the person concerned acts;
> b. extending legal aid to very poor persons who are stateless or aliens […];
> c. recognizing the right to be assisted by an appropriate counsel, as far as possible by one's choice, who will receive adequate remuneration;
> d. limiting the circumstances in which legal aid may be refused by the competent authorities chiefly to those cases in which the grounds for refusal are inadmissibility, manifestly insufficient prospects of success, or cases in which the granting of legal aid is not necessary in the interest of justice;

[252] Recommendation 1639 (2003) of the Parliamentary Assembly on family mediation and gender equality, adopted on 25 October 2003.
[253] Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice, adopted on 14 May 1981.

e. simplifying the procedure for granting legal aid to the very poor […];
f. considering the possibility of enabling non-governmental organizations or voluntary organizations providing support to the very poor, to give assistance, in the context of access to court, to persons who are in a position of such dependence and deprivation that they cannot defend themselves […]".[254]

The Council of Europe pays particular attention to the actors that play a crucial role in legal aid systems. It acknowledges the importance of the legal profession in this context and provides in Recommendation No. R (2000) 21 that:

> "1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers,
>
> 2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.
>
> 3. Governments of member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.
>
> 4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from the public funds." [255]

This instrument recommends bar associations or other professional lawyers' associations to promote the participations of lawyers in legal aid schemes in order to ensure the access to justice of persons in an economically weak position, in particular by providing legal aid and advice.

On 31 May 2002, the European Committee on Legal Cooperation (CDCJ) adopted an Action Plan on Legal Assistance Systems. It has to be noted that the Action Plan is very much a reflection of the ECtHR's case-law regarding the interpretation of

[254] Article 3 of the Recommendation No. R (93) 1 of the Committee of Ministers on the effectiveness of access to the law and justice for the very poor adopted on 8 January 1993. According to this Recommendation the term "very poor" means "persons who are particularly deprived, marginalized or excluded from the society both economic and in social and cultural terms".
[255] Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, adopted 25 October 2000.

Article 6 (1), a focus of the next chapter. The document reiterated the fact that legal aid is an essential tool in ensuring access to justice for all. The plan itself mainly focuses on four areas: setting up, developing and strengthening legal assistance systems; practical organization, administration and dispensation of legal assistance systems; provision of information concerning legal assistance systems on the websites; and cross-border legal aid.

According to the document legal aid systems may include:

- "the provision of legal assistance, including legal representation, by lawyers;
- providing information and legal advice at times and locations which take into account the needs of applicants, ensuring in particular that applicants are able to understand their lawyers;
- […];
- preparing files in non-criminal cases and representing clients;
- assistance with dealings with public authorities, when a legal matter seems to be at issue;
- advice and assistance with regard to the enforcement, or challenges to the enforcement, of judgments, sentences or extra-judicial arrangements […]".[256]

2.2.1.2 European Agreement on the Transmission of Application for Legal Aid

The Council o Europe created a mechanism which makes it possible to provide access to legal aid for individuals in an economically weak position across borders. According to the European Agreement on the Transmission of Application for Legal Aid[257], which was ratified by 31 Member States,[258] every person living on the territory of

[256] Action Plan on Legal Assistance Systems of the CDCJ, *supra note* 242 Add. III.
[257] European Agreement on the Transmission of Application for Legal Aid (ETS 92), signed on 27 January 1977, entered into force on 23 April 1983.

one state and wishing to apply for legal aid in civil, commercial or administrative matters in the territory of another state may submit his/her application in the state where he/she lives. For this purpose the states should designate special authority that shall receive and forward the application to the other state free of charge for the applicant. Instead of being obliged to find the relevant authorities in another state, the applicant can simply submit his application for legal aid to the transmitting authority of their own country of residence. The authority is obliged to assist the applicants in putting together their documents and, if necessary, ensure translation, before forwarding the application.

The agreement is supplemented by 2001 Protocol, according to which the applications for legal aid should be dealt within reasonable time and the costs of translation that might occur in communication between the applicant and his/her lawyer should be covered by the state.[259] There are also many other practical recommendations that come to improve the application of the Agreement.[260] This mechanism is strengthened through the activities of the Multilateral Committee on the European

[258] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=092&CM=1&DF=&CL=ENG

[259] Additional Protocol to the European Agreement on the Transmission of Application for Legal Aid (ETS 179), signed on 4 October 2001, entered into force on 1 September 2002.

[260] Recommendation No. R (99) 6 of the Committee of Ministers on the improvement of the practical application of the European Agreement on the Transmission of Application for Legal Aid, adopted on 23 February 1999. This Recommendation comes to replace the Recommendation No. R (97) 6 of the Committee of Ministers on the improvement of the practical application of the European Agreement on the Transmission of Application for Legal Aid, adopted on 13 February 1972; Recommendation (2003) of the Committee of Ministers to member states containing a transmission form for legal aid abroad for use under the European Agreement on the Transmission of Applications for Legal Aid (ETS 92) and its Additional Protocol (ETS 179), adopted on 9 March 2003. This Recommendation comes to replace the form for acknowledgement of receipt of the application for legal aid, contained in the Recommendation No. R (99) 6 (see above); Recommendation (2005) 12, containing an application form for legal aid abroad for use under the European Agreement on the Transmission of Applications for the Legal Aid (ETS 92) and its Additional Protocol (ETS 179).

Agreement on the Transmission of Applications for Legal Aid (T-TA),[261] which regularly examines the functioning of the Agreement and actively proposes improvements to it.

The Committee of Ministers has also produced the "Guide to legal aid procedures in Europe"[262] which contains useful information concerning the legal assistance systems of many Member States of the Council of Europe. On a practical level, the Council of Europe also assists governments in the development of their legal aid systems through its co-operation programmes to strengthen the rule of law[263] *inter alia* by drafting rules, producing written recommendations on how best states could usefully improve the provision of legal aid systems and by developing tailor-made strategies with states through action plans for legal aid national schemes.

2.2.1.3 European Convention on the Legal Status of Migrant Workers and the European Convention on Establishment

The European Convention on the Legal Status of Migrant Workers[264] and the European Convention on Establishment[265], two binding documents for States parties, make reference to the obligation to provide legal aid in non-criminal matters, though its existence is conditional.

The European Convention on the Legal Status of Migrant Workers states that:

> "1. Each Contracting Party shall secure to migrant workers treatment not less favourable than that of its own nationals in respect of legal proceedings. Migrant workers shall be entitled, under the same conditions

[261] The European Agreement of the transmission of applications for legal aid (ETS 92) is designed to assist persons to obtain legal aid abroad in civil, commercial or administrative matters. The Agreement may be used by persons, who qualify for legal aid and who are habitually resident in the territory of one Contracting Party to apply for legal aid in the territory of another Contracting Party.
[262] Council of Europe Legal Aid Best Practices (2002) CJ-EJ (2002) 2.
[263] These activities were formerly known as Activities for the Development and Consolidation of Democratic Stability (ADACS).
[264] Article 26 of the European Convention on the Legal Status of Migrant Workers, adopted on 24 September 1977.
[265] The European Convention on Establishment, adopted on 13 December 1955.

> as nationals, to full legal and judicial protection of their persons and property and of their rights and interests; in particular, they shall have, in the same manner as nationals, the right of access to the competent courts and administrative authorities, in accordance with the law of the receiving State, and the right to obtain the assistance of any person of their choice who is qualified by the law of that State, for instance in disputes with employers, members of their families or third parties. The rules of private international law of the receiving State shall not be affected by this Article.
>
> 2. Each Contracting Party shall provide migrant workers with legal assistance on the same conditions as for their own nationals…"[266]

These provisions are very extensive and apply to non-criminal matters, in this sense, a direct reference being made in the text. It should be pointed out that in view of the importance of the principle contained in this article no reservations may be made under Article 36 of this Convention in respect of this article.

The rationale for establishing access to legal assistance is based on the equal treatment principle, thus, the migrant workers will enjoy this right on equal footing with the nationals of the state if they have it. This also means that the scope of the right will vary, from country to country, depending on how much the relevant national law provides. However, the migrant workers will enjoy it under the same conditions as any national of the jurisdiction. Furthermore, it should be noted that the definition of 'migrant worker' given in Article 1 (1) indicates that this Convention applies only to nationals of a Contracting Party who have been authorised to reside in the territory of another Contracting Party in order to take up paid employment. In addition, as the Convention is not open to accession by non-member States of the Council of Europe, it will apply only to migrant workers who are nationals of a Council of Europe Member State which is at

[266] Article 26 of the European Convention on the Legal Status of Migrant Workers.

the same time a Contracting Party to the Convention. However, only a reduced number of Member States of the Council of Europe has ratified this Convention.[267]

Article 8 (1) of the European Convention on Establishment states that "nationals of any Contracting Party shall be entitled in the territory of any other Party to obtain free legal assistance under the same conditions as nationals of the latter Party." This provision entitles any nationals of the Contracting Party to enjoy in the territory of any other Contracting Party, under the same conditions as nationals of the last one, free legal assistance. The Convention does not make reference to the nature of the proceedings, therefore the provision of legal aid in non-criminal matters will depend on its existence in the domestic law of a Contracting Party.

2.2.2 Provisions that do not expressly provide for the general obligation to provide legal aid in non-criminal matters

2.2.2.1 European Convention of Human Rights

The regional human rights regime created by the European Convention of Human Rights (ECHR)[268] does not provide expressly for a general right to civil legal aid. By contrast judicial redress *per se* has a status of a protected right under Article 6 (1) of the Convention which provides that "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".

[267] As of 2007 France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and Ukraine have ratified the Convention.
[268] Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 October 1950, entered into force 3 September 1953 (ECHR).

This article has been described as "a pithy epitome of what constitutes a fair administration of justice"[269] mainly because it encompasses an important number of elements crucial for a fair administration of justice conferring a right to fair trial.

> "To some extent this paragraph may be seen as describing the general characteristics of judicial institutions and as outlining the broad parameters by which the fairness of a proceeding can ultimately be judged. However, before arriving at the point when such evaluations can be made, an individual must have been provided with the opportunity to have his case heard in the first place".[270]

In other words an individual should be provided with the opportunity to have his/her day in court. In addition, "enabling individuals to assert the right to fair trial requires more of states than merely ensuring that the courts and tribunals are accessible to all, or that everyone, in the case of civil disputes, has the right to institute proceedings."[271]

This very rationale was followed and widely developed by the ECtHR when dealing with the issues concerning legal aid in non-criminal matters through the interpretation of Article 6 (1) guarantees of the ECHR.

If referring strictly to the textual provisions of the ECHR, it can be noted that unfortunately, the right of access to legal aid in civil cases was not expressly included within the wording of Article 6 (1). It was for the ECtHR to develop through its case-law the ambit of the right to civil legal aid. This is considered in the next chapter.

At the same time, it is important to note that providing civil legal aid might appear as a necessary tool in ensuring state's obligation to provide an effective remedy, a right

[269] Cremona, J., The Public Character of Trial and Judgment in the Jurisprudence of the European Court of Human Rights in Matscher, F., Petzold, H., PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION: STUDIES IN HONOUR OF GERARD J. WIARDA, Koln, 1990, p. 107.
[270] Gomien, D., Harris, D., Zwaah, L., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER, Council of Europe Publishing, 1996, p. 159.
[271] Fleming, D., *supra note* 8 p. 8.

guaranteed under the ECHR. According to Article 13 "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." However, taking into consideration that Article 13 is only applicable to cases involving violations of the rights and freedoms guaranteed by the ECHR, the present rationale will apply to specific human rights cases and not necessarily to all categories of non-criminal matters.

2.3 European Union

2.3.1 Provisions expressly providing for the general obligation to provide legal aid in non-criminal matters

2.3.1.1 Charter of Fundamental Rights of the European Union

It has to be commenced with the statement that the European Community was slow in tackling the problem of legal aid as human rights issues were not a matter of original concern because the community had primarily an economic focus aiming at creating a common market. However, already the preamble of the Single European Act signed in 1986 contained the following reference:

> "Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".

By 1997, the reference to the ECHR and its principles had got into the body of the text of the Treaty Establishing the European Community (Amsterdam Treaty). Article 6(1) proclaims that "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."[272] This provision tied the European Union to the standards of the ECHR:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States, as general principles of Community law."[273]

The Union and the Member States are all subject to the provisions of the ECHR and to the case-law of the ECtHR, when applying or implementing Union law. The general entitlement of Article 6 of the ECHR related to fair hearing rights is also of concern for the Union's legal ambit. Also, the European Court of Justice gives a "special significance" to the ECHR and takes it as a "guiding principle" in its case-law.[274] This means that the European Court of Justice may follow the ECHR principles throughout its reasoning.

Besides the commitment to the standards developed under the ECHR there are legal obligations regarding civil legal aid that arise directly from the EU law. The Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties, [275]

> "includes the most fulsome protection for legal aid in any human rights treaty in the sense that, though in one way is a reasonable summary of Convention jurisprudence, it gains from clarity and makes no distinction at all between criminal, civil or administrative proceedings" .[276]

[272] The Treaty of Amsterdam, signed on 2 October 1997, entered into force on 1 May 1999.
[273] Article 6(2) of the Treaty on European Union (after amended by the Treaty of Lisbon signed at Lisbon, 13 December 2007, entry into force: 1 December 2009).
[274] Arnull, A., THE EUROPEAN UNION AND ITS COURT OF JUSTICE, Oxford University Press, 2006, pp. 339-440.
[275] Article 6 (1) of the Treaty on the European Union: "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 adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".
[276] Smith, R., Old Wine in New Bottles: Legal Aid, Lessons and the New Europe, Paper for "Legal Aid in the Global Era", the International Legal Aid Group Conference, Killarney, Ireland, 8-10 June 2005.

Article 47 (3) of the Charter provides 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."[277] It should be noted that this provision covers both criminal and non-criminal matters. At the same time Article 52(3) of the Charter clearly states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the Convention. The same article of the Charter provides that this is not to preclude the grant of wider protection by EU law. As regards Article 47(3) of the Charter, from the wording of the Explanations relating to the Charter, which refers to *Airey v. Ireland*, legal aid should be provided where the absence of such aid would make it impossible to ensure an effective remedy.[278]

Besides the explicit reference to legal aid the provision of Article 47(3) refers to the right of 'everyone' to an effective remedy and fair trial. Actually, the word 'everyone' is very significant, since it is broader that citizenship of the Union."[279] This means that provision related to legal aid is equally applicable to everybody and is not limited only to citizens of the European Union.

2.3.1.2 Directive on cross-border legal aid in civil cases

According to the Amsterdam Treaty the Council has the power to adopt measures in the field of judicial cooperation in civil matters in order to establish an area of

[277] The Charter of Fundamental Rights of the European Union, Nice 2000, Official Journal of the European Communities 18 December 2000.
[278] Explanations relating to the Charter of Fundamental Rights, OJ 2007/C 303/02.
[279] Francioni, F., ACCESS TO JUSTICE AS A HUMAN RIGHT, Oxford University Press, 2007, p.184.

freedom, security and justice.[280] The Tampere European Council in October 1999 advanced this idea and included also a section on access to justice. The Conclusion of the meeting stated that:

> "The European Council invites the Council, on the basis of proposals by the Commission, to establish 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 on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should be created by Member States."[281]

In 2000 the Commission presented a Green Paper on legal aid in civil matters with a view to solve the difficulties encountered by cross-border litigants. The Green Paper from the Commission emphasized that:

> "It is a corollary of the freedoms guaranteed by the EC Treaty that a citizen must be able, in order to resolve disputes arising from his activities while exercising any of those freedoms, to bring or defend actions in the courts of a Member states in the same way as nationals of that Member State. In many circumstances, such a right to access to justice can be effectively exercised only when legal aid is available under given conditions." [282]

On 27 January 2003 the Council adopted a directive on cross-border legal aid in civil cases.[283] The directive[284] establishes the principle that natural persons, whether European Union citizens or nationals of third countries lawfully residing in a Member State, who do not have sufficient resources to defend their rights are entitled to receive appropriate legal aid on the same terms as a citizen resident in that State. The directive

[280] *See* Article 61 (c) of the Amsterdam Treaty.
[281] Conclusions of the Tampere European, para 30.
[282] Green Paper from the Commission on Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant, Brussels, 9 February 2000, COM (2000) 51.
[283] 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, Official Journal L 026 , 31 January 2003 P. 0041 – 004.
[284] Article 3(1) of the Directive on cross-border legal aid.

applies in cross-border disputes to all civil, commercial, employment and consumer protection matters whatever the nature of the court or tribunal. It also covers extrajudicial procedures, if the law requires parties to use them or if the parties to the dispute are ordered by the court to have recourse to them[285] and enforcement of judgments[286] and of authentic instruments.[287]

It also lays down the services that must be provided for the legal aid to be considered appropriate "access to pre-litigation advice; legal assistance and representation in court; exemption from, or assistance with, the cost of proceedings, including the costs connected with the cross-border nature of the case".[288] Also legal aid should "cover the following costs directly related to the cross-border nature of the dispute such as interpretation, translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case and travel costs".[289]

According to Article 5(1) persons who are partly or totally unable to meet the costs of proceedings as a result of their economic situation are entitled to receive appropriate legal aid in order to guarantee effective access to justice. The instrument does not establish specific financial criteria for eligibility, however it mentions that "the economic situation of a person is assessed by the competent authority of the Member State in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are

[285] Article 10 of the Directive on cross-border legal aid.
[286] *Ibid* Article 9.
[287] *Ibid* Article 11.
[288] *Ibid* Article 3.
[289] *Ibid* Article 7.

financially dependent on the applicant".[290] Member States are free in defining the financial thresholds.

Furthermore, the text of the directive provides that legal aid must be granted, under certain conditions, to persons who have recourse to alternative dispute settlement methods. Lastly, the directive organizes certain mechanisms for judicial cooperation between the Member States' authorities designed to facilitate the transmission and processing of legal aid applications. In particular, the directive provides for the possibility for a person to submit their application in their country of residence, which must then transmit it, rapidly and free of charge, to the authorities of the country which is to grant the aid. Article 15 refers specifically to the processing of legal aid applications. Accordingly the national authorities shall take care that "the applicant is fully informed of the processing of the application".[291] The Member State shall also give the reasons when an application is totally or partially rejected. Also "Member States shall make provision for review of or appeals against decisions rejecting legal aid applications. Member States may exempt cases where the request for legal aid is rejected by a court or tribunal against whose decision on the subject of the case there is no judicial remedy under national law or by a court of appeal".[292]

Article 21(1) requires Member States to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive". At the same time the Directive does not prevent Member States to establish more favourable provisions[293].

[290] Article 5(2) of the Directive on cross-border legal aid.
[291] *Ibid* Article 15(1).
[292] *Ibid* Article 15(3).
[293] *Ibid* Article 19.

Two standard forms for requests of legal aid and their transmission between Member States have been established by Commission decisions in 2004[294] and 2005. [295]

As of the end of 2010[296] "a cross-border legal aid system for civil cases that effectively benefits persons who are domiciled in other Member States has been introduced in all the Member States on the basis of the Directive."[297] According to a report prepared by the European Commission on the application of Directive the interpretation of some legal provisions may differ between Member States, however there was no litigation or complaints regarding its transposition.[298] The report highlights the fact that all Member States transposed the principle according to which legal aid should be available for persons who lack sufficient means. In addition, the Member States with the exception of Slovakia transposed the provision according to which where financial thresholds are established, those thresholds may be set aside if the applicant proves that there is a difference in the cost of living in the two Member States concerned.[299] The report notes that there is some discrepancy in interpretation when it comes to merits test of an application. According to Article 6(3) of the Directive Member States should take into account "the importance of the individual case to the applicant". It seems that this concept may lead to different interpretations in the Member States, since it may raise

[294]Commission Decision No 2004/844/EC of 9 November 2004 establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such dispute.
[295] Commission Decision 2005/630/EC of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC.
[296] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2003/8/EC to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes, Brussels, 23.2.2012, the Report assesses of the application of the Directive for the period of 30 April 2004 – 31 December 2010.
[297] *Ibid* pp. 4-5.
[298] *Ibid* p. 5.
[299] *Ibid.*

questions in relation to which specific criteria one should look at to determine the "importance" of the applicant's case.[300] The case-law of the ECtHR gives some guidance on this matter. The report also notes that there is a consensus among Member States when it comes to provision of legal aid for litigation proceedings. However, there are problems with the transposition of the Directive's provisions[301] according to which legal aid must cover also extrajudicial procedures, the enforcement of judgments and authentic instruments. The difficulty is that the concept of extrajudicial procedures may differ among Member States that is why there is no uniform application. This lead to the fact that in some Member States extrajudicial procedures ordered by the court or required by the law are not covered by legal aid. At the same time, concerning enforcement of judgments proceedings there is no uniform application with regard to the determination of whether the grant of such aid is automatic or whether the applicant must make an application in the Member State of enforcement. Finally, since in some Members States there is no such concept as authentic instruments this raises certain difficulties. [302]

There are no major problems when it comes to the transposition of the list of costs that the Member States must cover in connection with cross-border legal aid in civil and commercial matters. Costs relating to the assistance or representation by a lawyer, interpretation and translation have been transposed in all Member States. The report notes that, however, Belgium, Bulgaria, Ireland, Slovenia and the United Kingdom have some

[300] Report on the application of Directive on cross-border legal aid, *supra note* 296 p. 5.
[301] Articles 9-11 of the Directive on cross-border legal aid.
[302] Report on the application of Directive on cross-border legal aid, *supra note* 296 p. 6.

deficiencies in the transposition of the Directive's provision according to which travel costs must be covered by legal aid as well.[303]

It has to be added that in the absence of Union law it is for the Member States of the Union to adopt the detailed procedural rules that trigger the rights which individuals derive from the Union law, including those related to legal aid in non-criminal matters. However, such procedural rules may neither discriminate nor restrict the fundamental freedoms granted by legislation.

Taking into consideration that the Directive on legal aid is not self-executing but transposed into national law by Member States, using any means it chooses, a citizen of EU or a national of a third country legally residing in a Member State will be able to enjoy the rights provided by it, as long as the Member State implements in due time the Directive in its national law. However, if a state fails to pass the required domestic legislation or it does not adequately comply with the requirements of the Directive or the state does not implement *de facto* its adopted national provisions an individual still can rely on the Directive at stake before the ECJ using the direct effect doctrine[304] and seek redress.

However, occasionally the national legislation of a Member State may already comply with the outcome envisaged in the Directive, in this case, the government is only required to keep its law in place. So if a Member State's legislation already provided for legal aid in cross-border disputes enhancing all the guarantees that the Directive has (or even more) the EU nationals can fully enjoy them. Moreover, on the basis of non-

[303] Report on the application of Directive on cross-border legal aid, *supra note* 296 p. 7.
[304] *See Andrea Francovich and Danila Bonifaci and others v Italian Republic*, judgment of the Court of 19 November 1991.

discrimination the nationals of third countries legally residing in a Member States will be able to enjoy those guarantees as well.

Conclusion

The majority of instruments dealing expressly with legal aid have a non-binding character. In this regard under the UN regime the existing documents include very limited guidance. It calls upon the states to guarantee the progressive development of comprehensive systems of legal aid to those who need it in order to protect their human rights and fundamental freedoms and put in place sufficient funding and necessary resources in this regard. On contrary non-binding documents elaborated by the Council of Europe include quite a number of concrete guiding standards regarding the need for providing state-funded legal aid and the elements of and effective system. In this sense, the instruments indicate that all persons should have a right to necessary legal assistance in civil, commercial and administrative matters, taking into account their financial resources. The recommendations require the equal treatment of persons applying for legal aid irrespective of their nationality. Legal aid should be made available at all stages of court proceedings.

Under these two jurisdictions only several conventions dealing with the rights and status of refugees, stateless persons and migrant workers refer to the obligation to provide legal aid in non-criminal matters, however these provisions are conditioned by the existence of such a scheme covering nationals in a member state.

The situation however is different in case of the European Union, where the Charter on Fundamental Rights provides for a general right to legal aid for those who lack sufficient resources, and in so far as such assistance is necessary to ensure effective

access to justice.[305] This right is however of limited application, since an individual will be able to claim it before the EU and national courts if the right has a direct effect and only in the context of the Union law application.

Council of Europe and EU provides also for a cross-border legal aid system for civil cases.

At the same time, there are several norms embedded in the most important human rights instruments belonging to UN and Council of Europe, namely those contained in the International Bills of Rights and the ECHR that bear the premises on which the general obligation to provide civil legal aid and its scope was further developed or can be developed. The most relevant provisions from which the right to civil legal aid were (can be) deducted from are specially those concerned with the fair trial rights, right to an effective remedy and equality principle. These are analyzed in details in the next chapter.

[305] *See* Artilce 47 of the EU Charter of Fundamental Rights.

3. CONCLUSION

This chapter identified the principles and international human rights standards that provide for a basis for establishing state obligation to ensure legal aid in non-criminal matters. The references cited indicate toward a general obligation to ensure legal aid and provide normative guidance for states in developing relevant domestic legal provisions and policies that comply with international human rights standards and principles.

The analysis of the international and regional norms and standards regarding the right to legal aid in non-criminal matters showed *prima facie* that the major binding instruments such as the two UN Covenants and the ECHR stop short in providing for an automatic right to civil legal aid for all individuals who lack the means to acquire legal assistance. This is not to mean that the states' responsibility to ensure legal aid in some form is completely non-existent. The analysis shows that the UN, at a smaller extent, and Council of Europe, at a bigger extent, non-binding documents include guidance regarding civil legal aid. In addition, several binding conventions on refugees, stateless persons and migrant workers refer to an express obligation to provide legal aid in non-criminal matters under certain circumstances.

The analysis of the most important human rights instruments, such as the Universal Declaration, ICCP, ICESCR and ECHR, and other specialized instruments also reveal a crucial source of principled support for civil legal aid, which is derived for example from the right to a fair trial, to equal treatment of all persons before the courts, the entitlement of all persons to equal protection of the law and the right to an effective remedy. Even when a right to legal aid in non-criminal matters is not expressly

articulated in domestic law, the state's obligation to provide legal aid to those in need is a critical part of the duty to ensure fundamental rights guaranteed by the international and regional human rights instruments, and as showed in this chapter, at least in the light of the right to fair trial, effective remedy and equality before the law. It is clear that international standards at a minimum put forward the rationale according to which states must ensure that efficient mechanisms for effective and equal access to legal aid are provided for all persons irrespective of race, citizenship, ethnic origin, gender, and financial status. However, beyond this, international norms provide little guidance on the standards to be adopted in ensuring that access to legal aid is available. National legislators have a wide margin of appreciation in terms of the way in which the right to legal aid should be given effect.

The interpretation of the principles and international and regional human rights regimes give weight to the assumption that the right to legal aid in non-criminal matters is a human right and is gaining increasing acceptance in the international community, at least when 'interests of justice', 'equality of arms', 'equality before law' so require, or basic human needs are at stake. Indeed the underlying principles and rationales of the obligation of the states' to provide legal aid in non-criminal matters transfers this institution, at the conceptual level, from the realm of largess and the perception of legal aid as a charitable grant or a pure benefit given by the state to the realm of human rights and its perception as a self-standing right. Principles of the rule of law, equal access to justice and laws, enforcement of rights, right to a fair trial etc. strengthens clearly this position. Moreover, all these principles, that form the bases of any constitutional democracy and in addition, represent already international human rights obligations,

forbid the distinction between those who can buy legal services and those who cannot as none of the principles at stake are welfare privileges, benefits or charity but an axiom that does not depend on the budgetary resources. Everybody is a beneficiary. Taken together these factors support the view that legal aid is an essential right and a fundamental aspect of a legal system. Today legal system is glorified in so many terms but the fact that one has to pay in order to obtain benefit from its promises is still silently accepted in so many instances. Therefore, transforming the debate about the right to legal aid in non-criminal cases and positioning it within the realm of human rights challenges those traditions that perceives this right as a progeny of largess and/or a welfare benefit. In the presence of a guarantee of the access to legal aid in civil matters rooted in the human rights rationale the question of the right to legal aid will turn from "why" to "how" as the implementation of the right would be the order of the day. Guidance in this regard can be found in the interpretation of international human rights law, which will be reflected in the next chapter.

CHAPTER 3 THE SCOPE OF THE GENERAL OBLIGATION TO PROVIDE LEGAL AID IN NON-CRIMINAL MATTERS

Previous chapter dealt with the identification of the basic sources that provide a basis for establishing the obligation of states to ensure legal aid for those in need. However, the majority of the legal international human rights standards do not contain express details regarding the scope and content of the general obligation to provide legal aid in non-criminal matters. The scope of the general obligation to provide state-funded legal aid under some of the most important international and regional human rights treaties was developed by means of interpretation by the relevant competent bodies. The jurisprudence and other submissions of relevant international bodies represent important sources for understanding state's legal obligation to guarantee civil legal aid. Chapter three gives an insight into how human rights instruments were interpreted as to determine how extensive the obligation to provide legal aid in non-criminal matters should be.

Issues related to civil legal aid are among those that the ECtHR, UN and EU bodies at a bigger or smaller extent have worked on and provided some guidance. However, their work has limitations, because for example international tribunals are restricting in considering valid issues raised by the applicants in their submissions, other treaty bodies are very much limited in their competence and thus refer only to specific problems. Nonetheless, the jurisprudence of the international courts and the work of various treaty bodies provide some guidance when it comes to the creation and development of civil legal aid and can also trigger structural changes as will be shown in this chapter.

1. European Court of Human Rights

States bound by the ECHR look to the ECtHR case-law for guidance on many of the issues they face regarding the implementation of fundamental rights provided in the Convention. Issues of fair trial are among those where the ECtHR's jurisprudence can provide specific guidance. In discussing particularly the development of the governments' obligation to provide legal aid in non-criminal matters it is important to recognize the unique and extensive contribution of the jurisprudence of the ECtHR in promoting access to justice. In this context, it was namely the ECtHR that developed extensively the ambit of civil legal aid. Article 6 (1) of the ECHR provides that:

> "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".[306]

To many it is obvious that "the fair administration of justice begins with the guarantee that an individual has access to a court that provides all the attributes of a judicial form of review".[307] However,

> "the right of access to court has not been laid down in express terms in Article 6. Its first paragraph only refers to entitlement to a fair and public hearing by a court, leaving it unclear whether this entitlement only exists in cases where judicial proceedings have been provided for under domestic law, or that provision implies – or rather presupposes – a right to such judicial proceedings."[308]

The right to civil legal aid is also absent. However the ECtHR through its evolutive interpretation has been expanding incrementally its case-law to encompass a

[306] Article 6 (1) of the ECHR.
[307] Gomien, D., SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe Publishing, 2005, p. 53.
[308] Pieter van Dijk *et al*, Right to a Fair and Public Hearing (Article 6) in THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Fourth Edition, (Antwerpen-Oxford), 2006, p. 557.

right to legal aid in non-criminal matters. This trend is evidenced by the ECtHR's interpretation of Article 6 (1) of the Convention. When analyzing the relevant case-law, the analysis concentrates firstly on the cases related to the right of access to court and the creation of an ancillary right to legal assistance in certain civil matters (their development, characteristics, limits etc.) and then on cases which determined and developed the scope and content of the states' obligation to provide legal aid in non-criminal matters.

As a starting point it has to be mentioned that when interpreting Article 6 (1), the ECtHR uses specific guidelines set in the *Delcourt* judgment. These guidelines mainly rely on the rationale that:

> "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision".[309]

The ECtHR has repeatedly stated that there is no justification for interpreting Article 6 (1) restrictively[310] and it has certainly followed this rationale. The right to legal aid in civil matters benefited from such an approach. It was namely through the development of the provisions of Article 6 (1) that legal aid was provided for certain civil cases. The first step was to confirm that the right to a fair trial comprises the right of access to courts, the second was to attach to the last one an ancillary right of access to legal aid in certain non-criminal matters.

[309] *Delcourt v. Belgium*, Series A no. 11, judgment of 17 January 1970, para. 25.
[310] *Moreira de Azeredo v. Portugal*, Series A, No. 189 (1990) 13 EHRR 74, ECHR (1990).

1.1 The right to access to court

In *Golder v. United Kingdom*[311] the ECtHR, by using an extensive teleological interpretation, found that Article 6 (1) guarantee of the right to a fair trial must be considered to include the right of "access to a court" in general, in civil as well as in criminal matters. The interpretation of Article 6 (1) in the present case was one of the most significant and creative steps taken by the ECtHR. In *Golder* the applicant, a prisoner, had been denied the right to consult a lawyer for the purpose of bringing a civil libel action concerning an accusation that he assaulted a prison officer during a disturbance in the recreation area of the prison.[312]

In its judgment the ECtHR first made reference to Articles 31-33 of the Vienna Convention on the Law of Treaties and held that, although not yet in force at that moment, these articles enunciate the general principles of international law that have to be taken into account.[313] It then examined the language of Article 6 and whether it settles the relevant legal issue, namely whether the Convention protects the right of access to a court. It concluded that the language does not "necessarily refer only to proceedings already pending" but may well imply "the right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal".[314] In another words, the ECtHR held that the wording itself is neutral between these two options.[315]

[311] *Golder v.UK, supra note* 153.
[312] For detailed facts *see Golder v.UK*, paras. 9-22.
[313] *Ibid* para. 29.
[314] *Ibid* para. 32.
[315] Lestas, G., A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, (Oxford University Press), 2007, p. 62.

In reading-in the right of access to a court the ECtHR further elaborated on the "object and purpose"[316] of the Convention. It referred to the passage in the Preamble of the ECHR that encompasses the rule of law as one of the features of "the common heritage of the member States of the Council of Europe".[317] Namely, it stated that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts".[318] The ECtHR went on by mentioning that "Article 6 (1) must be interpreted in the light of the following two legal principles: a) the principle whereby a civil claim must be capable of being submitted to a judge, as one of the universally "recognized" fundamental principles of law; and b) the principle of international law which forbids the denial of justice".[319]

The ECtHR further made the hypothetical point that if the ECHR did not guarantee the right of access to a court, States "could without in breach of that text, do away with courts, or take away their jurisdiction to determine certain class of civil action and entrust it to organs dependent on the Government".[320] "Such assumptions"[321], the Court stated, are "indissociable from a danger of arbitrary power"[322] and "would have serious consequences which are repugnant to the principle of the rule of law".[323] Thus, it follows that the right of access to a court represents an element which is "inherent" in the right stated in Article 6 (1)"[324] of the Convention. The ECtHR also noted that "this was

[316] *Golder v.UK, supra note* 153 para. 34.
[317] *Ibid*.
[318] *Ibid*.
[319] *Ibid* para 35.
[320] *Ibid*.
[321] *Ibid.*
[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid*, para. 36.

not an extensive interpretation which forced new positive obligations on the Contracting States".[325] Rather the ECtHR's interpretation was "based on the very first sentence of Article 6 (1) read in its context and having regard to the object and purpose of the Convention and to general principles of law".[326] Finally, it concluded that "Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal".[327] In addition, the right of access means access in fact, as well as in law. It was for this reason that there was a breach of Article 6 (1) in *Golder*. Whereas the applicant was able in law to institute libel proceedings in the High Court, the refusal to let him contact a lawyer impeded his access to courts in fact. It did not matter that directly the applicant's complaint was of an interference with his right of access to his lawyer, not the courts, that he might have made contact with his lawyer other than by correspondence, that he might never have instituted court proceedings at all or that the applicant would have been able to have written to his lawyer before his claim became statute barred after his release from prison. A partial or a temporary hindrance may be a breach of the right of access to a court.[328]

At the same time it was held that the right of access to a court is not absolute[329] and can be subject to limitations. The ECtHR in its case-law gave an extensive

[325] *Golder v.UK, supra note* 153, para 36.
[326] *Ibid.*
[327] *Ibid.*
[328] Harris, D., *et al*., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Second Edition, 2009, p. 197.
[329] *Golder v.UK, supra note* 153 para. 38.

appreciation to the possible limitations on the right to access to court. It has said that "by its very nature this right calls for regulation by the state".[330] In this respect,

> "the state has a margin of appreciation in making such regulations but the limitations applied must not restrict or reduce the access left to the individual in such a way as or to such an extent that the very essence of the right is impaired. In addition, a limitation will be incompatible with Article 6 (1) if it does not pursue a legitimate aim and if there is not a reasonable proportionality between the means employed and the aim to be achieved".[331]

1.2 The right to legal aid in no-criminal matters

The ECtHR has interpreted the right to free legal aid in civil matters as entailing the obligation of the governments to provide free or partly free legal assistance in civil judicial proceedings. Applying the *Golder* judgment, the ECtHR found in *Airey v. Ireland*[332] that right of access to a court embedded in Article 6(1) of the ECHR also contains the right to free legal assistance in those civil cases, where

> "such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case".[333]

In the present case, the applicant was a married woman from a humble family background with a modest income. Her husband has been convicted of assaulting her and for seven years she had been seeking to obtain a decree of judicial separation from him

[330] *See* among many other authorities: *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, para 34; *Garcia Manibardo v. Spain*, Application no. 38695/97, judgment of 15 February 2000, para 36.

[331] Reid, K., A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th edition, Sweet&Maxwell, 2011, p.107. For case-law on "limitations" *see* among many other authorities: *Ashingdane v. UK*, Series A, No. 93, judgment of 28 May 1985; *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, p. 1502, para 50; *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 62/1997/846/1052–1053, judgment of 10 July 1998, para 72; *Związek Nauczycielstwa Polskiego v. Poland*, Applicantion no. 42049/98, judgment of 21 September 2004, paras 28-29.

[332] *Airey v. Ireland*, *supra note* 84.

[333] *Ibid* para. 26.

on the grounds of husband's alleged physical and mental cruelty to her and their children. Decrees of judicial separation were obtainable only in the High Court and the costs of legal representation would have been very high. The applicant had requested free legal assistance to bring her action. In Ireland, however, there was no provision of legal aid for the purpose of seeking a judicial separation, nor for any civil matters.[334] It should be also noted that when ratifying the ECHR, Ireland made a reservation to Article 6(3)(c), limiting obligations to provide "free legal assistance to any wider extent than is now provided in Ireland."[335] Before the ECtHR the applicant claimed that the prohibitive cost of litigation prevented her from bringing proceedings before the High Court for the purpose of petitioning for judicial separation and that the above circumstances resulted in her being denied access to court in violation of Article 6(1).[336] The government argued that she could have applied in person to the High Court for a decree of judicial separation.[337] In response to this argument the ECtHR pointed out that the ECHR guarantees rights that are "practical and effective" and that "this is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial."[338] In addition taking into account such relevant factors as the complexity of the procedure, the complexity of the issues of law and need to establish facts through use of expert evidence and examination of witnesses and the fact that the case concerned a marital dispute entailing emotional involvement incompatible with the level of objectivity required for effective representation, the ECtHR came to the

[334] For detailed facts *see* paras. 8-12.
[335] Ratification of (I) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4th November 1950 and of (II) the Protocol to that Convention, Paris 20th March, 1952, 20 January 1953, NAI S.14921B.
[336] *Airey v. Ireland, supra note* 84 para. 20.
[337] *Ibid,* para. 24.
[338] *Ibid*.

conclusion that the possibility for the applicant to apply in person to the High Court did not provide her with and effective right of access to court.[339]

Furthermore the ECtHR held that:

> " … fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions" ... The obligation to secure an effective right of access to the courts falls into this category of duty".[340]

It rejected the government's claim that the right of access to a court does not impose positive obligations upon States, particularly ones with economic consequences such as to provide legal aid. It noted that:

> ".... The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions ... and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals... Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.
> ... The conclusion appearing ... does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".
> To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case".[341]

[339] *Airey v. Ireland, supra note* 84 para. 24.
[340] *Ibid* para. 25.
[341] *Ibid* para 26.

The argument that *Airey* and its implications are limited in coverage, because the circumstances of the case were considered by the ECtHR as sufficiently complex to trigger free legal assistance, sounds reasonable.[342] However, for Member States to the ECHR this judgement must be a starting point.[343] Its importance cannot be diminished by its limitative scope. In Ireland *Airey* had an immediate impact. Following the decision the Minister of Justice set up the Pringle Committee. It had the task to advise the Minister on the creation of a civil legal aid scheme. As a result of the Committee's recommendations the Scheme of Legal Aid and Advice came into operation in 1980,[344] the purpose of which was to make the services of the lawyers available both with regard to advice and were necessary representation to persons with limited financial capacity.

It also has to be underlined that an incontestable outcome of *Airey* is that the ECtHR has secured the principle that the state-provided or paid counsel is a matter of right for people with limited resources available in certain civil cases. The rationale seems to be simple: since Article 6 (1) comprehends civil rights and obligation the states must provide legal aid also in civil litigation, namely when it is deem necessary to make the right to access to courts effective. Thus, Article 6 (1) does not impose the obligation to provide civil legal aid in all non-criminal matters.[345] An effective right of access to courts dictates that the governments are compelled to provide legal aid in civil matters where legal representation is compulsory under national law or because of the complexity

[342] Manning, D., *supra note* 5 p. 62.
[343] *Ibid.*
[344] Whyte, G.F., *The Application of the European Convention on Human Rights before the Irish Courts,* The International and Comparative Law Quarterly, Vol. 31, No. 4 (Oct., 1982), p. 856.
[345] *Airey v. Ireland*, *supra note* 84 para. 26; *see* also *Del Sol v. France*, Application no 46800/99, judgment of 26 February 2002, para. 20 ; *Essaadi v. France,* Application no. 49384/99, judgement of 26 February 2002, para 30.

of the proceedings in a specific case.[346] In the last instance the following facts will be taking into account when determining the need for legal aid: the importance of what is at stake for the applicant in the proceedings, the complexity of the law and procedure and the applicant's capacity to represent himself effectively.[347]

It has to be noted that state-funded legal assistance will apply only for protection of Article 6 (1) 'civil rights and obligations'. Under the ECHR the concept of 'civil rights and obligations'[348] covers all proceedings decisive of private rights and obligations in relation to a genuine dispute over a right at least arguably recognized under the national law, or its scope or manner of exercise."[349] This means that for Article 6 (1) of ECHR to apply there must be a dispute over a right or an obligation[350] that has a basis in national

[346] *See* Leach, Ph.,TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, Oxford University Press, 2011, p. 271.
[347] *Airey v. Ireland*, *supra note* 84 para. 24.
[348] However, there are certain areas of law that according to the case-law of the ECtHR does not fall within the remit of Article 6 (1) and the concept of "civil rights and obligations" as for example, general taxation and customs issues; proceedings concerning tax assessment, unless surcharges and penalties are involved, in which case Article 6 may apply under its "criminal" head; proceedings for asylum, deportation, extradition and nationality; liability for military service; cases concerning the reporting for court proceedings; the right to stand for public office; the right to state education; the rights to state medical treatment; the unilateral decision of the state to compensate the victims of a natural disaster; applications for patents; proceedings regarding investigation by government inspectors into business takeover, despite tenuous consequences of their report on an applicant's reputation; actions alleging general incompetence of the authorities or improper execution of their official duties, as long as there is no sufficient reasonable link between the alleged actions or inactivity of the authorities on the one hand, and the applicant's private-law rights and obligations on the other; proceedings concerning internal administrative decisions of an international organization; proceedings concerning rectification of personal data in the Schengen database, etc. *See* Mole, N., Harby, C., THE RIGHT TO FAIR TRIAL. A GUIDE TO IMPLEMENTATION OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2006, pp.14-16; Vitkauskas D., Dikov G., PROTECTING THE RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, Strasbourg 2012, pp. 15-16.
[349] Jayawickrama, N., THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW, Cambridge, Cambridge University Press, p. 498.
[350] In *Benthem v Netherlands*, Application no. 8848/80, judgment of 23 October 1985, para 32, the ECtHR put together several principles as to the interpretation of the term dispute ('contestation'). First, conformity with the spirit of the ECHR requires that the term 'contestation' should not be construed too technically and should be given a substantive rather than a formal meaning. Second, the dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised. Third, a dispute may concern both "questions of fact" and "questions of law". The dispute must be genuine and of a serious nature. Finally, while the term dispute covers all proceedings the result of which is decisive for a person's

law[351] and has a civil nature.[352] In addition, the dispute must determine that right or obligation in a decisive manner. The concept "'civil right and obligations' covers ordinary civil litigation having the predominant features of private law, such as disputes between private individuals relating, for example, to actions in tort, contract, and family law."[353] Rights and obligations pertaining to the public law sphere "are likely to be excluded unless there are financial or economic implications or there is some scope for drawing an analogy between the interest concerned and right of an unquestionably private law character."[354] However, the private-law elements must be predominant over the public-law elements.[355]

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civil rights and obligations, the dispute in question must not have a tenuous connection or remote consequences to those rights or obligations. The civil rights and obligations must be the object, or one of the objects of the dispute, and the result of the proceedings must be directly decisive for such a right.

[351] In *Powell and Rayner v the United Kingdom,* Application no. 9310/81, judgement of 21 February 1990, paras. 34-36, the applicants claimed that they were prevented by statute from bringing an action in nuisance against the authorities regarding the increased aircraft noise at airport. ECtHR held that the national law effectively excluded liability of the authorities in such circumstances and thus, Article 6(1) was not applicable for lack of a right recognized under domestic law. In *Roche v the United Kingdom*, Application no. 32555/96, judgment of 19 October 2005 paras, 116-121, ECtHR held that "in assessing if there is a "right" and in determining the substantive or procedural characterisation to be given to the impugned domestic restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts. Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, the Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law and by finding, contrary to their view, that there was "arguably" a right recognised by domestic law".

[352] In *Ringeisen v. Austria*, Application no 2614/65, judgment of 16 July 1971, para. 94, ECtHR held that "for Article 6 (1), to be applicable to a case it is not necessary that both parties to the proceedings should be private persons. The wording of Article 6 (1) is far wider; it covers all proceedings the result of which is decisive for private rights and obligations. In addition, the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence."

[353]RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 6), Interights, 2009, p. 3.

[354] McBride, J., *Access to Justice and Human Rights Treaties,* C.J.Q., 1998, at 237.

[355] *Deumeland v. Germany*, Application no. 9384/81, judgment of 29 May 1986, pars. 59-74.

The right to legal aid applies to all court instances, including higher appellate or other stages with the condition that the *Airey* principles are met.[356] However, Article 6 does not include the right of the person to have legal representative of his/her own choosing when requesting legal aid. [357]

1.3 Eligibility criteria for legal aid

The ECtHR clearly stated that it is for states to decide how to comply with the obligations under the Convention, and subsequently a legal aid system cannot function without the establishment of a certain mechanism for selecting cases likely to benefit from it.[358] It is apparent from a review of the relevant case-law that governments would most probably be required to provide legal aid in civil matters by looking at *inter alia* the financial capacity of the applicant, prospects of success of the legal action, the complexity of the case, the significance of what is at stake, the emotive nature of the subject matter for the applicant, and personal capacity, etc. [359] This is not an exhaustive list.

1.3.1 Means test

When providing legal aid the first thing that may be taken into account is the financial capacity of the applicant. However, there are no clear lines drawn or an

[356] *Aerts v. Belgium*, 61/1997/845/105, judgment of 30 July 1998, the case concerned refusal of legal aid for an appeal before the Court of Cassation; *Tabor v. Poland*, Application no. 12825/02, judgement of 27 June 2006, the applicant's request for legal aid for submitting a cassation appeal dismissed and the cassation appeal was rejected on the ground that it had not been submitted by a lawyer as required by national law.
[357] In *Croissant v. Germany*, Application no. 13611/88, judgement of 25 September 1992 the ECtHR held that the right of the defendant to be defended by lawyer of his own choosing cannot be considered absolute. Where free legal aid is concerned the courts must have regard to the defendant's wishes, but these can be overridden. While the present case referred to criminal proceedings this finding can be equally considered for other cases as well.
[358] *See Gnahore v. France*, Application no. 40031/98, judgment of 19 September 2000, para 41; *Renda Martins v. Portugal*, Application no. 50085/99, Admissibility decision of 10 January 2002 (inadmissible).
[359] *Fabre v. France*, Application no. 69225/01, judgment of 18 March 2003; and *Del Sol v. France, supra note* 345 para. 23.

indicative threshold established in the case-law of the ECtHR regarding financial situation of the applicant, which would trigger mandatory provision of legal aid. "The cases have simply proceeded on the agreed basis that the applicants did not have the means to pay".[360] States definitely enjoy some discretion in determining this issue. However, the ECtHR will take into account the quality of the legal aid system and whether the method chosen by the national authorities in a specific case is consistent with the Convention.[361] In this regard it will asses if the decision on financial eligibility is based on law and is not arbitrary. In *Santambrogio v. Italy*[362] the applicant's request for legal aid in divorce and child custody proceedings was refused because he did not pass the eligibility test. He was denied legal aid because of the failure to satisfy the "state of poverty" test provided by the domestic law in the light of the fact that his financial means exceeded the established upper limit.[363] The ECtHR concluded that the Italian system offered substantial guarantees to individuals against arbitrariness[364] and found no violation of Article 6 (1).[365]

In cases where the national law is silent with regard to means test, the ECtHR will nevertheless look if the financial criterion. It will look if there are "some indications" that the applicant is poor and does not have sufficient means to pay for legal assistance and there are no "clear indications to the contrary".[366]

[360] McBride, J., *supra note* 343 at 260; *See B v. United Kingdom* (1985) 45 D.R. 113; *Denev v. Sweden* (1989) 66 D.R.; *Steel and Morris v. the United Kingdom supra note* 208.
[361] *Santambrogio v. Italy*, Application no. 61945/00, judgment of 21 September 2004, para. 52.
[362] *Ibid* paras. 48-58.
[363] *Ibid* para. 53.
[364] *Ibid* para. 55.
[365] *Ibid* para. 58.
[366] *Pakelli v. Germany*, Application no. 8398/78, judgment of 25 April 1983, para. 34. Though this is a criminal matter when assessing financial criterion the ECtHR takes the same approach in civil matters.

1.3.2 Merit test

Account may be also taken of the applicant's prospects of success in the litigation. In *X. v. United Kigdom*[367] the Commission reiterated that:

> "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. Such limitations on the availability of free legal aid, common to most Convention countries, often require a financial contribution or that the proposed litigation has reasonable prospects of success."[368]

In the light of this rationale the Commission found it acceptable that the applicant has been refused legal aid on the basis that his claim lacked prospects of success. Such a situation would not normally constitute a denial of access to court, unless it could be shown that the decision was arbitrary.[369]

In *P., C. and S. v. United Kingdom*[370] the ECtHR found a violation of Article 6(1) where the applicants were denied legal aid in parental rights proceeding. The applicants were a married couple and S. was their daughter. P. had been convicted in the U.S. of endangering her child's health. Later, when she gave birth to S. in England, the local authority obtained an emergency protection to move S. to a safe place away from her parents. At the same time, the local authority applied to the High Court for a care order to be made in respect of S. and then for an order freeing her for adoption. P. was represented by counsels under the domestic legal aid scheme. After three days into the hearings P.'s legal representatives withdrew from the proceedings due to the fact that, according to them, P. was requiring them to conduct her case in an unreasonable manner. The judge

[367] *X v. United Kingdom,* Application No. 8158/78, Admissibility decision of 10 July 1980 (inadmissible).
[368] *Ibid* para. 16.
[369] *Ibid*.
[370] *P., C. and S. v. United Kingdom,* Application no. 56547/00, judgment of 16/07/2002.

allowed P. an adjournment of four days but then required her to continue with the hearings conducting her own case. She was only assisted by a lay advisor. The hearings ended with the judge concluding that S. would be endangered by living with her parents and issuing of a care order in favour of the local authority. Few days later the same High Court judge heard the application to free S. for adoption.[371]

The ECtHR noted that:

> "… P. was required as a parent to represent herself in proceedings which … were of exceptional complexity, extending over a period of twenty days, in which the documentation was voluminous and which required a review of highly complex expert evidence relating to the applicants P. and C.'s fitness to parent their daughter. Her alleged disposition to harm her own children, together with her personality traits, were at the heart of the case, as was her relationship with her husband. The complexity of the case, along with the importance of what was at stake and the highly emotive nature of the subject matter, lead this Court to conclude that the principles of effective access to a court and fairness required that P. receive the assistance of a lawyer".[372]

The ECtHR also noted that "assistance afforded to P. by counsel for other parties and the latitude granted by the judge to P. in presenting her case was no substitute, in a case such as the present one, for competent representation by a lawyer instructed to protect the applicants' rights".[373]

The same line of rationale was followed by ECtHR in *Nenov v. Bulgaria.* [374] In this case the applicant suffered from a mental illness that is why his ex-wife applied to the national courts to have his right of contact with their children modified and limited accordingly. The national courts ignored the applicant's request for an appointed

[371] For detailed facts of the case *see P., C. and S. v. United Kingdom* , paras. 10-72.
[372] *Ibid* para 95.
[373] *Ibid* para 99.
[374] *Nenov v. Bulgaria,* Application no. 33738/02, judgment of 16 July 2009.

lawyer.[375] According to the Bulgarian law in force at that moment, the assignment of a court-appointed lawyer was possible for the proceedings before the Supreme Court. However, the ECtHR held that this could not remedy the situation in the present case as the Supreme Court had very limited competence in production of evidence.[376] Before ECtHR the applicant relying on Article 6 (1) alleged that his inability to benefit from the advice of officially appointed lawyer had infringed his right to a fair hearing. The ECtHR started its review with considerations of the nature of the proceedings and it noted that the case was of a particularly importance for the applicant, insofar as the modification of the right to contact his children could have the effect of significantly weakening the link between him and his children.[377] Then, though it noted that overall the judicial proceedings relating to a request for modification of visit rights are not particularly complex, it highlighted the fact that the parties may still face some difficult legal issues, such as the need to take evidence from experts, meet legal deadlines, formulate questions and objections relevant to the outcome of litigation, call witnesses, etc. In addition, the ECtHR noted that disputes between spouses often arouse emotions that interfere with the degree of objectivity required to plead in court and even more when the subject matter touches on the future of the children.[378] It observed the applicant's lack of legal training or significant experience in the field of judicial proceedings. It also noted that the nature of the applicant's serious mental illness and the character of the case have exacerbated the difficulties experienced by the applicant when pleading before domestic courts. In the light of the present circumstances, it concluded that the applicant could not effectively

[375] For detailed facts of the case *see Nenov v. Bulgaria*, paras. 5-25.
[376] *Ibid* para. 53.
[377] *Ibid* para. 45.
[378] *Ibid* para. 46.

challenge the conclusions of the expert or request a new expertise, he did not know, on its own, how to expose some factual arguments in support of his contention that he was able, despite his illness, to maintain normal relations with his children and he could not, by himself, adequately address the legal issue involved.[379] The ECtHR further observed that his former wife has benefited from the assistance of a lawyer throughout the proceedings before the district court, at which have been produced evidence concerning the dispute.[380] That is why the given circumstances placed him in a substantial disadvantage compared to the other party to the proceedings. Therefore, the ECtHR concluded that the fact of not having received legal aid has deprived the applicant of the opportunity to effectively defend his case, thereby undermining a key part of his right to respect for family life, guaranteed by Article 8 of the Convention. In these circumstances, respect of the applicant's right to a fair trial was also a guarantee to the place of his right to respect for family life. [381] Accordingly, the ECtHR considered that the particular importance of the issue for the individual - the ability to keep a real relationship with his children - combined with the very nature of his illness - mental illness - required the granting of a legal aid.

At the same time where the legal issues of the dispute is not complicated for the applicant the ECtHR is likely to accept that legal aid is not needed. In *A.W. Webb v. United Kingdom*[382] the applicant was subjected to paternity proceedings. The applicant applied for legal aid in domestic proceedings, but was refused on the ground that the prospects of his case to succeeding are minimal. The Commission found that the subject

[379] *Nenov v. Bulgaria, supra note* 374 paras. 47-50.
[380] *Ibid* para. 51.
[381] *Ibid* para. 52.
[382] *Webb v. United Kingdom*, Application 9353/81, Decision of 11 May 1983, pp. 137-142.

of the proceedings did not constitute in itself a complex point of law, the legal issue of the dispute was readily comprehensible to a lay person and it is clear from the applicant's submissions that he fully understood the nature of the proceedings.[383] It therefore concluded that the right of access to court was not prejudiced because the applicant could defend himself in person. Also in the present case the refusal of legal aid was not arbitrary.

1.4 The adequacy of legal aid

In cases when legal aid is provided, States have the obligation to ensure that the right to access to court is upheld in practical terms. The ECtHR held many times that even when legal aid is granted the governments' responsibilities do not come to an end there. The relevant case-law shows that the Member States of the Council of Europe are under a general obligation to secure that the system under which an individual is entitled to obtain legal aid provides effective representation in judicial proceedings. This leads to the idea that in allowing individuals to be able to have recourse to legal assistance, the legal aid institutions allow them to obtain legal advice and identify legal remedies appropriate to their specific legal problem. To this effect, legal aid should be adequate and effective. Though the ECtHR never gave a definition of adequacy from its judgements it is clear that it should include the following aspects: adequate and timely appointment of a lawyer, effective conduct of the appointed legal aid lawyer, rapid replacement of the legal aid lawyer in case of necessity etc. Overall it means that the legal aid providers are responsible to ensure a satisfactory end result.

[383] *Webb v. United Kingdom, supra note* 384 p. 139.

For, example in *A. B. v. Slovakia*[384] the ECtHR asserted that, when domestic law provides that a court may provide free legal assistance to a litigant in a non-criminal proceeding, a failure to provide formal decision in response to a request for such assistance constitutes a violation of Article 6(1) right of access to a court. As a consequence, in the present case, the applicant, a disabled individual, was unable to attend a court hearing on her action to overturn an administrative decision concerning her benefits. ECtHR found under the circumstances that the applicant was unable to present her case in conditions of equality with the other party. Such was the unfairness of the proceedings that it was unnecessary to examine whether the lack of legal representation caused the applicant any actual prejudice.

In *Bertuzzi v. France*[385], the applicant received legal aid to bring civil proceedings in negligence against a lawyer who allegedly rendered bad legal advice to him. However, the three lawyers which were assigned in turn by the president of the bar council to represent the applicant under the legal aid scheme withdrew from the case because of the personal links with the lawyer the applicant wished to sue. The ECtHR considered

> "... that permitting the applicant to represent himself in proceedings against a legal practitioner did not afford him access to a court under conditions that would secure him the effective enjoyment of equality of arms that is inherent in the concept of a fair trial".[386]

Therefore, the authorities were under the obligation to ensure the appointment of a replacement lawyer. However, in the cases where the applicant's own conduct is to be blamed for the withdrawal of the appointed legal aid lawyer, as it was for example in

[384] *A.B. v Slovakia*, Application no. 41784/98, judgment of 4 March 2003.
[385] *Bertuzzi v. France*, Application no. 36378/97, judgment of 13 February 2003.
[386] *Ibid* para 31.

Renda Martins v. Portugal,[387] the ECtHR will be satisfied with the State's execution of the Article 6(1) guarantee. In the above mentioned case, the applicant had gone through seven lawyers and it was his lack of cooperation that based the decision not to provide any further replacement and to suspend the proceedings, thus the applicant was not deprived of the possibility to benefit from legal aid as such. Such measures were not found in violation of the Article 6(1) obligation.

Also the conduct of a lawyer assigned to deliver legal aid is important in ensuring an adequate and effective legal assistance. However, it has to be noted that the ECtHR repeatedly held in its judgments that given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the lawyer and client and cannot, except in special circumstances, incur the State's liability under the ECHR.[388] Nevertheless, when drawbacks in legal representation are brought to the attention of the competent authorities, the State should act. It is important to retain that it will depend on the circumstances of each case whether the competent authorities should take action[389] and whether, taking the proceedings as a whole, the legal representation may be regarded as "practical and effective".[390] The mere appointment of a legal aid lawyer to represent a party to the proceedings does not ensure the adequacy and effectiveness of the assistance.[391] The obligation of the States does not stop automatically there, the obligation to ensure the right to access to court needs to be upheld in practice.

[387] *Renda Martins v. Portugal*, *supra note* 358.
[388] *Artico v. Italy*, Series A no. 37, judgment of 30 May 1980, para 36; *Daud v. Portugal,* 11/1997/795/997, judgment of 21 April 1998, para 38; *Tuziński v. Poland* (dec), no. 40140/98, 30 March 1999; *Rutkowski v. Poland* Application no. 45995/99, decision of of 19 October 2000.
[389] *Daud v. Portugal*, *supra note* 388 paras 40-42.
[390] *Goddi v. Italy*, Series A no. 76, judgment of 9 April 1984, para 27; *Rutkowski v. Poland*, *supra note* 388.
[391] *Imbrioscia v. Switzerland*, Series A no. 275, judgment of 24 November 1993, para 38.

Thus, for example in *Sialkowska v. Poland*[392] the ECtHR did not consider that the State has been discharged of its obligation under Article 6(1) of the Convention to ensure effective access to a court only by acceding to the applicant's request for legal aid.[393] The State's obligation under Article 6(1) did not end when the applicant's request for legal aid for the purposes of legal assistance in connection with the cassation proceedings had been granted by the appellate court. In the present case the applicant's legal aid lawyer had refused to prepare a cassation appeal on her behalf. According to the Polish law of civil procedure, lodging of a cassation appeal required mandatory assistance of an advocate or legal advisor. The appointed lawyer and the applicant met some three days before the expiry of time-limit for the appealing. [394]

The Government claimed before the ECtHR, recalling the *Artico v. Italy* judgment, that "a State could not be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes",[395] especially in the light of the principle of independence of the legal profession from the State.

In this context the ECtHR considered that indeed in *Sialkowska* that

> "… It is not the role of the State to oblige a lawyer, whether appointed under legal scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of an independent legal profession in a democratic society which is founded on trust between lawyers and their clients."[396]

[392] *Sialkowska v. Poland*, Application no. 8932/05, judgment of 22 March 2007.
[393] *Ibid* paras. 99-100.
[394] *Sialkowska v. Poland*, *supra note* 392 paras. 110-114.
[395] *Artico v. Italy*, *supra note* 388, para 36.
[396] *Sialkowska v. Poland*, *supra note* 392 para. 112.

However, it went on by emphasizing that "it is the responsibility of the State to ensure a requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other".[397]

The refusal of a legal aid lawyer should meet certain quality requirements. In respect of the present case, the ECtHR observed that the applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation appeal. When the applicant and the lawyer met, the time-limit for lodging of a cassation appeal was to expire shortly. Thus, the ECtHR was of the view that in the circumstances of the case, it would have been impossible for the applicant to find a new lawyer under the legal aid scheme. The principle of effectiveness of legal aid dictates that the beneficiary of legal aid should have a reasonable possibility of requesting for another legal aid lawyer to replace the first one, within a reasonable timeframe taking into consideration the special characteristics of the cassation procedure. Here, the applicant was put in a position in which her efforts to have access to a court secured in a "concrete and effective manner" by way of legal representation appointed under the legal aid system failed.[398]

In short any legal aid lawyer's refusal to act should be notified to the applicant within a time-frame giving a realistic opportunity of continuing and arguing the case. In addition to that, while a legal aid lawyer should not be obliged to lodge claims or legal remedies that are unmeritorious, there should be some viable guarantees against arbitrariness. For example, where a legal aid lawyer refuses to bring proceedings to the Court of Cassation in the belief that there was little prospect of success, such a decision

[397] *Sialkowska v. Poland, supra note* 392 para. 112.
[398] *Ibid* paras. 114-116.

should have been put in writing for its reasons to be ascertained, so that the lawyer's action leave the applicant in no doubt or uncertainty as to the legal grounds relied on.[399]

The main idea is that the requirement of effectiveness is of a crucial importance when assessing the legal aid lawyers' conduct, as the procedural requirements has to be respected in such a way that the client's interests are always well represented.

1.5 Guarantees against arbitrariness related to denial of legal aid

The ECtHR held that, although a selection procedure for cases may be established in order to determine whether legal aid may be granted or denied, that procedure must operate in a non-arbitrary manner.[400] The authorities must ensure that access to a court is secured in a "concrete and effective manner" by providing substantial guarantees against arbitrariness.[401] When an individual is denied legal aid, the refusal has to be objective and grounded. These are the basic guarantees that need to be in place in order to avoid arbitrariness.

In *Tabor v. Poland*[402] the applicant requested the domestic court to grant legal aid for the purpose of instituting cassation proceedings against his employer for unlawful termination of the labour contract. The Polish law required that the party to civil proceedings be assisted by a counsel in the preparation of the cassation appeal and that an appeal drawn up by the party, without legal representation, will be dismissed. The court denied the applicant's request for legal aid without giving written reasons for its decision.

[399] *Staroszczyk v. Poland*, Application no. 59519/00, judgment of 22 March 2007.
[400] *Del Sol v. France*, *supra note* 345 para 26; *Puscasu v. Germany*, (dec.), Applciation no 45793/07, 29 septembre 2009; *Pedro Ramos v. Switzerland*, judgment of 14 October 2010, para. 49.
[401] *Gnahore v. France*, *supra note* 358 para 38; *Staroszczyk v. Poland*, *supra note* 399 paras 128-129, 138.
[402] *Tabor v. Poland*, *supra note* 356.

The ECtHR took into consideration that under the applicable provisions of the Polish procedural law the court was not obliged to give any reasons for such a refusal, but noted:

> "However, in the absence of written grounds for this decision, it is difficult for the Court to understand the reasons for which the Regional Court considered that the grant of legal aid was not justified in the circumstances of the case. It further notes that a decision on legal aid is, under the applicable domestic law, dependent on the financial situation of the party and its ability to pay the costs of litigation. It observes in this connection that the case concerned the applicant's compensation claim against his former employer for the unlawful termination of his employment. The applicant also claimed reinstatement in his employment. The applicant argued before the Regional Court in support of his requests that he had been unemployed from November 1997 until May 1999. The Court considers that the principle of fairness required the court to give reasons for rejecting the applicant's request."[403]

Moreover, the ECtHR was of the view that the manner in which the national court handled the applicant's request for legal aid was incompatible with the requirement of diligence and accordingly, found a breach of Article 6(1) of the Convention.

ECtHR did not depart from this rationale in a subsequent case with similar facts also originating from Poland. In *Miroslaw Orzechowski* the decision of the national court according to which the applicant's request to appoint a legal-aid lawyer was denied did not contain reasons and the court refused to prepare the written reasons for it. In the light of the present circumstances ECtHR found "that the denial of legal aid to the applicant in the cassation appeal proceedings, which made it impossible for him to lodge a cassation appeal with the Supreme Court, infringed the very essence of the applicant's right of access to a court."[404]

[403] *Tabor v. Poland*, *supra note* 356.para. 45.
[404] *Miroslaw Orzechowski v. Poland,* Application no. 13526/07, judgment of 13 January 2009, para. 22.

Another incompatible refusal of a request for civil legal aid with Article 6 (1) was found in *Aerts v. Belgium*[405]. Here, the applicant, a prison detainee, by a decision of the Medical Health Board had to be transferred to a specific social protection centre. However, due to a lack of places at the centre, he continued to be detained in prison. As a result, the applicant brought a civil action against the competent authorities for failing to place him in the designated centre. Eventually, he applied to the Legal Aid Board of the Court of Cassation as legal representation before the Cassation Court, according to the Belgian Law, was mandatory. The Legal Aid Board accepted that Mr. Aerts lacked sufficient means to pay for a lawyer but rejected his application for legal aid as his appeal did not appear to be well-founded. The ECtHR held that:

> "… 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. 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".[406]

There has accordingly been a breach of Article 6 (1).

These cases clearly indicate that a State has the obligation to ensure certain guarantees with the purpose to exclude arbitrariness when legal aid is denied, namely any denial should be reasonably and objectively justified, based on legal grounds, the decision should be made by an appropriate body.

At the same time, denial of legal aid may be acceptable if a claim is not sufficiently well grounded, does not have prospects of success or is "frivolous or vexatious",[407] but only if the decision is not arbitrary.[408] In *Nicholas v. Cyprus*[409], the

[405] *Aerts v. Belgium*, *supra note* 356.
[406] *Ibid* para 60.
[407] *X. v. United Kingdom*, *supra note* 367.

ECtHR relied on Commission's case-law that refusal of legal aid was not a denial of access to a court where the proceedings had no prospects of success and the costs of funding was disproportionate to any likely damages. It also took into consideration that the applicant had had *pro bono* assistance for some time and he had not tried to find similar assistance later on. In *Thaw v. United Kingdom*[410], the Commission found the applicant's complaint manifestly ill-founded. Here, legal aid was refused on the basis that the applicant had shown no grounds for being a party to the proceedings and that his claim had very little prospect of success. The applicant has made no allegation, and the Commission found no basis for finding that the decision was arbitrary. Also in *Jones v. United Kingdom*[411] the ECtHR found the applicant's complaint about refusal of legal aid manifestly ill-founded, as there was no indication that he could claim any right under domestic law concerning the type of memorial stone to be placed on a grave owned and managed by a burial authority. The applicant was denied permission by the burial authority to place a memorial stone with a picture of his daughter on her grave. He thought to challenge this decision, but his application was dismissed in domestic courts for lack of reasonable grounds. Also the motive of litigation and that of legal aid request may be a factor that can be taken into consideration when refusing legal aid. In *W. v. Federal Republic of Germany*[412] the applicant requested legal aid to terminate a marriage that was concluded in order for the foreign partner to receive residence permit and she

[408] *Thaw v. United Kingdom*, Application No. 27435/95, Commission decision of 26 June 1996 (partly inadmissible), para. 1.
[409] *Nicholas v. Cyprus*, Application No. 37371/97, Admissibility decision of 14 March 2000 (inadmissible).
[410] *Thaw v. United Kingdom*, *supra note* 408.
[411] *Jones v. United Kingdom*, Application No. 42639/04, Admissibility decision of 13 September 2005 (inadmissible).
[412] *W. v. Federal Republic of Germany*, 11564/85, Commission Decision of 4 December 1985, 45 D.R. 291 (inadmissible).

had divorced before in similar circumstances. In these circumstances the Commission found that that refusal of legal aid was acceptable even though the applicant had prospects of success in suing for divorce.

1.6 Unavailability of legal aid in non-criminal matters

It has to be underlined that in general, the ECtHR does not regard the unavailability of legal aid *per se* as a violation of Article 6(1) of the Convention, especially in the light of the ECtHR's already repeatedly endorsed interpretation according to which there is no general right to civil legal aid under Article 6(1). It nevertheless may indicate the necessity to create a legal aid scheme in non-criminal matters. For instance, in *Faulkner v. UK*[413] the Strasbourg Court encouraged the establishment of a formal civil legal aid scheme in Guernsey in the light of a total absence of such a system in the law and practice. As a result of this case the government reached a friendly settlement with the applicant and undertook the obligation to draft necessary legislation and introduce a civil legal aid scheme which will enable Guernsey to comply with the provisions of the ECHR and bring the scheme into force in 2000.

Otherwise, when dealing with the cases involving the unavailability of the civil legal aid the ECtHR will look at whether the effect of the unavailability of legal aid has not been arbitrary. This is a clear indication that blanket exclusions will not be accepted.

In *Andronicou and Constantinou v. Cyprus*[414], the ECtHR rejected the applicants claim that Article 6 (1) of the Convention requires states to establish a national system of legal aid in civil matters. The applicants' son and daughter had been killed by police

[413] *Faulkner v. UK,* Application No. 30308/96, judgment of 30 November 1999.
[414] *Andronicou and Costantinou v. Cyprus*, Application no. 25052/94, 1997-VI, judgment of 9 October 1997.

officers during an attempt to terminate an armed domestic hostage-taking crisis. Consequently, the families of the victims sued the public authorities for negligence. There was no civil legal aid scheme available in Cyprus. However, they were offered by the government an *ex gratia* offer, lasting only for several weeks, to fund the applicants action. They refused the offer considering it as not being in compliance with the government's positive obligation under Article 6 (1) of the Convention. In this respect, the ECtHR held:

> "… whilst Article 6 (1) of the Convention guarantees to the litigants an effective right of access to the courts for the determination of their 'civil rights and obligations', it leaves to the state a free choice of the means to be used towards this end. The institution of legal-aid scheme constitutes one of the means but there others. It is not to the Court's function to indicate, let alone stipulate, 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 (1) (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, pp. 14-15, para 26)."[415]

Thus, governments may satisfy their obligations under Article 6(1) of the ECHR through less formal arrangements, legal aid not being an exclusive solution. At the same time, the ECtHR will closely scrutinize if those arrangements lead to an effective exercise of the right of access to courts. In this case Cyprus was found to satisfy its obligations, because the government made an offer to fund the applicants' action, which seemed to be a reasonable arrangement in the circumstances of the present case.

In *McVicar v. United Kingdom*[416] the unavailability of legal aid in defamation cases in UK[417] was also not considered by the ECtHR as a violation of Article 6(1) after

[415] *Andronicou and Costantinou v. Cyprus, supra note* 414 para. 199.
[416] *McVicar v.United Kingdom*, Application no. 46311/99, judgment of 7 May 2002.
[417] Proceedings wholly or partly related to defamation were excluded from the scope of the civil legal aid scheme under the UK Legal Aid Act of 1998.

assessing the circumstances of the case. The applicant was a journalist who had written an article about a well known athlete suggesting that the last one had taken prohibited performance-enhancing drugs. He was sued for defamation. Legal aid in England was not available to parties in defamation actions and consequently the applicant had to represent himself during the most of the proceedings. He lost the case.[418] Before the ECtHR the applicant complained *inter alia* that the unavailability of legal aid impaired his right to a fair trial guaranteed by Article 6 (1). The ECtHR held:

> ". … Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to a court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer."[419]

The ECtHR went further by determining that the applicant was a well-educated and experienced journalist,[420] the law on defamation was not sufficiently complex to require a person in the applicant's position to have legal assistance,[421] in addition, he was represented until the commencement of trial by an experienced lawyer,[422] his "emotional involvement was not incompatible with the degree of objectivity required by advocacy in court".[423] Therefore, it concluded, that there had been no violation of the applicant's fair trial rights as guaranteed by Article 6(1).[424] This indicates that the ECtHR will take into account the personal background of the applicant (education, profession) and is likely to

[418] For detailed facts of the case *see McVicar v.United Kingdom*, paras. 8-22.
[419] *Ibid* para. 48.
[420] *Ibid* para. 53.
[421] *Ibid* para. 55.
[422] *Ibid* para. 56.
[423] *Ibid* para. 61.
[424] *Ibid* para. 62.

accept that legal aid is not needed, where legal issue involved in the dispute is not so complex for the applicant and he may present his defence effectively.

In *Munro v. United Kingdom*[425] there was also no violation of Article 6(1) found in the light of the lack of legal representation in defamation proceedings under the Legal Aid Act 1974. The Commission held that the unavailability of legal aid in defamation proceedings against the former employer did not limited the applicant's right to access to court because by its nature, a claim of defamation is such that it may easily be open to abuse and the defamation proceedings are inherently risky and it is extremely difficult accurately to predict their outcome. Thus they do not necessarily trigger the *Airey* rule. In this case the consequences were not as serious for the litigants as in *Airey* that involved judicial separation and the applicant had a hearing challenging his dismissal in an Industrial Tribunal, during which the same substantive issues were resolved as would have been in defamation proceedings, although it did not specifically consider the allegations of defamation.

However, in *Stewart-Brady v. United Kingdom*[426] the Commission acknowledged that the lack of legal aid in defamation proceedings where the applicant was mentally disabled could constitute a potential problem of access to court. But the denial of legal aid in this case was not found to be arbitrary, because the applicant's action had no reasonable prospect of success, he was given legal aid to seek legal advice on other possible proceedings in relation to the same publication, and the costs of the action would be disproportionate to the damages to be awarded.

[425] *Munro v. UK*, Application No. 10594/83, Admissibility decision of July 14, 1987 (inadmissible).
[426] *Stewart-Brady v. United Kingdom*, Application Nos. 27436/95 and 28406/95, Admissibility decision of July 2, 1997 (inadmissible).

The ECtHR adopted a different approach when assessing the impact of the lack of legal aid in an "exceptionally demanding"[427] defamation case. In *Steel and Morris v. United Kingdom*[428] the applicants were defendants in defamation proceedings brought by McDonald's concerning leaflets they had distributed. The applicants were a part-time bar-worker and an unemployed postman that were refused legal aid to defend the claim on the basis that legal aid was not available for defamation proceedings in UK.[429] Before the ECtHR they complained that that the denial of legal aid deprived them of a fair hearing in violation of Article 6(1) of the ECHR. The applicants asserted that a blanket ban on legal aid requires a close scrutiny, since it prevents the competent authorities from responding to real cases of injustice brought about by lack of legal representation. The ECtHR took into consideration that in the preset case there were potential financial consequences of a significant nature compared to the applicants' personal situations, the legal issues were rather complex, and there were a large number of interlocutory actions, court hearings (it was the longest trial, either civil or criminal, in English legal history), documentary evidence, pages of written judgments, and witnesses, including experts' evidence.[430] It further considered that "neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel",[431] especially given "disparity between the levels of legal assistance enjoyed by the applicants and

[427] Before the trial here were 28 pre-trial hearings; the trial lasted 313 days, the appeal 23 days; 130 witnesses were heard; there were 40,000 pages of trial documentation and 20,000 pages of transcripts. The trial judgment covered 762 pages and the Court of Appeal's judgment was 301 pages.
[428] *Steel and Morris v. UK*, *supra note* 208.
[429] For detailed facts of the case *see Steel and Morris v. UK*, paras. 8-36.
[430] *Ibid* paras. 64-66.
[431] *Ibid*, para. 69.

McDonald's".[432] Taking into consideration the above mentioned considerations the ECtHR unanimously found that "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"[433] and therefore found a violation of the guarantee of the right to a fair trial guaranteed by Article 6(1) of the Convention.

It is true that because of the special characteristics of the case it may be best not to make too much out of it. However it should be noted that the ECtHR found legal aid to be a requirement in cases where it had clearly not been required previously.

1.7 The right to an effective national remedy and the right to legal aid

Article 13 of the ECHR states that:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before the national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

Article 13 of the ECHR requires the provision of an effective relief at the national level for the violation of a right provided by the Convention. The essence of the Article 13 guarantee was highlighted in *Klass v. FRG*,[434] where the ECtHR held that:

> "...Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to has his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated."[435]

[432] *Steel and Morris v. UK*, *supra note* 208; McDonald's spent about £10 million on the case, while the applicants spent about £40, 000.
[433] *Ibid*, para. 72.
[434] *Klass v. FRG*, A 28 EHRR 214 (1979).
[435] *Ibid* para. 64.

As noted, Article 13 requires the possibility of an effective remedy, which must be effective "in practice as well as in law"[436]. In interpreting what constitutes an effective remedy the ECtHR referred to the institutional requirements, highlighting in *Leander v. Sweden*[437] that in principle "the authority referred to in Article 13 need not to be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective".[438] Following this rationale in *Chahal v. United Kingdom*,[439] an Article 3 case concerning an alleged terrorist's deportation on grounds of national security, the ECtHR found the national remedy as not satisfying the effectiveness requirement of Article 13, because the advisory panel which reviewed the applicant's deportation order adopted a non-binding decision and it suffered from a lack of 'sufficient procedural safeguards', *inter alia*, the applicant had no right to legal representation during the proceedings.[440]

Though the remedy in *Chahal* was found to be ineffective not solely on the basis of the fact that the applicant did not have recourse to legal representation, this is, however, an indication that the ECtHR is ready to find a national recourse as ineffective if procedural guarantees, including legal representation, are not in place. This allows concluding that states must equip national remedies with procedural guarantees, including provision of state-funded legal representation where necessary.

[436] *Kudla v. Poland*, Application no. 30210/96, judgment of 26 October 2000, para. 157.
[437] *Leander v. Sweden*, Application no. 9248/81, judgment 26 March 1987
[438] *Ibid* para. 77.
[439] *Chahal v. United Kingdom*, Application no. 22414/93, judgment of 15 November 1996.
[440] *Ibid* para. 154.

It has to be noted that ECtHR has accepted limitations on the type of remedies available with respect to Article 8 and 10 cases, but standards are much higher in Article 2 and 3 cases.

Conclusion

It is clear that under Article 6 (1) of the ECHR states are not under a positive obligation to establish general schemes of legal aid for civil cases and are not required to grant legal aid in all civil cases.[441] However, ECtHR held that the right to access the courts includes the right to state-funded legal assistance in non-criminal proceedings of indigent applicants when such assistance proved indispensable for the right to fair hearing and access to courts.[442] States have a free choice of means and tools to be used in guaranteeing the right of access to courts. Legal aid constitutes one of those tools. ECtHR developed a quite wide reaching approach by holding that in certain civil cases legal aid may be required under Article 6(1) for parties, both claimants and defendants, in the light of the rationale "that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1"[443] In this regard states are "compelled to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory by the domestic law or by reason of the complexity of the procedure or of the case".[444] Under the ECtHR's interpretation these principles have been applied to a wide range of proceedings including with respect to termination of employment, divorce, custody and

[441] *Airey v. Ireland, supra note* 84 para 26; *Del Sol v. France*, *supra note* 345 para. 20; *Essaadi v. France*, *supra note* 345 para 30.
[442] *Ibid* para. 26.
[443] *Ibid* para. 26.
[444] *Ibid.*

access to children, approval of private land sales, licensing of professionals and private business, expropriation of property and social security.[445] State-funded legal aid may be sought to protect only civil rights as provided and interpreted under Article 6(1), which exist in national law.

At the same time, the right to access to a court is not an absolute one and thus may be subject to restrictions, provided that they do not restrict the right in such a manner that the very essence of it is impaired. The restrictions need to pursue a legitimate aim and there should be a reasonable relationship of proportionality between the means and the aim to be achieved.[446] It means that an imposition of certain conditions on the grant of legal aid is possible. The criteria to be used for provision of free legal aid are left at the latitude of the governments. The ECtHR gives some directions in this context. For example, in providing legal aid the states may take account of financial situation of the applicant and/or the prospects of success of the proceedings, but also the complexity of the case both as to the law and procedure, the significance of what is at stake for the applicant, the emotive nature of the subject matter, and personal capacity.[447] Thus, the ECtHR held that denial of legal aid did not amount to a violation of Article 6(1) in cases of "frivolous or vexatious claims"[448], petty claims or claims where the costs of legal aid

[445] Johnsen, J.T., *Human Rights in the Development of Legal Aid in Europe,* Paper presented at the Legal Services Research Center's International Research Conference, Belfast, 19-21 April, 2006, p. 4-6.
[446] *See Edificaciones March Gallego S.A. v. Spain*, *supra note* 318, para 34; *Garcia Manibardo v. Spain*, *supra note* 319, para 36.
[447] *Airey v. Ireland, supra note* 84 para. 24; *Del Sol v. France, supra note* 345 para. 23; *X v. United Kingdom, supra note* 367 para. 16, *P., C. and S. v. United Kingdom, supra note* 370 para. 95; *McVicar v.United Kingdom, supra note* 416 paras. 53-62, etc.
[448] *X. v. United Kingdom, supra note* 367.

provision were disproportionate to damages to be awarded, claims that had no reasonable prospects of success or were manifestly ill-founded.[449]

The obligation to provide legal aid in non-criminal under Article 6(1) does not stop with the simple provision of such an aid. The formal appointment of a lawyer is not enough. It is clear from the relevant case-law that states are under a general obligation to secure that the system under which an individual is entitled to obtain legal aid provides effective assistance in proceedings. This means that available legal aid should be adequate and effective.[450] To this end competent institutions are responsible to ensure *inter alia* an adequate and timely appointment of a lawyer,[451] rapid replacement of the legal aid lawyer in case of necessity,[452] and most importantly an effective conduct of the appointed legal aid lawyer.[453]

States have a wide discretion in putting in place a selection mechanism to determine whether legal aid may be granted or denied. The ECtHR indicated in its case-law that such procedure must operate in a non-arbitrary manner.[454] This means that when an applicant is denied legal aid, the refusal has to be objective and grounded.[455] These are the minimum guarantees that should be present and observed.

Even though there are certain criteria and indicators that could be depicted from the ECtHR's jurisprudence regarding the scope and the content of the right to civil legal aid it is still not so broad, *inter alia* because the ECtHR is limited in reviewing and

[449] *Nicholas v. Cyprus*, *supra note* 409; *Thaw v. United Kingdom*, *supra note* 408.
[450] *Sialkowska v. Poland*, *supra note* 392, paras. 99-100 and 107.
[451] *A. B. v. Slovakia*, *supra note* 384.
[452] *Bertuzzi v. France*, *supra note* 385.
[453] *Sialkowska v. Poland*, *supra note* 392.
[454] *Del Sol v. France*, *supra note* 345 para 26; *Puscasu v. Germany*, *supra note* 400; *Pedro Ramos v. Switzerland*, *supra note* 400.
[455] *Tabor v. Poland*, *supra note* 356 para. 45.

interpreting only the cases brought before it, but the case-law clearly shows that abrupt changes are possible.

2. United Nations specialized treaty bodies

2.1 Human Rights Committee

Notwithstanding the fact that there is no explicit provision of the right to legal aid in non-criminal matters in the ICCPR, the Human Rights Committee (HRC), which is the treaty's principal interpretive body, has found the availability of civil legal assistance to be relevant to countries' compliance with the treaty. According to the Optional Protocol to the ICCPR[456] the HRC has the power to receive and adjudicate communications from the individuals who allege that their rights have been violated by the one of the States, which has ratified the Optional Protocol to the ICCPR. In addition, it reviews States reports as to their performance under the ICCPR and adopts general comments interpreting the provisions of the Covenant. Namely, via these mechanisms the HRC found that the silent provisions of the ICCPR might actually in some circumstances demand the provision of civil legal aid.

2.1.1 Jurisprudence

Individuals have frequently complained under the Optional Protocol about alleged infringements of the right to a fair trial guaranteed by Article 14 of the ICCPR. HRC's decisions bear an advisory character since states have not expressly recognized its views as legally binding, however, they do represent authoritative interpretations of the

[456] Optional Protocol to the ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

Covenant. They carry a strong moral condemnation and are often followed or made mandatory by means of domestic law.[457]

The HRC plays an important role in interpreting the right to a fair trial and there is jurisprudence which was developed on elaboration and interpretation of this right. However, there are no cases in which the HRC found that the issue of the right to legal assistance in civil cases context was properly raised by the complainant.[458] Mostly the HRC had dealt extensively with complaints concerning the right to legal assistance in criminal cases. However, the rationale behind these cases in many instances may be equally applicable to the issue of civil legal aid. These cases often raised issues concerning the general procedural principle of equality of arms. In this context the HRC had reiterated many times that the principle of equality of arms represents an important element of a fair trial[459] and that it will be violated "when the imbalance of access and power is so great that it threatens the fairness of the proceedings."[460] In *Morael v. France*[461] and in *Munoz Hermoza v. Peru*[462] the HRC has found that the principle of equality of arms also extends to civil cases. That is why jurisprudential developments on the principle of equality of arms are also relevant to the civil context.

[457] Wilson, R.J., Principles, Sources and Remedies for Violations of the Right to Assigned Legal Assistance in International Human Rights Law, Paper prepared for the National Legal Aid and Defender Association, February 5, 2002, p. 4.
[458] Davis, M. F., In Interest of Justice: Human Rights and the Counsel in Civil Cases, Vol. 25, Northeastern University School of Law Research Paper No. 14-2007, March 2007, p. 166.
[459] Nowak, M., *supra note* 223 p. 246-47.
[460] Davis, M. F., *supra note* 458.
[461] *Morael v. France*, *supra note* 207.
[462] *Munoz Hermoza v. Peru*, *supra note* 207 (equality of arms in administrative proceedings on dismissal from armed forces).

In *Olo Bahamonde v. Equatorial Guinea*[463] the HRC dealt with the principle of equality of arms, though the case concerned the availability of legal assistance in criminal matters it tangentially touched the issue of legal aid in non-criminal proceedings. In this case the complainant claimed that he was discriminated by the government on the basis of his clan membership. He also claimed that he was arbitrarily arrested, detained and prevented from pursuing available legal remedies. In its communication the HRC noted:

> "that the notion of equality before the courts and tribunals encompasses … access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of Article 14, paragraph 1."[464]

In *Allan Henry v. Trinidad and Tobago*[465] the HRC emphasized that:

> "legal assistance must be provided free of charge where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy, provided by the national law, and where the interest of justice so requires".[466]

The Committee went and held that:

> "although article 14, paragraph 1, does not expressly require States parties to provide legal aid outside the context of the criminal trial, it does create an obligation for States to ensure to all persons equal access to courts and tribunals. The Committee considers that in the specific circumstances of the author's case, taking into account that he was in detention on death row, that he had no possibility to present a constitutional motion in person, and that the subject of the constitutional motion was the constitutionality of his execution, that is, directly affected his right to life, the State party should have taken measures to allow the author access to court, for instance through the provision of legal aid. The State party's failure to do so, was therefore in violation of article 14, paragraph 1".[467]

[463] *Ola Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991 (1993).
[464] *Ibid* at 9.4.
[465] *Allan Henry v. Trinidad and Tobago*, Communication No 752/1997, UN Doc CCPR/C/64/D/752/1997 (10 February 1999).
[466] *Ibid* para. 7.5
[467] *Ibid* para. 7.6.

The unavailability of legal aid in this case was found in violation of the right to fair trial of Article 14 (1) and the right to an effective remedy of Article 2 (3) of the ICCPR.

Although the constitutional review does not fall in the realm of civil proceedings the finding in this case gives the possibility to argue that when at least fundamental human rights are at stake, legal aid could prove to be an intrinsic tool in ensuring the right to fair trial and to an effective remedy not only in criminal cases.

In *Currie v. Jamaica*[468] the complainant was awaiting execution. He could not challenge the sentence as he lacked legal assistance. The HRC noted that "the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases,"[469] but only in those criminal cases where the "interest of justice so require."[470] And even though the present language reiterates one more time the lack of an express right to legal assistance in non-criminal matters however, a careful reflection shows that there is a possibility to extend legal aid to non-criminal proceedings as well. This is a valid argument especially in the light of the fact that according to HRC's general comments, which are discussed further on, Article 14 of the ICCPR clearly applies not only to procedures for the determination of criminal charges, but also to procedures for the determination of civil rights and obligations, and states are encouraged to provide free legal aid in other cases than the criminal ones.

This also is possible in the light of already established rationale in the HRC's case-law triggering equality of arms and 'in the interest of justice' principle. These

[468] *Currie v. Jamaica*, Communication No. 377/1989. U.N. Doc. CCPR/C/50/D/377/1989 (1994).
[469] *Ibid* para. 13.2.
[470] *Ibid*.

principles may be considered as crucial components in construing the right to legal aid in non-criminal proceedings and then determining its scope and content, especially in the light of the existence of similar interpretation used by the Strasbourg Court in its case-law on Article 6(1) of the ECHR. These two rationales aim mainly at ensuring access to courts and remedies modelled by the domestic legislation for the resolution of civil disputes, thus an ancillary right to legal aid becomes a fundamental requirement as it represents one of the most important elements in enforcement of the rights guaranteed by the ICCPR.

2.1.2 General comments

It has to be stated that notwithstanding the fact that the HRC did not have the direct opportunity to deal with the issue of legal aid in civil cases via the mechanism of individual complaint, it did so in the issuance of general comments. In 1984, the Committee issued General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), where it reiterated that Article 14 applies to civil as well as criminal matters. It also noted that:

> "the reports of State Parties fail to recognize that Article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit of law."[471]

[471] United Nations, Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, Adopted at the Twenty-first Session of the Human Rights Committee, on 13 April 1984 at 2.

In this context, the State Parties were asked to provide all relevant information and details on what 'criminal charge' and 'right and obligations in a suit at law' means in their legal systems.[472]

Comment No. 32 on article 14 of the International Covenant on Civil and Political Rights, Right to equality before courts and tribunals and to a fair trial [473] came to replace Comment No. 13. In the present Comment the HRC noted the importance of the right to equality before the courts and tribunals and to a fair trial embodied in Article 14 of the ICCPR and stated that it represents "a key element of human rights protection and serves as a procedural means to safeguard the rule of law".[474] The Comment clarified that Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. It noted that the concept "suit of law"

> "encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, it may cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question".

[472] Human Rights Committee, General Comment No. 13 at 2.
[473] United Nations, Human Rights Committee, and General Comment No. 32 (81) on article 14 of the International Covenant on Civil and Political Rights, Right to equality before courts and tribunals and to a fair trial (90th sess., 2007).
[474] *Ibid* at 2.

In referring to the right to legal assistance the HRC in the new Comment took into consideration the issues regarding legal aid in non-criminal matters already considered by it via individual communications mechanism[475] and noted that:

> ” States are encouraged to provide to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant. ”.[476]

Though the HRC brought as an example constitutional proceedings, mainly relying on its case-law, this reference still allows concluding that the governments are encouraged to create a right to legal aid for proceedings that go beyond the criminal realm, especially in the light of the fact that Article 14(1) of the Covenant encompasses the right of access to the courts in cases of determination rights and obligations in a suit at law as explained above. In this context, it appears that what is at stake for the person involved in the proceedings and the lack of sufficient means to acquire qualified assistance are the guiding elements that should signal the need for a right to legal aid in non-criminal cases.

At the same time civil legal aid, where available, should be provided on equal basis between men and women. According to General Comment No. 28: Equality of rights between men and women (Article 3):

[475] *See Currie v. Jamaica*, *supra note* 468, para. 13.4; *Shaw v. Jamaica*, Communication No. 704/1996, para. 7.6; *Taylor v. Jamaica*, Communication No. 707/1996, para. 8.2; *Henry v. Trinidad and Tobago*, Communication No. 752/1997, para. 7.6; *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, para. 7.10.

[476] HRC General Comment No. 32(81) on article 14 of the ICCPR at 10.

> "... states parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, *Ato del Avellanal v. Peru*, Views of October 28, 1988) ... and whether measures are taken to ensure women equal access to legal aid, in particular in family matters." [477]

2.1.2 Monitoring compliance with the ICCPR

The HRC may influence and keep an eye on the State parties through the mechanism of the periodic reports, which the last ones have to submit in relation to their compliance with the ICCPR provisions. States are often asked to address the legal aid topic in their reports. Davis[478] makes a good compilation of the relevant examples of such reports, for example Canada was asked to report on the state of legal aid. In its report the State party specifically mentioned the 1999 Supreme Court case *New Brunswick (Minister of Health and Community Services) v. G.J.*, in which the Supreme Court of Justice held that the Canadian Charter right to life, liberty and security applies outside of the criminal law context and where

> "government action triggers a hearing in which either the physical or psychological integrity of the individual are at risk then the government is under an obligation to do whatever is require to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the party, the government may be required to provide an indigent party with state-funded counsel."[479]

Madagascar also affirmatively reported that it guarantees at the constitutional level the right to legal assistance in civil cases if the plaintiff or defendant cannot afford

[477] General Comment No. 28: Equality of rights between men and women (article 3), CCPR/C/21/Rev.1/Add.10, 03/29/2000 at 18.
[478] Davis, M. F., *supra note* 447 p. 162-166.
[479] United Nations, ICCPR, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fifth Periodic Report: Canada, 95 (2004), CCPR/C/CAN/2004/5, at 95.

it. [480] Germany in its report submitted in 2000 also reiterated its commitment to providing universal legal aid.[481]Spain also reported the availability of legal aid in criminal and civil matters depending on the defendant's need.[482] The HRC positively noted the progress made by Ireland[483] and Italy[484] in guaranteeing civil legal aid. On contrary, reviewing the 2007 periodic report of the Czech Republic, the HRC expressed its concern over the housing issues that Roma are facing, including forced evictions and substandard quality. Czech Republic was urged "to provide legal aid for victims of discrimination" as part of the implementation of fair trial guarantees provided in Article14 and as a matter of equality principle embodied in the ICCPR.[485] Following the same rationale, Chile was also criticized in relation to the restrictions made on trade unions and workers activism in the employment sphere being urged to "make legal aid available to workers to enable their complaints to be successfully heard."[486] Also, while responding to Zimbabwe's report in 1998, the HRC welcomed the new legislative amendment according to which a widow could inherit her diseased husband's estate. However, it noted that "the State should take concrete measures in providing legal assistance to their benefit".[487]

[480] United Nations, ICCPR, Considerations of Reports Submitted by the State Parties under Article 40 of the Covenant, Third Periodic Report: Madagascar, 22-23 (2005), CCPR/C/MDG/2005/3.
[481] United Nations, ICCPR, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fifth Periodic Report: Germany, 190 (2002), CCPR/C/DEU/2002/5.
[482][482] United Nations Report of the Human Rights Comm., Concluding Observations, CCPR, Spain, 494, U.N. Doc. A/34/40 (1979).
[483] U.N. Report of the Human Rights Comm., Concluding Observations, CCPR, Ireland, 430, U.N. Doc. A/55/40 (2000).
[484] U.N. Report of the Human Rights Comm., Concluding observations, Italy 271-90, CCPR/79/Add. 37; A/49/40 (1994).
[485] UN Report of the Human Rights Comm., Concluding Observations, Czech Republic, CCPR/C?CZE/CO/2 (2008), at 16.
[486] UN Report of the Human Rights Comm., Concluding Observations, Chile, CCPR/C?CHL/CO/5 (2007), at 14.
[487] Davis, *supra note* 458 p. 165.

Though states' reports and concluding observations show that the HRC often addresses directly the topic of the right to legal aid in civil cases they rarely include broad criteria for the determination of the scope and the content of such a right. Nevertheless, this mechanism represents an important tool in reminding the State parties to the ICCPR that civil legal aid is needed in certain proceedings in order to guarantee fairness in civil context and enforce the rights provided in ICCPR. Moreover, the provision of legal aid appears to be quite important in the context of certain categories of people such as poor or otherwise disadvantaged, victims of discrimination, women, workers, etc.

2.2 Committee on Economic, Social and Cultural Rights

2.2.1 General Comments

The Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the ICESCR by its States parties. As highlighted in the previous chapter the instrument is completely silent with regard to the right to legal aid in non-criminal matters. The CESCR, being responsible for the Covenant's interpretation, in General Comment No. 7 on the right to adequate housing (Article 11(1) of the Covenant), having considered a significant number of reports of forced evictions, including instances in which obligations of States parties were being violated, provided clarification as to the implications of such practices in terms of the obligations contained in the ICESCR. It concluded *inter alia* that:

> "Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be

> applied in relation to forced evictions include … where possible, of legal aid to persons who are in need of it to seek redress from the courts."[488]

The clarification is clearly indicating for a right to legal aid in forced evictions proceedings for those in need. This allows concluding that in proceedings which involve basic needs, such as those guaranteed by the ICESCR, the governments should take into consideration the necessity in guaranteeing access to legal aid.

2.2.2 Monitoring compliance with the ICESCR

At the same time States parties are obliged to submit regular reports to the CESCR on the implementation of rights provided in the Covenant. The Committee after examining the reports addresses its concerns and recommendations in concluding observations. In several such concluding observations, the CESCR welcomed the introduction of civil legal aid, but at the same time expressly called upon the State parties to ensure an effective and equal access to the right to legal aid in non-criminal matters in the light of the rationale that access to civil legal aid is a tool in ensuring the exercise of the rights provided in ICESCR and in eradicating and reducing poverty.

For example, the CESCR welcomed the adoption of Law on State-Guaranteed Legal Aid by the Lithuanian government in 2000, which entitled disadvantaged persons to free legal aid in civil cases.[489] And it criticized countries that restrict the right to legal aid in non-criminal matters. In 1998 the Committee criticized Canada for restricted access to legal aid civil matters for women.[490] It pointed out that legal aid for non-criminal matters should be made available at levels that ensure the right to an adequate

[488] UN Human Rights Committee, General Comment No. 7: The Right to Adequate Housing (Article 11.1): Forced Evictions: 20/05/97, 15, 16th Sess., U.N. Doc. E/1998/22, Annex. IV (1997), at 15.
[489] Concluding observations of the Committee on Economic, Social and Cultural Rights, Lithuania, E/C.12/1/Add.96, 7 June 2004, at 5.
[490] Concluding observations of the Committee on Economic, Social and Cultural Rights, Canada, E/C.12/1/Add.31, 10 December 1998, at 16.

standard of living.[491] It also urged the "federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status." To this end it recommended that the "enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims … are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups."[492] Furthermore it recommended that "a greater proportion of federal, provincial and territorial budgets be directed specifically to *inter alia* provision of legal aid to women for family matters".[493] In a subsequent review the CESCR again criticized Canada for inadequate availability of civil legal aid, particularly for economic, social and cultural rights and cuts in financial support to civil legal aid services in a number of jurisdictions, especially noting that drastic cuts in British Columbia raised particular concern. The CESCR expressly noted that this leads "to a situation where poor people, in particular poor single women, who are denied benefits and services to which they are entitled to under domestic law, cannot access domestic remedies." [494] The Committee recommended that "civil legal aid is provided to poor people in the provinces and territories, and that it be adequate with respect to coverage, eligibility and services provided."[495] Though the Committee did not elaborate on what adequate means in respect to legal aid coverage, eligibility and services provided, nevertheless, this could be depicted from the ICESCR interpretation and the

[491] Concluding observations of the Committee on Economic, Social and Cultural Rights, Canada, *supra note* 479 at 42.
[492] *Ibid* at 51.
[493] *Ibid* at 54.
[494] Concluding observations of the Committee on Economic, Social and Cultural Rights, Canada, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, 22 May 2006, at 11 (b) and 14.
[495] *Ibid* at 43.

recommendations noted in concluding observations. Accordingly, legal aid in terms of coverage should be provided in all cases involving economic, social and cultural rights, at a minimum in cases concerning such rights as enshrined in the ICESCR. In terms of eligibility, civil legal aid should be made available to poor or otherwise disadvantaged people, with no discrimination whatsoever. Unfortunately, in terms of the adequacy of the legal aid services it would be difficult to predict what precisely adequate would mean for the CESCR. However, taking into consideration the previous indicators, *i.e.* ensuring equal access to legal aid for enforcement of social, economic and cultural rights, one could conclude that State parties are the best actors in deciding on the nature of the services to be put in place.

UK was also criticized regarding the accessibility to civil legal aid. In 1997 the CESCR in its concluding observations highlighted several principal subjects of concern, one of which was limited access to free legal aid with respect to a number of economic and social rights.[496] It pointed out that a less restrictive policy on free legal aid for social and economic rights would facilitate access to available social and economic benefits.[497]

2.3 Committee on the Elimination of All Forms of Racial Discrimination

2.3.1 General Recommendations

The Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee) as the principal body which interprets the International Convention on the Elimination of All Forms of Racial Discrimination adopts general recommendations which, though non-binding have a great persuasive power. In this context, the CERD

[496] Concluding observations of the Committee on Economic, Social and Cultural Rights United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.19, 12 December 1997, at 9.
[497] *Ibid* at 22.

Committee issued General Recommendation No. 29, where it expressly recommended to the State parties in the context of administration of justice to: "Take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights".[498]In General Recommendation No. 31 on prevention of racial discrimination in the administration and function of the criminal justice system the CERD Committee acknowledged the importance of the possibility of the victims of racial discrimination to seek civil redress in the courts and *inter alia* to have access to legal aid. [499]

2.3.2 Monitoring compliance with ICERD

The CERD Committee also monitors the States' implementation of the respective Convention. The governments have to submit reports to the CERD Committee. In the framework of this process the Committee asks the States parties to take certain steps, which directly trigger the issue of civil legal aid. Thus, for example the Committee urged Republic of Korea to expand access to legal assistance in civil cases to victims of acts of racial discrimination as one aspect of increasing its compliance with the Convention. In this context, the Committee was concerned with the persons' of foreign origin access to recourse procedures, indicating that legal aid is the tool that will facilitate such access. [500] In its concluding observation issued as a response to Botswana's report the CERD Committee noted its concern in relation to "reported difficulties experienced by poor

[498] UN CERD General Recommendation No. 29: Article 1, paragraph 1 of the Convention (Descent), 11/01/2002.
[499] UN CERD General Recommendation No. 31 on prevention of racial discrimination in the administration and function of the criminal justice system, 2006.
[500] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Republic of Korea, 19, 07/04/99, U.N. Doc. CERD/C/304/Add.65 (1999), at 17.

people, many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts, due in particular to high fees and the absence of legal aid in most cases".[501] It also added that legal aid should be guaranteed "to persons belonging to the most disadvantaged groups, to ensure their full access to justice."[502] A similar recommendation was issued in relation to Madagascar. The CERD Committee urged the country to "make it easier for victims to gain access to justice, in particular through the effective application of a system of legal aid."[503] The USA was also criticized in relation to the "disproportionate impact that the lack of a generally recognized right to legal aid in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities" and recommended that the American government:

> "... allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs - such as housing, health care, or child custody - are at stake".[504]

This recommendation clearly indicates that legal aid should be provided to poor people or otherwise disadvantaged categories, which cannot access the justice system in proceedings where basic human needs are at stake.

2.4 CEDAW Committee

2.4.1 Monitoring compliance with CEDAW

The CEDAW Committee is the UN specialized body charged with monitoring State parties' compliance with the Convention on the Elimination of All Forms of

[501] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Botswana, U.N. Doc. CERD/C/BWA/CO/16 (2006), at 14.
[502] *Ibid*.
[503] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Madagascar, U.N. CERD/C?65?CO/4 (2004), at 19.
[504] Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, 22 CERD/C/USA/CO/6 (2008), at 22.

Discrimination against Women. Periodically each State party to the Convention has the obligation to report about how well it is measuring up to the standards provided by the mentioned instrument. In the context of this process, the CEDAW Committee had often brought up the issue of legal aid and indicated how important civil legal aid is in implementing equality between men and women and empowering women to enforce their rights. For example, Ecuador was expressly requested by the members of the Committee to provide whether legal advice was provided to women on their rights provided by the CEDAW and if women had access to legal aid and if such legal aid was free.[505] The Committee urged Cambodia in the context of ensuring equality in the employment field in both the public and private sectors "to create effective enforcement and monitoring mechanisms and to ensure that women have access to means of redress, including legal aid".[506]The CEDAW Committee has negatively reacted to cuts triggering legal aid systems. It expressed its concern about the possibility that Australia, at a time of fiscal constraint may operate disproportionate budget cuts in regard to programmes and policies benefiting women or aimed at overcoming discrimination, such as the provision of legal aid services.[507] Similarly, Canada was criticized for inadequate civil legal aid system. In 2008, the Committee recommended that the Canadian government ensure access to justice for all women, particularly vulnerable women, and expressed concern "at reports that financial support for civil legal aid has diminished and that access to it has become

[505] Concluding Observations CEDAW - Ecuador - adopted up to December 31, 2003, the Committee considered the initial report of Ecuador (CEDAW/C/5/Add.23) at its 72 , 73 and 78 meetings, on 14 and 19 March 1986 (CEDAW/C/SR.72, 73 and 78) 236, CEDAW A/41/45 (1986).
[506] Concluding comments of the Committee on the Elimination of Discrimination against Women: Cambodia, CEDAW/C/KHM/CO/3, 25 January 2006, at 28.
[507]Concluding Observations CEDAW - Australia - adopted up to December 31, 2003, the Committee considered the initial report of Australia (CEDAW/C/5/Add.40 and Amend.1) at its 114th and 118th meetings, held on 23 and 25 February 1988 (CEDAW/C/SR.114 and 118), CEDAW A/43/38 (1988), at 393.

increasingly restricted, in particular in British Columbia, consequently denying low-income women access to legal representation and legal services." [508] The CEDAW Committee also looks if an existing legal aid system is effectively accessible and is functioning properly. In this context, it criticized Albania for the legal and practical obstacles faced by women seeking redress for acts of discrimination based on sex and gender under the new Albanian anti-discrimination legal framework, as well as the lack of legal aid services available to women, especially women belonging to ethnic and linguistic minorities, women in rural areas and women belonging to other disadvantaged groups.[509] The Committee recommended to the Albanian Government to:

> "accelerate its efforts to remove impediments faced by women in accessing justice, provide legal aid and raise awareness about how to utilize legal remedies against discrimination based on sex and gender, so as to increase the capacity of women to avail themselves of existing complaint mechanisms and seek redress for discrimination through the Albanian legal system, and to monitor the results of such efforts."[510]

The CEDAW Committee welcomed the adoption of several laws aimed at eliminating discrimination including the Legal Aid Act by the Bulgarian Government in January 2006. While appreciating the enactment of the law and the establishment of a national legal aid bureau, the Committee noted "with concern the practical obstacles faced by women seeking redress for acts of discrimination based on sex and gender, and the insufficient counselling and legal aid services available to women, especially women belonging to disadvantaged groups."[511] Therefore, it recommended to "provide women

[508] Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada, UN CEDAWOR, 42d Sess., UN Doc. CEDAW/C/CAN/CO/7 (7 November 2008), at 5, para. 21.
[509] Concluding observations of the Committee on the Elimination of Discrimination against Women, Albania, CEDAW/C/ALB/CO/3, 16 September 2010, at 14.
[510] *Ibid* at 15.
[511] Concluding observations of the Committee on the Elimination of Discrimination against Women Bulgaria, CEDAW/C/BGR/CO/4-7, 27 July 2012, at 13.

with effective access to legal aid by strengthening the legal aid facilities in place and ensure that, when pursuing legal remedies, women are sufficiently informed of their rights during proceedings"[512] and make sure that legal aid services be available to women with insufficient means.

Unfortunately though the CESCR, CERD and CEDAW Committees also review individual communications/complaints brought under the respective UN instruments, however it never directly referred to issues involving legal aid in non-criminal matters.

Conclusion

Though the right to legal aid in non-criminal matters was not explicitly included in the principal UN human rights instruments, the right to civil legal aid has been developed as part of the law of nations by the specialized bodies. The HRC, CESCR, CERD and CEDAW Committees are invested with the power to interpret the legal provisions of the respective instruments via the adoption of general comments, overview the States parties' compliance under the corresponding instruments and adjudicate communications from the individuals who allege that their rights have been violated. These mechanisms allowed the Committees to find that the silent provisions of the ICCPR, ICESCR, ICERD and CEDAW might actually in some circumstances demand the provision of legal aid in non-criminal matters. This finding was done especially through monitoring of instruments' implementation by State parties and the adoption of general comments. Unfortunately, neither of the UN Committees has found a right to civil legal aid via adjudication. Notwithstanding the fact that the Committees brought up the right to civil legal aid in their work, they rarely included broad criteria for the

[512] Concluding observations of the Committee on the Elimination of Discrimination against Women Bulgaria , *supra note* 511, at 14.

determination of the scope and the content of such a right. However, some characteristics surrounding the right of legal aid could be depicted and serve as the basis for further development of its scope. It is important to note that all the Committees directly have linked the availability of legal aid in non-criminal matters to the State parties' compliance with the ICCPR, ICESCR, ICERD and CEDAW and have specifically urged countries that such aid should be put in place where not available. These recommendations have often focused on such rationales as the right to a fair trial and access to courts, the general procedural principle of equality of arms, equality principle, ensuring the exercise of the rights provided by the corresponding UN instruments, eradicating and reducing poverty. Keeping in mind these rationales it has been indicated that states should provide access to legal aid in cases involving fundamental civil, political, economic, social and cultural rights as enshrined in the ICCPR, ICESCR, ICERD and CEDAW. At the end of the day it is for the governments to decide which civil matters would fall under the legal aid scheme. However, states might be actually obliged to make legal aid available in proceedings involving basic human needs such as housing, health care, child custody, employment, and access to social and economic programmes. The analysis above showed that the UN specialised bodies have been particularly apt to recognize the right to civil legal aid when threats to fundamental rights were exacerbated by the lack of such aid. In addition, legal aid should be made available for individuals who do not have sufficient means or are otherwise disadvantaged. Indeed lack of sufficient means to acquire legal assistance is the main guiding element that should signal the need for a right to legal aid in non-criminal cases. At the same time, civil legal aid should be provided in such a way

as to secure equal access to the justice system for all members of a society, irrespective of gender, origin, and ethnicity.

These principles may be considered as crucial components in construing the right to legal aid in non-criminal proceedings and then determining its scope and content. It should be, however, noted that these are minimum standards that need to be observed by the states, and that they are encouraged to establish more far reaching provisions regarding legal aid in non-criminal matters.

3. European Union

The Luxembourg Court had very few occasions to rule on the questions of legal aid. In a recent case originating from Germany the ECJ has given guidance on the extent of the right of legal persons to legal aid under the EU Charter of Fundamental Rights. In *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*[513] the company brought an action against Germany on the basis of State liability under EU law. The company applied for legal aid as it was neither able to cover the advance payment of court costs nor pay for legal representation. Legal aid was refused. The national court referred the case to the ECJ. In its ruling the ECJ has considered if the principle of effectiveness requires legal aid to be granted to legal persons. "The question referred thus concerns the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection",[514] which is embodied in Article 47 of the Charter. Because the text of the present legal provision does not mention the fact that the right to

[513] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland,* judgment of 22 December 2010, Case C-279/09.
[514] *Ibid* paras. 45-52.

legal aid is available to legal persons, the ECJ interpreted the provision in the light of the EU law, national law of the Member States and the case-law of the ECtHR[515].

It concluded that:

> "the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer."[516]

The ECJ went on to hold that it is for the national courts

> "to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve."[517]

The ECJ set up clear guidance with regard to provision of legal aid. It indicated specific criteria that should be taken into account by the domestic courts when deciding on the provision of legal aid, namely:

> "the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts."[518]

The ECJ also added that specifically when it comes to legal persons, the national court may take account of, "*inter alia*, the form of the legal person ... whether it is profit-

[515] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* , *supra note* 513, para. 37.
[516] *Ibid* para. 59.
[517] *Ibid* para. 60.
[518] *Ibid*, para 61.

making or non-profit-making; the financial capacity of the partners or shareholders; the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings".[519]

There are also some cases[520], which did not involve legal aid, but raise relevant issues and might be taken into consideration when referring to legal aid in non-criminal matters. For example, from the *Mutsch* judgment[521] can be concluded that a rule limiting access to legal aid to nationals of the State where proceedings take place could not be invoked against a Community national working in that State (whether he resides or not there) or member of his family for whom he bears financial responsibility.

More recent cases suggests that a national of the Union residing in another State Member is entitled to equal treatment with nationals irrespective if the person has the status of a worker or not.[522]

In addition, according to the judgment in *Data Delecta Aktiebolag*[523] it is very important that the beneficiaries of the freedoms granted by the Community law must be able to bring court actions in a Member State on the same basis as the nationals of that State.

The abovementioned case-law suggest that any beneficiary of rights granted by the European law, including a cross-border recipient of services or purchaser of goods, is

[519] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* , *supra note* 513 para. 62.
[520]A compilation of such cases can be found in the Green Paper from the Commission on Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant, Brussels, 9.2.2000, COM (2000) 51 final.
[521]*Mutsch* judgment, Case 137/84, ECR 1985, 2681-2697, "the Court of Justice held that a right to have court proceedings conducted in one's own language contributed significantly to the integration of the migrant worker in the Host State and thus constituted a "social advantage" within the meaning of Article 7 (2) of Regulation 1612/68. Community nationals working there were thus entitled to avail themselves of this right on the same basis as the nationals of the Host State. This reasoning would seem to apply *a fortiori* to legal aid".
[522]*See Martinez Sala* judgment, Case C-85/96, ECR 1998 p. I-2694.
[523] *Data Delecta Aktiebolag* judgment, Case C-43/95, ECR 1996, p. I-4661.

entitled to equal treatment with nationals of the State, as regards both formal entitlement to bring actions in court and also the practical conditions in which such actions can be brought, irrespective if the person is or has been a resident or even physically present in that country. Therefore, the right to bring actions includes the right of access to courts and also the right to legal aid when a national of the State would, *mutatis mutandis*, is so entitled.

Any restrictive rules regarding provision of legal aid to nationals of a Member State or requirements that foreign nationals to be resident or even present on the territory of the country in order to be assimilated to nationals would be invalidated under Article 12 of the EC Treaty and such requirements could not be used against a Community nationals involved in litigation in the Member State at stake. Even a requirement which just formally discriminates could be considered as a disguised discrimination and would be therefore impermissible unless there are objective grounds that a Member State can raise. And finally, a cross-border litigant may require assistance from two lawyers, one in his Home State for a preliminary advice and the second in a in the Member State where he brings an action in order for the lawyer to conduct the proceedings. So, any rules that would restrict the grant of the legal aid in respect of advice given by an "out of State" lawyer than a local lawyer could constitute disguised discrimination both against the litigant, in respect of his freedom to receive services, and the lawyer, in respect of his freedom to provide services. [524]

Conclusion

[524] *See Guiot* judgment of 28 March 1996, Case C-272/94, ECR 1996, p. I-1905 (freedom to provide services); *Kohll* judgment of 28 April 1998, Case C-158/96, ECR 1998, p. I-1831 (freedom to receive services).

The ECJ's case-law provides as well some guidelines that determine the scope of the general obligation to provide legal aid in civil matters among its Member States, mainly endorsing those developed by the ECtHR in its case-law. The Luxembourg Court had the opportunity to hold that the right to civil legal aid provided in Article 47 of the Charter on Fundamental Rights is applicable to legal persons as well, though the provision at stake does not include this expressly. In the light of the present case the ECJ also indicated specific criteria that should be taken into account by the domestic courts when deciding on the provision of legal aid to a legal person: "the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively".[525] The national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. These criteria could be at the same time considered when dealing with the provision of legal aid for a natural person. They represent criteria developed by the ECtHR.

In addition, one of the most important guiding principle with regard to states' obligation to provide legal aid in non-criminal matters is that any beneficiary of right to legal aid is entitled to equal treatment with nationals of the Member State, as regards both formal entitlement and also the practical conditions, irrespective if the person is or has been a resident or even physically present in that country.

[525] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, *supra note* 513 para. 61.

4. Conclusion

The above analyzed case-law, instruments and monitoring mechanisms of the UN bodies, ECtHR and ECJ provide for some guidance as to the scope of the general states' obligation to provide civil legal aid.

From all three sources under review the case-law of the ECtHR is the amplest in providing guidance as to what is the scope of the states' general obligation to provide legal aid in non-criminal matters. Looking at the relevant jurisprudence, it can be concluded that in principle states are not under a positive obligation to establish general legal aid schemes for civil cases and that there is no general right to civil legal aid. However, the ECtHR developed a wide reaching approach by holding that in certain civil cases legal aid may be required under Article 6(1) for parties, both claimants and defendants as a matter of guaranteeing an effective right to access to court. The ECtHR accepted that governments can select cases that are to be legally aided. The issue 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 law and procedure and the applicant's capacity to represent himself effectively.[526] Also account may be taken of the financial capacity of the litigant and/or his prospects of success. In addition to the circumstances when the states actually bear an obligation to provide civil legal aid, ECtHR also put forward clear indications as to the scope of such a

[526] *See Airey v. Ireland*, *supra note* 84 para. 26; *McVicar v. the United Kingdom*, *supra note* 416 paras. 48-49; *P., C. and S. v. the United Kingdom*, *supra note* 370 para. 91, *Steel and Morris v. the United Kingdom*, *supra note* 208 para 61.

right once it is granted. Namely the Court went on to develop clear guidance with regard to the quality and content of the right to legal aid in non-criminal matters. Thus, merely granting such a right will not suffice. States have to ensure a "practical and effective" [527] right. This means that the general obligation to provide legal aid in certain civil matters comes hand in hand with such requirements as adequate and timely appointment of a lawyer, effective conduct of the appointed legal aid lawyer, rapid replacement of the legal aid lawyer in case of necessity, reasoned decision with regard to denial of legal aid, etc.[528]

While the right to legal aid is concerned mainly with judicial oversight, under the ECtHR's interpretation these principles have been applied to a wide range of court proceedings including with respect to termination of employment, divorce, custody and access to children, approval of private land sales, licensing of professionals and private business, expropriation of property and social security.[529] In addition, when certain rights are being limited the ECtHR seems to insist on the necessity of procedural safeguards being put in place, including legal assistance and thus legal aid. Though this is not really developed in the case-law, however it represents a concrete way of overcoming the limited right to legal aid in non-criminal matters existent under Article 6(1).[530]

And even though at the moment the scope and the content of the right to legal aid in non-criminal matters created under the auspices of Article 6(1) of the ECtHR is not so

[527] *Goddi v. Italy*, *supra note* 390 para 27; *Rutkowski v. Poland*, *supra note* 388.
[528] *See A.B. v Slovakia*, *supra note* 384, *Bertuzzi v. France*, *supra note* 385, *Sialkowska v. Poland*, *supra note* 392, *Tabor v. Poland*, *supra note* 402.
[529] Johnsen, J.T., *supra note* 445, p. 4-6.
[530] For example, proceedings related to refugee claims that have been construed as not coming within Article 6 (1) can be covered as well as other hearings may also attract an entitlement to free legal aid such as the relative of someone who died while in the state custody may be entitled to legal aid to cover a hearing required by Article 2 (*see Hugh Jordan v. United Kingdom*, Application no. 24746/94, judgement of 4 May 2001).

broad, *inter alia* because the ECtHR is limited in reviewing and interpreting only the cases brought before it, the case-law clearly shows that abrupt changes are possible.

The UN specialized bodies' jurisprudence established through decisions and views on individual cases to a smaller degree and concluding observations on country reports, and general comments to a bigger degree revealed the fact that the implementation of the fair trial rights, access to courts equality of arms or equality principle under the UN instruments mandatorily requires in some cases access to civil legal aid, at least in civil proceedings that involve basic human needs. And though these sources do not include detailed criteria and offer little guidance on the scope of the general obligation to provide legal aid in non-criminal matters, they reveal some guiding elements for the states when creating such a right. In this context, for example the considerations of what is at stake for the person involved in the proceedings and the lack of sufficient means to acquire qualified assistance or any other disadvantages such as race or ethnical origins, gender etc., that hinder certain categories from accessing the justice systems are clear indicators with regard to the scope of the right to legal aid in non-criminal matters.

The ECJ's case-law provides as well for some guidelines that determine the scope of the general obligation to provide legal aid in civil matters among its Member States, mainly endorsing those developed by the ECtHR in its case-law. At the same time one of the most important guiding principle with regard to such an obligation is that any beneficiary of right to legal aid is entitled to equal treatment with nationals of the State,[531] as regards both formal entitlement and also the practical conditions, irrespective if the

[531] *Data Delecta Aktiebolag* judgment, *supra note* 523.

person is or has been a resident or even physically present in that country. In addition, the ECJ clearly stated that legal persons[532] also enjoy the right to legal aid guaranteed by the Charter and endorsed the ECtHR's criteria when national courts determine the need for legal aid.

What needs to be kept in mind is that all international sources considered in this chapter provide for minimum guarantees and corresponding guiding criteria. States untimely have free choice of means to employ in guaranteeing an effective right to civil legal aid.

[532] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, supra note* 513.

CHAPTER 4: LEGAL AID IN NON-CRIMINAL MATTERS IN BULGARIA, GEORGIA AND THE REPUBLIC OF MOLDOVA

New democracies that emerged from the Eastern bloc, such as the countries under review in this chapter – Bulgaria, Georgia and the Republic of Moldova, have been in a continuous process of reforming their legal systems. The period of democratic transition[533] and freedom brought numerous substantial changes in the life of the post-communist societies: the establishment of western-type democratic, political, constitutional regimes; independent judiciaries; checks-and-balance mechanisms; the emergence the civil society; the shift from command economies to market ones; the privatization of state property; flow of the foreign investments; growing numbers of private enterprises, etc. The establishment of democracy brought institutional reform and institution building within the justice system to address the lack of access to justice for certain groups. However, the reality reveals that despite the expeditious transformation and reform, the laws governing access to justice still remained for a long time in line with the principles of the old legal regime. As this long but necessary path of legal reform is pursued, it is vital that the states concerned should consider seriously the institution of civil legal aid when reforming their legal systems, since it represents one of tools that makes access to justice a reality. The provision of legal aid in non-criminal cases is a matter that needs to be considered and decide by the governments with due regard to the national context and international standards that they undertook to abide. This chapter

[533] "A democratic transition is complete when sufficient agreement has been reached about political procedures to produce an elected government, when a government comes to power that is the direct result of a free and popular vote, when this government *de facto* has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies *de jure.*" in Linz, J.I., Stepan, A., PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION, The John Hopkins University Press, 1996, p. 3.

examines the legal aid schemes, with a particular focus on non-criminal matters, existent in Bulgaria, Georgia and the Republic of Moldova today. These three legal aid schemes were intentionally chosen, because all of them were created in the same period and their creation was at big extent externally-driven and tailored according to international standards and human rights considerations. The first section of the chapter gives an overview of the process of reforming of the national legal aid schemes. Thereafter, it focuses on the analysis of the legal framework regulating the institution of legal aid, and how the relevant legal provisions actually operate in practice.

Following the countries' case studies, the research goes on to consider the main characteristics of the legal aid schemes created under the human rights rationale and from this perspective reveals their content. All three national legal aid schemes are based on ideological underpinnings, which stem from the human rights rationale. One of the most significant consequences of such an approach was to place the potential consumer of legal aid at the centre of the creation and design of the system, by taking into consideration his/her specific legal needs and the overall goal that access to justice should be ensured in an effective manner. This determined the appearance of a "consumerist type" of legal aid schemes that is analysed in details in the last section of the present chapter.

1. Legal aid in non-criminal matters in Bulgaria

1.1 Remarks on the legal aid reform in Bulgaria

The old Bulgarian legal aid system "shared many of the plagues and shortcomings of the typical post-socialist legal systems".[534] The old scheme was underfunded, fragmented and had a non-systematic character regarding the guarantee and delivery of legal aid. Legal aid was envisaged as a tool for ensuring equality of arms for defendants unable to secure their rights, mostly for criminal matters. Relatively less attention was given to non-criminal matters, with extremely low rates of access to legal aid in civil cases. The legal aid scheme provided access to legal aid in civil matters only to a very limited category of people. According to the old Bulgarian Civil Procedure Code[535] a court had the power to assign an *ex officio* lawyer for court representation to a party who had a conflict with his/her legal guardian, *i.e.*, to minors and mentally retarded persons. Also, an *ex officio* lawyer could be appointed in respect of individuals whose address was unknown and thus could not be summoned for the proceedings. These procedural clauses were transferred to the new Code as well. Another option was to seek assistance from a lawyer, according to the Bar Act[536] a lawyer could deliver *pro bono* services, for consultations, preparation of documents, and legal representation, to economically deprived individuals or to persons legally entitled to receive alimony or child support, but this was by no means an obligation. In practice this was rarely implemented.[537]

[534] Gramatikov, M., National Report on Bulgaria, Paper presented at International Legal Aid Group Conference 6-8 June 2007, Antwerpen, Belgium, p. 1.
[535] Civil Procedure Code, Izvestiya No. 12, 8 February 1952.
[536] Bar Act, State Gazette No. 80, 27 September, 1991.
[537] Gramatikov, M., Multiple Justiciable Problems in Bulgaria, TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, No. 08/2008, November 2008, p. 5

The numerous problems in the organization and supply of the legal aid in Bulgaria determined the necessity for a comprehensive reform. There were several studies and analyses that highlighted a range of drawbacks in the old legal aid system and all of them concluded that the government could not fulfil its obligation to provide equal access to justice for its citizens. For example, the Bulgarian Helsinki Committee produced a comprehensive study in this regard and identified the following shortcomings: a high degree of exclusion from the access to legal aid in civil context among those of limited or moderate means[538]; the absence of clear criteria regarding appointment of *ex-officio* lawyers and control over the quality of the services provided;[539] the lack of data regarding the legal aid system's compliance with the budgetary limits and its effectiveness;[540] the absence of an independent budget.[541] To this could be added the following drawbacks: the absence of a specialized body responsible for administering the system and inadequate incentives for lawyers to participate in the system and to provide high-quality services.[542] The Legal Aid System Reform Concept[543] elaborated by the Bulgarian government based on comments received from human rights organizations and EU, noted a range of similar shortcomings, namely that the access to legal aid was highly limited; the budget was managed by different bodies; there were no information on the financing and efficiency of the legal aid system; there were no control over the quality of

[538] Kanev, K., Mitrev, G., Access to Justice Country Report: Bulgaria, Bulgarian Helsinki Committee, 2002, 2nd part, p. 11.
[539] *Ibid*, pp. 11, 14.
[540] *Ibid* , p.15
[541] *Ibid.*
[542] Kanev, K. (ed.), Access to Justice: International Standards and the Bulgarian *status quo*, Bulgarian Helsinki Committee, Sofia, 2003.
[543] Legal Aid System Reform Concept, elaborated by the working group composed of the representatives of the Ministry of Justice, Bar Association and Open Society Justice Initiative formed on the basis of the Order No. LS-04-300/28.05.2004 of the Minister of Justice, 2004, p. 1.

the service provided and no reliable statistical data to adequately plan and manage the system; there were no clear criteria and procedures for selection and appointment of lawyers; payment was not consistent with legal provisions. These shortcomings indicated towards the following categories of systemic problems that had to be addressed: lack of institutional frame through which systematic policies in the legal aid sphere could be conducted; limited scope of the legal aid; lack of standards and frequent cases of low quality of the legal aid and non-transparent and insufficient funding.[544]

In addition to the evident problems of the old legal aid system, the establishment of a new reformed legal aid scheme that meets EU's standards represented one of the prerequisites of the Union's membership that Bulgaria had to undertake. The EU Regular reports on the Progress of Bulgaria in the process towards the accession urged the government to consider the issue closer and determined the momentum of change. [545] As already mentioned above, in 2004 the Bulgarian Ministry of Justice elaborated the Legal Aid System Reform Concept, which included the fundamental principles of the legal aid reform and the requirement that the new Bulgarian legal aid scheme has to satisfy the relevant standards of the ECHR for effective access to legal aid as provided in Article 6(1). The Concept expressly highlighted that:

> "Currently, much of the legal aid financed by the state is provided in criminal cases while public defense for civil and administrative cases is relatively limited. Given Bulgaria's obligations to the process of EU accession and the need to improve access to justice for all Bulgarian citizens, the volume of legal aid in different civil and administrative cases inevitably will increase".[546]

[544] Gramatikov, M., Evaluation of the Effect of the Legal Aid Act, Open Society Institute – Sofia, 2007.
[545] Gramatikov, M., The Development of the Legal Aid System in Bulgaria, 2005, p.3.
[546] Legal Aid System Reform Concept, *supra note* 543 p. 3.

On the basis of this Concept the Legal Aid Act was drafted and adopted in 2005.[547] The new Legal Aid Act aimed at promoting greater fairness in the access to legal aid by guaranteeing high standards of free legal aid delivery and providing effective access to lawyer. The normative scope of the law increased in the direction of the non-criminal matters. In this context, in addition to cases in which the appointment of a lawyer is compulsory under national law, cases in which the person fulfils the means and merit tests were also included. The new law completely restructured the delivery, funding, and organization of legal aid in Bulgaria. The National Legal Aid Bureau[548] was established as an independent policy making and policy implementing authority that manages the system, first of the kind in Central and Eastern Europe.

1.2 The Bulgarian legal framework on legal aid

1.2.1 The Constitution

The right to counsel in Bulgaria is a fundamental right of constitutional value. Article 56 of the Bulgarian Constitution directly refers to the right to legal defence stipulating that "everyone shall have the right to legal defence whenever his rights or legitimate interests are violated or endangered. He shall have the right to be accompanied by legal counsel when appearing before an agency of the State." [549]

In addition, Article 122 states that "citizens and legal entities shall have the right to legal counsel at all stages of a trial" and that "the procedure by which the right to legal counsel shall be practiced shall be established by law." However, these provisions have

[547] The Legal Aid Act was adopted on 21 September 2005, published in the State Gazette on 4 October 2005 and entered into force on 1 January 2006.
[548] *See* www.nbpp.government.bg (National Legal Aid Bureau – NLAB)
[549] Constitution of the Republic of Bulgaria, State Gazette No. 56/13 July 1991.

never been interpreted to impose a duty to provide a lawyer in non-criminal matters and were considered for long time as provisions targeting only the criminal matters.

1.2.2 The Law on Legal Profession

According to Article 38 (1) of the Bar Act[550] lawyers can provide on their own discretion *pro bono* services for persons entitled to receive alimony or child support, for economically deprived persons, or for relatives and friends. This norm applies to any type of proceedings. In this context, lawyers may play an important role in actually guaranteeing access to justice for those in need. Nevertheless, this is not an obligation and thus legal profession has full discretion in providing services free of charge. It has to be reminded that under Council of Europe and UN standards legal profession should be encouraged "to provide legal services to persons in an economically weak position"[551] and "assist the government in fulfilling its obligation to provide legal services to the poor by cooperating in the organization and provision of services, facilities and other resources".[552]

1.2.3 The Civil Procedure Code

The Bulgarian Civil Procedure Code[553] regulates the mandatory appointment of a state-funded lawyer. It states that an *ex officio* lawyer can be assigned to a party who has a conflict with his/her legal guardian (minors and mentally retarded persons). Also, an *ex*

[550] Закон за Адвокатурата, Обн. ДВ. бр.55 от 25 Юни 2004г., изм. ДВ. бр.43 от 20 Май 2005г., изм. ДВ. бр.79 от 4 Октомври 2005г., изм. ДВ. бр.10 от 31 Януари 2006г., изм. ДВ. бр.39 от 12 Май 2006г., изм. ДВ. бр.105 от 22 Декември 2006г., изм. ДВ. бр.59 от 20 Юли 2007г., изм. ДВ. бр.69 от 5 Август 2008г. (in Bulgarian). Law on the Legal Profession.
[551] Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, *supra note* 255.
[552] UN Basic Principles on the Role of Lawyers *supra note* 213.
[553] Civil Procedure Code, State Gazette No. 59/20 July 2007, effective as of 1 March 2008.

officio lawyer could be appointed to individuals whose address is unknown and thus could not be summoned for the proceedings.

1.3 The Bulgarian legal aid scheme

The Legal Aid Act from 2006 regulates the order and conditions for providing legal aid not only in criminal but also in civil and administrative cases. In is important to note here that there is a diffuse boundary between civil and administrative cases. For example, public services or social benefits fall within the realm of administrative cases. Thus the administrative realm is not limited only to administrative contraventions, the last one for ECHR purposes being essentially criminal. According to the interpretation of Article 6(1) of ECHR there is no obligation under the ECHR to make legal aid available for all disputes, therefore the extension of the legal aid to civil and administrative cases represents definitely a step forward. In addition, the law applies to all types of civil and administrative cases, without giving priority to certain categories of non-criminal matters. However, commercial and tax cases under the Tax Procedure Act are excluding from the reach of the scheme. Since under ECHR state-funded legal assistance will apply only for protection of Article 6(1) 'civil rights and obligations' and this concept does not cover taxation issues, the exclusion of cases that may raise under Tax Procedure Act does not contravene the Convention as such.

The scope of the legal aid is envisaged in Article 1 of the law, which provides that legal aid covers all procedural phases of the civil and administrative cases.

1.3.1 Types of legal aid

According to Article 21 of the Legal Aid Act there are two types of legal aid: primary legal aid in the form of consultations in view of reaching an agreement out of the court room before the beginning of the judicial proceedings or before submitting a case to the court and drafting documents necessary for submitting a case and secondary legal aid, which consists of representation in court.

Acknowledging the fact that in the light of the specific nature some of the civil legal needs and disputes may be very well met or settled via primary legal aid, the provision of such aid under the scheme is definitely a step forward. However, as discussed in more details below, only a limited number of requests for primary legal aid were considered. Such a low number indicates that in its first years of existent the legal aid scheme was definitely not achieving the overall scope of ensuring access to civil justice to those who qualify.

1.3.2 Management of the legal aid system

According to Article 6(1) of the Legal Aid Act the state policy in the area of legal aid is formed, coordinated and implemented by the Ministry of Justice. At the same time, the legal aid is managed by the NLAB, and by the bar councils.

The NLAB started its function on the basis of the Legal Aid Act in January 2006. It is a public legal entity with a separate budget. The NLAB consists of the Chairperson, the Vice Chairperson and three additional members. The latter are designated by the Supreme Bar Council and the first two are appointed by the Prime Minister on the basis of a decision of the Council of Ministers. The Minister of Justice proposes nominations to the Council of Ministers. This strategic division of NLAB's leadership aims at ensuring

the balance between the interests of the government and the providers of the legal services. According to the law the NLAB has the following functions:

> "(1) provides general and methodological guidance for the providing of legal aid;
> (2) prepares a draft legal aid budget;
> (3) disburse the funds of the legal aid budget;
> (4) organizes the maintaining of a National Legal Aid Register;
> (5) remunerates the provided legal aid;
> (6) monitors the provision of legal aid;
> (7) prepares draft laws and other normative acts in the area of legal aid, which shall be submitted to the Council of Ministers by the Chairperson of the NLAB;
> (8) analyzes the information necessary for the proper planning and management of the legal aid system;
> (9) popularizes the legal aid system;
> (10) adopts decisions for reimbursement of costs incurred pursuant to art 27(3);
> (11) endorses the forms pursuant to this act;
> (12) conducts the international legal cooperation in the area of legal aid".[554]

Overall the workload of the NLAB is quite big and is increasing rapidly. For example, in the first three months of 2011 there was a 20% increase in the number of reports submitted by lawyers reflecting the legal services provided by them within the framework of legal aid – 15.700. Such reports should be checked in one month. In May 2011 the NLAB was checking reports received in April and was processing payments for February 2011.[555] This fact indicates towards some drawbacks regarding the administrative work that the NLAB should and has the actual ability to fulfil. At some extent this could be solved by increasing the number of employees and by increasing the efficiency of performance.

[554] Article 8 of the Legal Aid Act.
[555] Делчева, В., Ангелов, Г., Иванова, И., Оценка на приложението на Закона за правната помощ 2007 – 2011 г. на Правна програма на Институт "Отворено общество", София през април – юни 2011, p. 10 (in Bulgarian). Evaluation of the Law on Legal Aid 2007-2011.

When it comes to the administration of the legal aid scheme the Legal Aid Act also invests with significant powers the bar councils. Actually, the local bar councils are those which implement at large extent the legal aid policy. According to the law the bar councils organize the provision of legal aid in the respective court districts and:

> (1) "prepare a statement (position) in regard of the applications of attorneys from the bar for registering with the National Legal Aid Register;
> (2) prepare and maintain a list of attorneys on duty;
> (3) pursuant to art. 25 i. 4 and 5 assign the providing of legal aid to an attorney registered with the National Legal Aid Register. The assignments shall take into consideration the professional experience and qualifications of the attorney and the type, the factual and legal complexity of the case, as well as other assignments of the attorney and his/her work load;
> (4) monitor the provision of legal aid by the attorneys from the bar;
> (5) certify the reports of the attorneys who have provided legal aid and prepare proposals for remuneration within the amounts indicated by the regulation pursuant to art. 37."[556]

The bar councils receive remuneration for administering legal aid from the NLAB budget.[557] This institutional setting has its rationale, since the bar councils operate at local level it is easier for them to meet and match the demand and supply of legal aid.

1.3.3 Eligibility for legal aid

In the light of the fact that the scope of the legal aid was increased in the direction of civil and administrative disputes legal aid is granted to all natural persons that satisfy the specified legal requirements either regarding mandatory legal defence or the indigenous clause. Both the plaintiff and the defendant in a non-criminal matter may seek legal aid.

[556] Article 18 of the Legal Aid Act.
[557] *Ibid* Article 19.

According to the Legal Aid Act primary legal aid in the form of consultations and drafting legal documents in civil and administrative cases are rendered to the following categories of persons: to persons who are eligible to receive social aid monthly allowances under the Rules on the Application of the Social Aid Act; to persons hosted in specialized institutions that provide social support; to adoptive families or to families of relatives where a child is hosted pursuant to the Child Protection Act.[558]

Secondary legal aid applies to all cases in which legal counselling or representation is required by law,[559] but also to all persons who satisfy the eligibility test.[560] There is a twofold eligibility test and it consists of means test and merits test. Accordingly, court representation for non-criminal cases is rendered to parties who do not possess the necessary means to pay for an attorney and if the interests of justice require it.

Article 23 (4) of the Legal Aid Act sets forth financial criteria by stating that:

> "Legal aid in civil and administrative cases shall be provided where on the grounds of the evidence submitted by the respective competent bodies, the court adjudicates that the party does not dispose of the necessary means to pay for legal counselling. The court adjudicates based upon:
>
> 1. the income of the person or the family;
> 2. the financial situation certified by a declaration;
> 3. the family status of the person;
> 4. the medical condition of the person;
> 5. the employment of the person;
> 6. other relevant circumstances."

Legal aid may be declined if the provision of legal aid is not justified as to the benefit it could bring to the person applying for legal aid, the claim is manifestly

[558] Article 22 (1) and (2) of the Legal Aid Act.
[559] *Ibid* Article 23 (1).
[560] *Ibid* Articles 23 (4) and 24.

ungrounded, unjustified or inadmissible or it is requested for commercial and tax cases under the Tax Procedure Act.[561] These grounds for declining a request for legal aid in non-criminal matters are in accordance with the requirements developed by the ECtHR in its case-law, namely the consideration of what is as stake for the applicant could be definitely balanced when a decision to grant legal aid is taken. Thus, if the benefit that is at stake is too small the request could be declined, even though other formal requirements are met such as for example the unavailability of financial means to acquire legal assistance. In addition, it has to be noted that taking into consideration that the ECtHR reiterated that the right to legal aid is not an absolute right and thus could be subject to legitimate restrictions the eligibility criteria set up by the Bulgarian legislator as a prerequisite for receiving legal aid in non-criminal matters are in line with the ECHR.

Also, state-funded legal services are provided in international disputes in civil and commercial cases before all judicial institutions to the citizens of the European Union or to legally residing persons in a Member State of EU if their property status does not exceed the social level under the conditions for receiving monthly social support for Bulgarian citizens.[562] The extension of the application of the means test to the nationals of other Member States of the European Union as well, is in compliance with ECJ's equal treatment principle.

1.3.4 Applying for legal aid

There are two different procedures when applying for legal aid under the Bulgarian scheme. In case a person needs legal services at state's expense in the form of

[561] Article 24 of the Legal Aid Act.
[562] *Ibid* Articles 41 and 42.

consultation or drafting legal documents he/she has to apply directly to the NLAB.[563] However, if a person needs legal aid for court representation he/she should ask the court that examines the case to grant it.[564]

If a person applies for primary legal aid there is a special form that needs to be filled in. It can be found on the website of the NLAB. The request should be submitted to the NLAB along with the following documents: an order of the Director of Social Aid Directorate certifying that the person receives social aid monthly allowances under the Rules on the Application of the Social Aid Act, if a person has not exercised his/her right of receiving social aid allowances under the Rules on the Application of the Social Aid Act, he/she shall present before the NLAB a certificate issued by the Director of Social Aid Directorate certifying his or her eligibility for receiving social aid; a court decision for the hosting of the child; a document certifying that the person is hosted by a specialized institution for providing social support. [565]

In these cases the decision for granting legal aid is taken by the Chairperson of the NLAB within 14 days after the submission of the mentioned documents. The refusal is subject to appeal under the procedure of the Administrative Proceedings Code.[566]

If a person wishes to request legal aid for court representation he/she should make a request for legal aid. There is no specified mandatory form. As mentioned above, the request should be addressed by the interested party directly to the body which examines the case. The person should specify that he/she cannot afford to pay the expenses for the case as well as to declare his/her incomes, employment status, property status, family

[563] Article 25 (2) of the Legal Aid Act.
[564] *Ibid* Article 25 (1).
[565] *Ibid* Artilce 22 (3).
[566] *Ibid* Article 25 (2).

status, possibly his/her health status and any other circumstances, which could ground the request of legal aid[567]. In addition, the application for legal aid should be submitted with the following documents: declaration on the family and property status; evidence regarding the amount of received labour remuneration or incomes from other professional activity, performed by the applicant and by the members of his/her family; documents certifying the presence of an illness or disability in case the applicant is afflicted with them; other documents certifying the circumstances claimed in the request for legal aid[568].

The same documents have to be submitted to the Bulgarian Ministry of Justice when citizens of the European Union or legally residing persons in a Member State of EU apply for legal aid.[569] The application for legal aid as well as the documents evidencing that the applicant meets the requirements for its provision must be translated into Bulgarian or in another official language of the EU, which Republic of Bulgaria has stated as acceptable before the European Commission[570].

If the request for legal aid was accepted, "the act for granting legal aid shall immediately be sent to the respective local bar council which shall nominate an attorney from the National Legal Aid Register."[571] At the same time, "when possible the Bar Council shall nominate the attorney, indicated by the person to whom legal aid is granted."[572] This last provision goes beyond the human rights standards, since Article 6

[567] Article 23 (4) of the Legal Aid Act.
[568] *Ibid Article* 23 (4).
[569] *Ibid* Articles 42 (1), 43(1)
[570] *Ibid* Article 44 (2).
[571] *Ibid* Article 25(4).
[572] *Ibid* Article 25 (5).

of the ECHR does not provide for a right of a person to be defended by a counsel appointed under the free legal aid of his/her own choosing.

The refusal to provide secondary legal aid is also subject to appeal under the procedure of the Civil Procedure Code. [573]

The fact that the Bulgarian legislature provided for the right to appeal against decisions of refusal for granting both primary and secondary legal aid represents an important procedural safeguard against arbitrariness, a consideration highlighted by the ECtHR. In addition, putting the review of such decisions under the competence of the courts, the legislature created at least *de jure* an effective mechanism that brings into play also some other fair trial guarantees provided by Article 6(1) of ECHR.

1.3.5 Legal aid providers

The Legal Aid Act introduced the institute of registered list of the legal aid providers. The law contains detailed procedures and rules for selecting and registering a lawyer as a legal aid provider. The NLAB maintains a National Register for Legal Aid of the lawyers, nominated to provide legal services in accordance with the court regions of the respective district courts. This Register is public. It is constituted on paper and electronic devices and is publicized on the Internet.[574] A lawyer who wishes to be listed in the NRLA shall submit an application to the NLAB through the respective bar council. As late of May 2007, 3456 lawyers were registered in the NRLA from all 27 regional bar

[573] Article 25 (1) of the Legal Aid Act.
[574] National Register for Legal Aid (NRLA) available at: http://www.nbpp.government.bg/reg/index.php?page=Register&Itemid=52

councils.[575] At the end of 2010 already 37% of the total number of lawyers was registered in the NRLA.[576] According to the NLAB data as of February 2013 there are more than 5000 registered lawyers.

At this point legal aid under the national scheme is rendered only by registered lawyers. The principle by which tariffs are set to pay fees for legal services delivered under the legal aid scheme is regulated by a special Ordinance.[577] There are uniform tariffs for the whole country. The amount of payment for each case is determined by NLAB within certain limits specified in the Ordinance. Wages are determined according to the legal nature of the case, with a fixed minimum and maximum. NLAB is reviewing and paying annually between 40.000 to 50.000 individual lawyers' requests for payment. In 2009 the average payment amount was around 93 Euros. Management of such large volumes of small payments is a huge challenge for NLAB staff, which in 2009 constituted 25 persons.[578]

1.3.6 The number of cases

According to the Annual Report of the NLAB in 2006 there were 16.637 cases covered by the legal aid scheme.[579] In 2007 the number of cases doubled and it reached 33.272 cases. Payments were disbursed in 29.392 cases, of which 25.379 were criminal,

[575] Blagoevgrad, Bourgas, Varna, Veliko Tarnovo, Vidin, Vratsa, Gabrovo, Dobrich, Kardzhali, Kyustendil, Lovech, Montana, Pazardzhik, Pernik, Pleven, Plovdiv, Razgrad, Rousse, Silistra, Sliven, Smolyan, Sofia, Stara Zagora, Targovishte, Haskovo, Shumen, Yambol.
[576] Годишен Отчетен Доклад за Дейността на Национално Бюро за Правна Помощ за 2010 година, Sofia 2011, p. 4, (in Bulgarian). Annual Report on the Activity of the National Legal Aid Bureau for 2010.
[577] Наредба за заплащането на правната помощ, Приета с ПМС № 4 от 06.01.2006 г., Обн., ДВ, бр. 5 от 17.01.2006 г.; изм. и доп., бр. 59 от 28.07.2009 г. (in Bulgarian). Ordinance on remuneration for legal assistance, approved by Decree No. 4 of 06 January 2006.
[578] Делчева, В., *et al*, *suprta note* 555 p. 20.
[579] Отчетен доклад за дейността на НБПП за 2006 г. (in Bulgarian). Report on the Activity of the National Legal Aid Bureau for 2006.

3953 civil and 31 were administrative and 29 others (14 constituted primary legal aid). [580] Despite the reform, comparing to 2004, there was no radical change in the provision of civil legal aid. In 2004 *ex officio* counsels have been appointed in 4881 civil and administrative cases. The finding is even more alarming taking into consideration that primary legal aid was delivered only in 14 cases, virtually being non-existent in that period. At the same time, provision of legal aid in criminal cases for the period of 2004-2007 increased with 36%.[581] Thus, the impact of the new law on legal aid played an unimportant role in the first years of its implementation in the context of civil and administrative matters. The lack of noticeable impact of the new legal aid scheme in civil and administrative cases could be explained by the lack of information among the citizens about their right to ask for appointed lawyer in case they could not afford one at the same time and the remuneration rates do not provide sufficient incentives for the attorneys[582], who specialize in civil and administrative matters to deliver legal aid in non-criminal matters as private practice is more rewarding. However, taking into account that the number of lawyers registered in NRLA and the budget allocated to legal aid is constantly increasing it might be expected that the situation will change.[583]

In 2008 there were 43.100 cases.[584] The official report of the NLAB for 2009 also shows that there is a continuous increase in the demand for legal aid. According to the

[580] Отчетен доклад за дейността на НБПП за 2007 г. (in Bulgarian). Report on the Activity of the National Legal Aid Bureau for 2007.
[581] Gramatikov, M., *supra note* 534.
[582] *Ibid*.
[583] In 2007 there were around 3000 lawyers registered, at the moment there are more than 5000 lawyers included in the NRLA. Also the legal aid budget was significantly increased, for details see the relevant sub-section.
[584] Доклад за резултатите от извършен одит на програма „Равен достъп до правосъдие“ на Министерството на правосъдието за периода от 01.01.2008 г. до 31.12.2009 г. (in Bulgarian). Report

Annual Report of the NLAB 47.331 reports were received from lawyers regarding the delivery of legal aid and the Bureau disbursed money for 31.563 reports, of which legal aid was delivered in 24.342 criminal cases and 3823 civil cases. The number of civil cases should be bigger because money for some of the civil cases were disbursed in 2010, nevertheless, there is still no radical increase in the number of civil cases covered by legal aid in the period under review comparing with the previous years. But there is an increase in other non-criminal matters, namely in administrative cases which constituted 480 and 2918 cases brought under the Health Law. The same tendency can be observed in relation to primary legal aid, the NLAB registered 283 applications, including two coming from EU citizens.[585] In this context there is a clear progress, since in 2007 there were only 14 such applications.

According to the NLAB Annual Report for 2010 during the reporting period there were 45.345 cases. Unfortunately, the report does not provide figures per matters covered. However judging by the proportion during previous years it could be assumed that up to 20% of the number of cases were civil and administrative ones. At the same time NLAB received 191 applications for primary legal aid, including four coming from EU citizens.[586]

The number of persons that received legal aid in 2011 amounts to 46.523.[587]

on the results of the evaluation of the "Equal Access to Justice" Ministry of Justice for the period from 01.01.2008 to 31.12.2009.

[585] *See* Годишен Отчетен Доклад за Дейността на Национално Бюро за Правна Помощ за 2009 година, 11.03.2010 (in Bulgarian). Annual Report for 2009 on the Activity of the National Legal Aid Bureau, p. 4.
http://www.nbpp.government.bg/novini/novini/doklad-2009.html

[586] Annual Report for 2010 on the Activity of the National Legal Aid Bureau, *supra note* 576 p. 8.

[587] Отчет за изпълнение на целите на НБПП за 2011 г. (in Bulgarian). Annual Report for 2011 on the Activity of the National Legal Aid Bureau for 2011, Annex 2.

The available data clearly shows that there is a continuous increase in the demand for legal aid. Also the number of cases in which consultations and drafting documents was requested increased starting with 2008[588] comparing to previous years, bit still represents overall a very low figure. One of the reasons for the limited use of such assistance is the restrictive regime, which the law itself imposes on those who have the right to receive primary legal aid. According to Article 22 of the Legal Aid Act only the following categories of persons are eligible to receive primary legal aid: persons who are eligible to receive social aid monthly allowances under the Rules on the Application of the Social Aid Act; persons hosted in specialized institutions that provide social support; adoptive families or to families of relatives where a child is hosted pursuant to the Child Protection Act. That is why in practice people with relatively low income may not fall within the categories mentioned above. Another obstacle is the requirement according to which a person must submit an application for primary legal aid to the Chairperson of the NLAB attaching to it several documents, such as an order or certificate from the Directorate of Social Assistance, respectively, or the decision of the court with regard to the placement of the child in the family, even though sometimes a request for a consultation may entail a quite simple question. In the light of the fact that applicants should ensure the mandatory submission of the required documents, these formalities may discourage certain eligible persons to apply for legal aid. In cases when a document is missing the NLAB is obliged to return the application back with instructions. For people who do not live in the capital, the distance to reach NLAB is an obstacle as well. The same goes for people who are illiterate and cannot properly formulate their legal

[588] In 2008 – 210 applications for primary legal aid were received; in 2009 – 283 and in 2010 – 191.

needs. This not only slows down the NLAB, but also gives the citizens the impression of bureaucracy and slowness.[589]

Another disturbing finding is the low number of administrative cases in which legal aid is provided compared to criminal ones. In the administrative proceedings one of the other parties is an administrative body, which is usually represented by a competent lawyer that is why it is crucial to ensure equality of the parties. Primary legal aid is also crucial in these types of cases because the preparation of documents to bring an action against such a body definitely requires special knowledge.

The small number of civil and administrative cases in which legal aid is granted may be also explained by the poor knowledge of the public of the existence of the right to legal aid in such matters and its frequent confusion with the possibility of exemption from state fees and costs and expenses, stipulated by the Civil Procedure Code. In civil cases the person must demonstrate inability to pay for lawyer's services, which represents an additional obstacle. And since the parties themselves have to decide whether to exercise their right to legal aid and the Civil Procedure Code contains prescription terms, which if not met can lead to serious legal consequences for the person, it is extremely important for the public to better know their right to legal assistance and benefit from it.[590] A recent survey showed that out of 1175 respondents only 1.7% benefited from legal aid. 63% did not know about the right to legal aid and only 37% knew that under certain conditions they were entitled to legal aid. In addition, 70% of persons did not know about the NLAB or bar councils and to what public authority they

[589] Делчева, В., *et al.*, *supra note* 555 p. 13.
[590] *Ibid* p. 14.

should address in case they need free legal assistance.[591] According to the law the NLAB is responsible for popularizing the legal aid system among the population.[592]

1.3.7 Monitoring the quality of legal services under the legal aid scheme

The Legal Aid Act establishes a two-tier mechanism for ensuring the quality of the legal services provided under the legal aid scheme. At the first level the quality of services is controlled by the relevant bar council. In this context, the lawyer has to submit a written report to the relevant bar council upon the completion of the legal services rendered under the legal aid scheme. The second level of the monitoring mechanism is realized by the NLAB. In this context, Article 33 (5) states that:

> "The NLAB may deny an attorney's application or remove a listed attorney from the Register where: ... the attorney … has provided legal aid of a bad quality. The violation or the bad quality of legal aid shall be determined by the Bar Council or NLAB."

Also, Article 35 provides that:

> " (1) the National Legal Aid Office may conduct activities monitoring the granted legal aid ... It can require information from the respective body directing the proceedings, in order to certify the volume and the type of the legal aid provided.
>
> (2) The client or the body under art. 25 (1) may refer an attorney's violations to the NLAB.
>
> (3) The findings from the monitoring activities may serve as grounds for removal of attorneys from the National Legal Aid Register".

And finally, Article 37 states that "where an attorney has provided legal aid for a particular case incompetently or in bad faith, he/she shall not receive remuneration for this particular case regardless of other sanctions".

[591] Делчева, В., *et al.*, *supra note* 555 p. 25.
[592] Article 8 of the Legal Aid Act.

The main weakness of such an institutional arrangement is the fact that bar councils are invested with the primary function of quality control of the services provided in the framework of the legal aid scheme. There is a real risk that the bar councils would be reluctant in monitoring closely and objectively the quality of the services, since they have to control their own members. Actually, these concerns were already raised. Gramatikov brings the example of the two local bar councils in which 30% of the lawyers registered in the legal aid scheme are at the same time members of the bar council. Such a situation clearly raises questions regarding the capacity of the bar councils to ensure a rigid quality assurance of the services provided under the scheme.[593] The same author in a study shows that the bar councils usually exercise *de facto* nothing more than a formal check of the submitted reports of the legal aid lawyers. In this context, one attorney who is registered to provide legal aid stated that: "There are thousands of legal aid cases per months. Irrespective of the diligence of the bar council, it would be an exaggeration to say that there is effective, in the full meaning of the word, supervision over all these cases of legal aid". [594] The study went on by bringing the example of a session at the Sofia Bar Council where at the same time the quality of 708 legal aid reports was decided. Thus, the passivity of the bar councils in imposing an efficient system of quality control can be fully assumed.

The same study shows that the second tier of the monitoring system also encounters serious drawbacks. There is a department within the NLAB with very few employees who review all submitted reports. It is obvious that the capacity of such an

[593] Gramatikov, M., *supra note* 534 p. 7.
[594] *Ibid.*

entity in effectively monitoring the quality of the delivered legal aid is limited. In practice, employees of the NLAB are fully occupied with processing the reports submitted by lawyers and respective payments. A viable solution would be to increase the role of the NLAB in quality control of legal aid services, but "NLAB needs to be equipped with adequate financial resources and but also corresponding clear procedures."[595]

At the same time it cannot be definitely argued that this model of monitoring quality of delivered services under the legal aid scheme is completely ineffective. There is an indication that at some degree, lawyers who fail to deliver adequate services are sanctioned. For example in 2010 on the basis of the disciplinary sanctions applied by the bar councils as well as complaints against lawyers' performance the NLAB removed from the NRLA 33 lawyers for one year. And thus they cannot participate in the provision of services under the legal aid scheme[596]. Since no objectively verifiable information about quality of service is to be found, it is difficult to draw overall conclusions about the quality of provided legal assistance.

However, it has to be reminded that the issues raised above with regard to the ineffectiveness of the current monitoring mechanism is problematic in the light of the states' obligation to ensure a "practical and effective" right to legal aid in the light of the ECHR standards. The failure to monitor the quality of legal services rendered under the legal aid scheme may jeopardize the state's obligation to provide adequate and effective legal aid. Though, formally the Bulgarian legislature put in place a two-tier monitoring

[595] Делчева, В., *et al.*, *supra note* 555 p. 3.
[596] Annual Report for 2010 on the Activity of the National Legal Aid Bureau, *supra note* 576 p. 5.

system, due attention should be paid to its work and if necessary changes should be made.

1.3.8 Funding and the development of the legal aid scheme

NLAB has a separate and unified budget. In 2006, the first year of the Bureau's functioning, the total annual approved public budget allocated to legal aid constituted 1.804.100 Euros, that represented 0.2 Euros annual public budget allocated to legal aid per inhabitant and 0.007% annual public budget allocated to legal aid per inhabitant as a percentage of per capita GDP.[597] Despite the impressive number, the legal aid budget did not represent a big portion if taking into account the fact that in 2006 the total annual approved public budget allocated to all courts, public prosecution and legal aid constituted 96.190.115 Euros[598]. And despite the fact that 2006 marked the beginning of the new legal aid scheme, the government did not allocate too much money in comparison for example with the year 2004 when the annual public budget approved for legal aid constituted 1.571.358 Euros and the annual budget allocated to legal aid per inhabitant was 0.202 Euros. [599] The sum for administrative expenses in 2006 constituted 27.4% of the general expenses of the legal aid system. This can be explained in the light of the fact that lots of expenses were needed for offices, information systems and so on as the new system was just instituted.[600]

However, when the 2006 data of the budget allocated to the legal aid system is compared with the 2007, 2008, 2009 and 2010 data, a sharp increase of the budget can be

[597] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2008 (2006 data), p. 18-19.
[598] *Ibid.*
[599] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2006 (2004 data), p.28.
[600] Gramatikov, M., *supra note* 534.

clearly noticed. In 2007 the legal aid budget constituted 3.218.786 Euros. In 2008 the budget almost reached 5 mln Euros. The average amount of money spent per case in this year constituted 113 Euros,[601] which was actually more in comparison with the countries in the region. [602] In 2010[603] the legal aid budget has decreased and constituted more than 3 mln Euros. In that year public budget allocated to the legal aid per inhabitant constituted 0.5 Euro per inhabitant, quite a low number in comparison to the average in Europe - 6,8 Euros.[604] In 2010, 20% of the legal aid budget went to non-criminal matters,[605] which amounts to a sum of approximately 700.000 Euros. Total number of cases granted with legal aid per 100.000 inhabitants constituted 567,5 of which 122,1 was the number of non-criminal cases. The average amount of legal aid allocated per a non-criminal case was 86 Euros, with 8 Euros less than in a criminal case.[606] This is a very low number in comparison to the average in Europe, which constitutes a bit more than 2000 Euros.[607] At the same time, the number overall represents a progress in states where the legal aid systems are being developed since recently.

The budget for 2012 constituted almost 4 mln Euros of which more than 3 and a half millions were paid for lawyers' fees.[608]

[601] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2010 (2008 data), p. 52-53.
[602] CEPEJ, "Evaluation of European Judicial Systems", Edition 2010 (2008 data) *supra note* 586. This is more than in comparison with countries in the region, in Romania is only 30 Euros, in Hungary is 7 Euros, in Turkey is 8 Euros, in Russia is 38 Euros, in Moldova is 56 Euros. Perhaps there are differences in the structure of the legal aid systems and the way it is
organized, but certainly Bulgaria has a relatively good indicator in the region.
[603] *See* Budget for 2010 http://www.nbpp.government.bg/novini/novini/biudzhiet-2010-gh.html
[604] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2012 (2010 data), p. 46.
[605] *Ibid*, p. 64.
[606] *Ibid*, p. 68.
[607] *Ibid*.
[608] *See* Budget for 2012 http://www.nbpp.government.bg/images/bujet_NBPP_2012.jpg

In the last years the legal aid budget significantly exceeded the amount of money planned for the administrative expenses as well as for the direct expenses for policy execution. This occurred partly because of the promoted policy to stimulate the use of legal aid and therefore the increase in the number of legal aid applications.

The NLAB adopted the Strategy for Reform of the Judiciary system for 2008-2013 "Equal access to justice for all". The main objective is to ensure effective legal aid.[609] The Strategy has two long term objectives:

- increasing efficiency and effectiveness of legal aid, and
- improving the legal framework regulating the legal aid system.

The immediate priorities regarding the efficiency and effectiveness of the legal aid system were set up as follows: promote the objectives and functioning of the legal aid system; ensure equal access of individuals to justice through effective and free legal aid; improve the administrative capacity; improve the overall methodological guidance related to the activity of the legal aid provision.

The long term priorities target the guarantee of the quality control of the legal services delivered under the legal aid scheme; computerization of the legal aid system; increasing public confidence in the legal aid system, its bodies and officially appointed lawyers; ensuring adequate budgeting for the legal aid system.

The set of priorities are very well selected, since the analysis shows that the new legal aid scheme suffers when it comes *inter alia* to such issues as quality control of the legal

[609] Стратегията за реформа на съдебната система за 2008-2013 предвижда равен достъп до правосъдие, Национално Бюро за Правна Помощ, Sofia 2008 (in Bulgarian). Strategy for Judicial Reform for 2008-2013 on equal access to justice, National Legal Aid Bureau.

aid services and the knowledge of the public about the operation of the scheme and the right to free legal assistance for those who cannot afford it.

Conclusion

The analysis shows that during several years of the operation of the Bulgarian state legal aid scheme it has its pluses and minuses. A recent report produced by OSI Sofia[610] found that the new legal aid system is slow and quite bureaucratic. But at the same time, the new system is more transparent and allows for a better control and reporting over the costs. Following the ECHR standards the new Legal Aid Act widened the scope of the legal aid by including civil and administrative matters. However, as available data shows, the new model did not lead in practice to widening access to justice, at least not in non-criminal matters. Provision of legal aid continues to be limited mostly to criminal cases. Legal aid in civil and administrative matters is still limited, though the numbers show a small but continuous increase. Looking at the numbers of the cases covered by the scheme *i.e.* in 2006 (the first year) 16.637, in 2007 it already doubled and in 2012 it almost reached 50.000 cases, it cannot be concluded that the scheme did not attain its main goal - ensure access to justice for those who cannot afford a lawyer. Nevertheless, if one looks strictly at the number of non-criminal cases covered by the scheme, the progress is less encouraging. For the last 4 years the number of such cases remains overall the same around 4000 cases per year. There seems to be no problem at the *de jure* level, the low number of non-criminal matters can be mostly explained by the lack of popularization of the right to legal aid among the population. Thus the problem is not in the model itself. According to its Strategy for 2008-2013,

[610] Делчева, В., *et al.*, *supra note* 555, p. 4.

NLAB has a very well set up long term goal to disseminate information with regard to this right. These efforts need to be backed up by an active involvement of the bar councils, since they represent the entities that implement the legal aid policy at the local level. Judging by the results of the survey referred above in the analysis the situation is quite alarming: 67% of the respondents did not know that they have a right to legal aid in certain circumstances and 70% did not know which competent authority needs to be addressed.[611] For civil legal aid to reach its potential beneficiaries it is crucial that the population is well informed about the statutory right to legal aid and how the scheme works. It is intrinsic that the bar councils play an active role in the dissemination of this information, especially taking into consideration that people having legal needs usually knock first on their door.

Also primary legal aid is almost inexistence and it could be especially an important tool in meeting legal needs of the population encountering problems in the civil and administrative fields. The available data show that the situation is deplorable, in 2008 the NLAB received 210 requests for primary legal aid and only 21 were actually accepted, in 2009 – 283 and only 37 accepted, in 2010 from 191 applications only 34 were accepted. The fact that primary legal aid does not work in practice is a problem at the level of the law, which needs to be resolved by concrete changes. As already mentioned in the relevant sub-section the limited eligibility criteria and other legal requirements are a serious obstacle in accessing primary legal aid for those who actually need it and cannot afford to pay for it. A redress of the situation would be possible by broadening the eligibility criteria with the view to cover more categories of people in

[611] Делчева, В., *et al.*, *supra note* 555, p. 25.

need and simplifying other requirements that needs to be satisfied. Assessing the financial position of the applicants for such aid may be done by using the official data from the tax administration, especially in the light of the fact, that some legal problems could be resolved very fast because of their not complicated legal nature, however they are dismissed because of the bureaucracy.

Under the Bulgarian scheme legal aid there are no opportunities to provide partial legal assistance, *i.e.*, when the person pays a part of the fee and the government the other part. Such an approach would enable to achieve greater access to justice with less means.

Overall the model is well conceived but as the analysis shows it encounters some serious drawbacks at the level of practice that of course could be redressed with further reform and improvement. For civil legal aid to properly work there is definitely a need for the population to know the rights and benefit from them. The impressive increase of the numbers of the criminal cases covered by the legal aid in the last years' shows that there is a good perspective for non-criminal cases as well.

2. Legal aid in non-criminal matters in Georgia

The research covers only the legal aid system in Georgia without reflecting that in two breakaway republics South Ossetia and Abkhazia. At this point Georgia has no *de facto* authority over these regions.

2.1 Remarks on the legal aid reform in Georgia

The legal aid reform in Georgia was part of a broader reform of the justice system initiated by the government in 2004. In the same year a working group was created under the initiative of the Ministry of Justice to establish a new legal aid system. The details of the reform were introduced within the Reform Strategy[612] which was elaborated with the assistance of the Rule of Law Mission of the European Union in Georgia EUJUST THEMIS. The relevant international human rights standards were placed at the core of the strategy. At the same time, by signing a memorandum, representatives of the Ministry of Justice, Supreme Court of Georgia, Ministry for Internal Affairs and the General Prosecutor's Office agreed to cooperate in order to reform the national legal aid system. Besides governmental bodies, which were involved in reforming the legal aid system, many national and international entities representing civil society played an important role in this process. For example several local NGOs, the Georgian Young Lawyers' Association (GYLA), Union "Article 42 of the Constitution" and the Human Rights Center had a very important and active role in this reform. These organizations participated in the activities of the Georgia's Legal Aid Reform Working Group which

[612] Reform Strategy Adopted by Presidential Order on 9 July 2005.

developed the draft legal aid law. The reform was supported and driven by international forces such as Open Society Justice Initiative (OSJI) and Open Society Georgia Foundation (OSGF), which were members of Georgia's Legal Aid Reform Working Group but also the United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF), IRIS-Georgia, Norwegian Mission of the Rule of Law Advisers (NORLAG), American Bar Association Rule of Law Initiative (ABA/ROLI) and the United States Agency for International Development (USAID). Many of these organizations are still actively supporting the development of the new legal aid scheme. For instance UNDP is supporting the legal aid system on numerous levels to become an effective and highly professional, to increase the capacity of the Legal Aid Service, to train lawyers across the country, and to inform and educate the public about their rights. The support is part of a larger UNDP programme, which aims to boost reforms in Georgian judiciary, and to ensure access to justice for all.[613]

The piloting of the new legal aid system commenced in 2005 when in February the Public Attorney Service was established within the Ministry of Justice. In cooperation with OSJI, OSGF and GYLA two public defender bureaus were opened in Tbilisi - Gldani-Nadzaladevi region and Zestafoni already in June of the same year. Later these offices were integrated into the new legal aid scheme. In February 2006 the jurisdictions of the regional bureaus were increased to include other districts as well. But this pilot project was exclusively concentrated on criminal cases.

In parallel work was conducted in regard to the new law on legal aid. There were four versions of drafts. One of the drafts was proposing an independent agency that

[613]For details of the UNDP programme see:
http://www.undp.org.ge/index.php?lang_id=ENG&sec_id=40&pr_id=112

would manage and coordinate the national legal aid scheme. The last version proposed a strong authority which would be at a certain extent under the supervision of the Ministry of Justice. Preference was given to the last version, a pilot Public Attorney Service was set up in February 2005 under the Ministry of Justice[614] and the reason why the last model was preferred is that the Ministry of Justice would lobby for money from the government much easier than a completely independent authority. Also, the Ministry of Justice would easier introduce and advocate for necessary legislative changes or amendments into the legislation regulating legal aid. These were the official reasons. The unofficial rationale was that the Ministry of Justice would be able to control the service at some extent, though it could not interfere with the lawyers' work or the management of cases.

The culmination of the reform of the legal aid system was when the Georgian Parliament with an overwhelming majority adopted the new legal aid law in July 2007. On the basis of new law and the already existent Public Attorney Service and the two bureaus the Legal Aid Service was set up to manage and coordinate the national legal aid scheme, initially under the supervision of the Ministry of Justice and from 2009 under the supervision of the Ministry of Corrections and Legal Assistance. The new law radically changed the former system of publicly-funded legal services, which was deeply rooted in the Soviet legacy. The previous system suffered from a number of shortcomings. Legal aid was viewed as mechanism that would formally ensure equality of arms for defendants who had to stand before the court in criminal matters. Behind the appointment of an *ex officio* lawyer was the mere observance of procedural rules and not the necessity to

[614] Decree of the Minister of Justice adopted on 17 February 2005.

guarantee a person's rights and legal needs. The old system lacked well-defined criteria for the right to free legal advice and assistance, clear procedures and standards for lawyers' admission into the legal aid system, and absence of an effective mechanism to monitor the quality of the legal services provided. Though *de jure* legal aid was foreseen on indigence-based ground for civil cases in practice it did not work. As a result, free legal aid in Georgia was neither accessible, nor of high quality. Georgia's new law addressed these shortcomings by devising clear procedures to assess individual eligibility for free legal aid and for appointment of legal aid lawyers, and by introducing registration and reporting requirements for lawyers who wish to become legal aid providers.

2.2 The Georgian legal framework on legal aid

2.2.1 The Constitution

The Constitution[615] of Georgia does not contain provisions regarding specifically the right to legal aid in civil matters. Article 42(1) states that "each individual has the right of appeal to the court to protect his rights and freedoms" and 42(3) proclaims that "the right to defence shall be guaranteed". However, it is not further stipulated what are those guarantees. It was left to the legislature to elaborate by means of ordinary law the specific guarantees. The Constitutional Court has not ruled in this regard.

2.2.2 The General Administrative Code

According to the Administrative Code of Georgia[616] everyone can be represented before an administrative agency (or in administrative proceedings) by a proxy or enjoy the assistance of a lawyer. The General Administrative Code "defines the procedures for

[615] The Constitution of the Republic of Georgia, adopted on 24 August 1995.
[616] Article 86-91 of the General Administrative Code of Georgia, adopted on 25 June 1999.

issuing and enforcing administrative acts, reviewing administrative complaints, and preparing, concluding, and implementing administrative contracts by an administrative agency."[617] It affects the activities of "state, local self-government, and government agencies and institutions, and of those entities who act as administrative agencies".[618]

2.2.3 The Civil Procedure Code

According to Article 47(2) if a party cannot afford the costs of a lawyer the court can assign a lawyer at state's expense based on the party's request with the condition that the presence of a lawyer is necessary based on the importance and difficulty of the case.[619]

2.3 The Georgian Legal Aid Scheme

The Law on Legal Aid was adopted by the Georgian Parliament on 26 June 2007. The new law on legal aid introduced a full-fledged model of public attorneys as legal aid providers. Apart from the public lawyers, private lawyers might be used in certain cases for court representation from the Contracted Public Lawyers' Register. It has to be noted that qualified legal aid in civil cases will start applying from 2015. At the moment, the legal aid scheme in relation to civil cases covers only primary legal aid, consisting of consultations and drafting documents.

2.3.1 Definition and types of legal aid

According to Article 2 of the mentioned law, legal aid is defined as "preparation of legal documents, representation before the court and administrative bodies on

[617] Article 1 of the General Administrative Code of Georgia.
[618] *Ibid,* Article 3(1).
[619] Civil Procedure Code of Georgia, adopted on 14 November 1997.

administrative and civil cases, as well as in criminal proceedings, at the expense of the State."

The law also introduces several types of legal aid[620], namely primary legal aid, which consists of preparation of legal documents and consultations on any legal issue[621] and secondary legal aid consisting of defence of the interests of the suspect, accused, defendant and convict in criminal proceedings; defence of the interests of victim in criminal proceedings, at the state's expense in cases determined by Criminal Procedure Code; representation before the court in administrative[622] and civil cases; representation before the administrative bodies.

From the entry into force of the new law on legal aid in 2007, the legal aid scheme covered primary legal aid, which extends to any legal issue and secondary legal aid in criminal cases. Giving priority initially to the application of secondary legal aid only in criminal matters is partly understandable in the light of the political and economic situation of Georgia at that moment. The bulk of criminal cases was huge due to the "zero tolerance" policy on crime that "has swelled the prison population from 6,654 in 2004 to 23,684 in 2010", making Georgia the state with the fifth-highest prison population per capita in the world.[623] Court representation in administrative cases started its application in 2011, however only in those cases that trigger arrest as a penalty. In the light of the ECHR these cases are viewed as criminal. The implementation of court representation in

[620] Article 3 of the Law of Georgia on Legal Aid.
[621] Preparation of documents applies to certain categories of persons on all issues. Rendering consultations applies to any person disregarding his/her financial status on all legal issues.
[622] Article 26 (1) of the Law on Legal Aid states: "In relation to … administrative cases … this Law should enter into force on January 1, 2011." Since March 2011 legal aid covers administrative cases that involve arrest as a penalty.
[623] De Waal, T., Georgia's Choices, Charting a Future in Uncertain Times, Carnegie Endowment for International Peace, 2011, p.24

civil and administrative matters proved to be quite difficult. Initially the Law on Legal Aid provided for the beginning of court representation for civil and administrative cases as of 1 of January 2009, however by the amendment from 07.10.2008 No. 325 it was postponed to 1 of January 2011. In 2011 court representation in civil matters was again postponed. According to Article 26(2) of the Law on Legal Aid "This Law in the part of civil and administrative judicature, except for the case of conducting free defence as prescribed by the Administrative Procedure Code of Georgia, shall be enacted from January 1, 2013". The story repeated itself and now court representation in civil and administrative matters is expected to start functioning as of 2015. This repetitive prolongation is quite alarming. The relevant officials are explaining the difficulty of starting free qualified assistance in civil matters due to the lack of sufficient financial means. Nevertheless, in the light of the European standards Georgian authorities might be obliged to ensure legal representation for those in need in certain civil proceedings where the interests of access to justice require that it be granted, notwithstanding the fact that such assistance will be covered by state legal aid only in couple of years.[624]

2.3.2 Management of the legal aid system

The new Georgian legal aid scheme is administered by the Legal Aid Service, a quasi-independent executive entity under the Minister of Corrections and Legal Assistance. According to Article 8(1) of the Law on Legal Aid the "Legal Aid Service is a legal entity of public law ... which secures accessibility to legal advice and legal aid". The Minister of Corrections and Legal Assistance appoints and dismisses the director of the Service, oversees its activities, assesses the effectiveness of the existing mechanisms

[624] *Steel and Morris v. the United Kingdom*, *supra note* 208.

for delivery of legal consultation and legal aid to recipients and approves quarterly and annual activity reports (including financial report) of the director.[625] The Ministry monitors the Service's activities through a special Council. The Monitoring Council was established at the end of 2010 and started functioning in 2011. It is formed of five representatives with voting right from the Parliament, the Supreme Court, the Georgian Bar Association, NGO representative and the Ministry and two non-voting members who are the Legal Aid Service's Rustavi and Tbilisi bureaus[626]. Such a mixed composition is welcomed, since it ensures the presence, and thus assumingly the view and interests of the Ministry and the Service itself, but also the legislator, judiciary, lawyers and civil society. The members of the Council are appointed by the Minister.[627] The Monitoring Council approves the main directions of the development of the Legal Aid Service, controls their fulfilment and works out relevant recommendations.[628] It convenes at least once in three months and is overall responsible for the monitoring of the activities of the Legal Aid Service.[629] It prepares, together with the director of the Service, recommendations and proposals aimed at improving the work of the Service and submits them to the Minister for consideration, assesses the effectiveness of existing mechanisms for delivery of legal consultation and legal aid to recipients and submits its recommendations to the Minister, listens to the interim report on the activities of the Service every three months, hears the report on the activities of the Service (including financial report) at the end of every budgetary year and exercises other authorities as

[625] Article 9 of the Law on Legal Aid.
[626] *Ibid* Article 10(2).
[627] *Ibid* Article 10(4).
[628] *Ibid* Article 11.
[629] *Ibid* Article 10(6).

prescribed by the Law on Legal Aid, Legal Aid Service's Charter and the Council's Charter.[630]

Neither the Ministry nor the Monitoring Council interferes in the Service's activities related to the management of cases or the work of legal aid providers. However, representatives of the civil society voiced their concern regarding the fact that the Legal Aid Service is under the Ministry of Corrections and Legal Assistance. It was highlighted that such an arrangement may pose a challenge to the Legal Aid Service for an effective implementation of its duties, especially in relation to provision of legal aid to the prisoners against alleged illegal actions of the administration of prison.[631]

The Legal Aid Service is comprised of staff apparatus, legal aid bureaus and consultation centres. Bureaus render legal aid to the citizens within the scope of the preliminary defined territory. It provides free legal consultations on all legal issues, the drafting of legal documents related to civil and administrative proceedings, the provision of representation services to the defendants in case of criminal and administrative proceedings.[632] Currently 11 Legal Aid Bureaus are functioning in various regions of Georgia: Tbilisi, Kakheti, Mtskheta-Mtianeti, Kvemo Kartli, Shida Kartli, Samtskhe-Javakheti (the bureau started functioning in January 2010), Imereti (Kutaisi, Zestaphoni), Samegrelo (Zugdidi, Poti) and Adjara.[633]

Consultation centre renders legal aid within the preliminary defined territory. Consultation centres offer only free consultations and assist citizens in drafting legal

[630] Article 11 of the Law on Legal Aid.
[631] Comments on the Legal Aid Service Strategy 2012-2015 submitted by East West Management Institute, Judicial Independence and Legal Empowerment Project, 2012.
[632] Article 16 of the Law on Legal Aid.
[633] For details on bureaus see http://www.legalaid.ge/index.php?action=page&p_id=59&lang=eng

documents. There are four consultation centres which operate in Ozurgeti, Ambrolauri, Akhalkalaki (absolute majority are Armenian inhabitants), Tsalka[634] and Marneuli[635] (majority representing Azerbaijani inhabitants).

By the end of 2008, including the central office, there were 150 people employed at the Legal Aid Service.[636] In 2009 two offices were opened in Kutaisi and Zestafoni, Western Georgia and in Akhaltsikhe.[637]

2.3.3 Eligibility for legal aid

Everyone is entitled to benefit from legal aid provided at the expense of the state. Legal aid recipients may be citizens of Georgia, stateless persons, foreign citizens who meet the criteria laid down in the Law on Legal Aid and other legislative acts. In non-criminal matters both the plaintiff and the defendant is entitled to legal aid.

The Law of Legal Aid provides for different eligibility criteria when it comes to primary and secondary legal aid.

Primary legal aid in the form of drafting legal documents is limited to certain categories of persons namely, persons registered in the Unified Database of Socially Indigent Persons.[638] Drafting documents implies preparation of all types of legal documents such as complaints, motions, applications, counter suits by means of which a person is willing to present his/her legal interests to an administrative agency or a court.

[634] For details on consultation centers *see* http://www.legalaid.ge/index.php?action=page&p_id=92&lang=eng
[635] http://www.legalaid.ge/index.php?action=news&lang=eng&npid=245
[636] Annual Report of the Legal Aid Service for 2008, Tbilisi, 2009, p. 5.
[637] *Ibid.*
[638] Article 2 of the Law on Legal Aid.

Primary legal aid in the form of legal consultation is available on all matters to everyone, regardless of the financial condition of the person.[639]

Article 5(2) of the Law on Legal Aid states that: "in civil and administrative cases, legal aid shall be provided if a person is indigent and provision of legal aid is in the interest of justice." According to the law an indigent person is "a member of the family registered in the unified database of socially indigent persons, whose social-economic indicator is below the limit established by the government of Georgia"[640]. Thus, the Law on Legal Aid introduces a twofold eligibility test for the provision of secondary legal aid in civil and administrative cases *i.e.* the means and the merits test, which should be satisfied cumulatively. The financial test limits the provision of the legal aid to persons proven to be indigent. The other aspect of the eligibility test refers to the "in the interest of justice"[641] condition. This aspect concerns the seriousness of the case and the well-foundness of the legal claim. These requirements for receiving legal aid in non-criminal matters fully satisfy the ECHR standards, since under the Convention the right to legal aid is not an absolute one and could be subject to legitimate restrictions.

The means test limits the provision of legal aid to indigent individuals, thus excluding for example the middle-class representatives that in some cases are not able to cover all their litigation costs. The law does not create the possibility that such individuals would be covered by the legal aid scheme at least partially when needed. However, representatives of the middle-class would be able, theoretically, to enjoy secondary legal aid in exceptional cases. Article 5(3) of the Law on Legal Aid provides

[639] Article 17(2) of the Law on Legal Aid.
[640] *Ibid* Artilce 2.
[641] *Ibid* Article 5(2).

that "in special cases director of the Legal Aid Service is entitled to provide free legal assistance for the person, that is not registered in the special database of the socially vulnerable families", though no further elaboration is present. It could be assumed that if the case involves serious and complex issues and the person is not able to fully cover the assistance of a lawyer legal aid could be granted, though the director of the Legal Aid Service has full discretion in this regard. This is an important guarantee that goes beyond of what is required by the minimum human rights standards, which clearly indicate the obligation to ensure a right to legal aid in civil matters for indigent persons.

As already mentioned at this point free court representation applies to criminal and some administrative cases. Court representation in civil cases will begin to apply as of 1 of January 2015. Currently, persons encountering civil legal needs may use only primary legal aid.

The establishment of the above mentioned eligibility criteria for receiving legal aid is in line with the standards envisaged under ECHR. The ECtHR clearly held that states have the discretion to decide how to comply with the obligations under the Convention, and subsequently may put in place certain mechanism for selection of cases likely to benefit from state-funded legal aid.

2.3.4 Applying for legal aid

If a person needs lawyer's assistance he/she should apply to the Legal Aid Bureau, Provider or Consultation Centre either individually or with the assistance of a close relative or friend. The person should fill in an application for legal aid and justify the necessity of appointing a lawyer by specifying the socio-economic conditions that hinder from hiring a lawyer. It has to be noted that the application procedure is quite

simple and does not require submission of multiple documents, since persons are registered in the unified database of the indigent persons. After verifying the economic status and the complexity of the case, the head of the bureau, immediately or within two days after receiving the application, appoints a lawyer on the case. If there is a conflict of interest *i.e.,* the bureau already represents the interests of the opposing party in the case or if the applying person already has a lawyer, the application on appointing a lawyer will be rejected. However, the legal aid bureau or consultation centre will appoint a contracted lawyer if there are several defendants in the case and there is a risk that a conflict of interest will arise. In such a case the lawyer from the legal aid bureau represents one party, while other party's interests will be represented by a contracted lawyer. In the regions where no legal aid bureaus are functioning consultations centres will appoint a lawyer from the Contracted Public Lawyers' Register.

The Law on Legal Aid requires that if legal aid is denied, refusal shall be grounded. This represents an important safeguard against arbitrariness, a consideration highlighted by the ECtHR. According to Article 21(4) of the Law on Legal Aid the refusal to grant legal aid may be challenged by making a submission to the higher-ranking officer or the body. If this appeal is not successful, dismissal of the appeal may be challenged in the court. The fact that the applicant can avail of a court to consider the legitimacy of the refusal represents an important guarantee envisaged also by the requirements of Article 6(1) of ECHR.

If a person needs a consultation on any legal issue he/she may apply to legal aid bureaus or consultation centres. Everyone is eligible to receive legal advice. Those who need assistance with drafting legal documents can apply to legal aid bureaus or

consultation centres. Since drafting documents is limited to certain categories of persons, the competent person will verify if the applicant falls under such a category.

2.3.5 Number of cases

Since state-guaranteed legal aid in non-criminal matters at the moment covers only consultations and drafting documents, the unmet civil legal needs can be fulfilled only via these two options.

In 2008 there were 4767 consultations rendered, of which 745 hot-line consultations and 4020 private consultations. 1134 legal documents were drafted. The total amount of accepted criminal cases by the legal aid bureaus was 11.196.[642]

According to statistics for 2009, 8076 consultations were rendered, from which 7453 were private consultations and 623 hot-line consultations. There were 2279 drafted legal documents. The total number of accepted cases by the legal aid bureaus was 9291.[643]

In 2010 consultations were given in 12.005 cases, of which 10.535 were given directly and 1470 via phone. 2950 legal documents were drafted. From the total number of consultations and drafted documents 59% included issues of civil law, 26% administrative law, only 8% criminal law, 4% involved social questions and 3% other type of issues. The total number of criminal cases in which qualified legal aid was rendered constituted 10.140. [644]

In 2011, 15.495 consultations were rendered, of which 14.268 private consultations and 1227 on the phone. 4700 legal documents were prepared. 50% of total number of consultations and drafted documents involved civil law issues, 37% administrative law, only 7 % criminal issues, 4% social issues and 2% other type of issues. Consultations and legal documents basically

[642]Statistics provided by the Legal Aid Service for 2008:
http://www.legalaid.ge/cms/site_images/statistics/LAS%20statistics%202008-eng.pdf
[643] Statistics provided by the Legal Aid Service for 2009:
http://www.legalaid.ge/cms/site_images/statistics/LAS%20statistics%202009-eng.pdf
[644] Statistics provided by the Legal Aid Service for 2010:
http://www.legalaid.ge/cms/site_images/statistics/LAS%20statistics%202010-eng.pdf

covered the following fields: family law, contract law, heritage law, property rights, procedural issues of civil litigation, etc. Qualified legal aid was rendered in 8458 criminal cases. [645]

Statistical data for 2012 shows that 17.557 consultations were delivered, 15.5568 private and 1989 via phone. From the total number of rendered consultations, 54% were related to civil law, 26% to administrative law, 13% criminal law, 3% social issues and 4% other. The majority of consultations referred to such issues as family relations, heritage, property rights, labour relation, land disputes, corporate law, tax and social benefits. There were 5338 legal documents drafted. In 2012 legal lawyers were involved in more 7173 criminal cases, which is the lowest indicator for the past several years. [646]

Comparing the data for all the years it is noticeable that the demand and number of consultations and legal documents is increasing constantly, which at the moment is the sole tool through which persons with civil legal needs may resolve their problems. In 2008, when the scheme just started functioning there were 8079 rendered consultations. In 2012 there were more than 17.000 consultations delivered, a number that clearly exceeds the first year indicator by more than 50%. This is an impressive and very important progress. At the same time if one looks at the numbers reflecting delivered primary legal aid in non-criminal matters and legal representation in criminal cases, the first category clearly exceeds the second one by more than 50% as well. This emphasises that persons in Georgia encounter a large number of non-criminal problems and that they need assistance from the state to solve them.

Though court representation is not covered by the legal aid scheme, persons could benefit from legal consultations and legal documents that can be drafted under the legal

[645] Statistics provided by the Legal Aid Service for 2011: http://www.legalaid.ge/cms/site_images/statistics/LAS%20statistics%202011-eng.pdf
[646] Statistics provided by the Legal Aid Service for 2012: http://www.legalaid.ge/cms/site_images/statistics/statistika%202009-2012_final.pdf (in Georgian)

aid scheme for any proceedings and instances. This in no way can substitute a proper representation before court, but still can bring a successful outcome of case. The Annual report of the Legal Aid Service for 2010 exemplifies how a consultation with a lawyer is crucial in winning a case. Zurab T. worked for the Revenue Service. In 2003-2004 the latter has accumulated 600 GEL of salary arrears. On the advice received from the legal aid bureau he addressed the Revenue Service with a request for the payment of the salary arrears. However, the Revenue Service indicated that this was not possible due to the fact that the financial allocation for that year did not allow the Ministry of Finance to pay for arrears accumulated in previous years. Consequently, the consultant of the legal aid bureau prepared a lawsuit invoking relevant national law and ECtHR case-law. The court found in favour of Zurab T.[647]

Moreover, the Legal Aid Service carries out regular mobile consultations targeting different groups of the population throughout Georgia. Such consultations are provided to IDPs, ethnic minorities, population in mountainous and rural areas. Thus, the reach of such consultation is broad covering people that are not able to reach urban areas.

2.3.6 Legal aid providers

Legal representation and legal consultations are rendered by public lawyers working in legal aid bureaus and consultation centres. In 2012 the legal aid scheme comprised approximately 120 lawyers. The selection of lawyers is made on a competitive basis. During the selection process independent practicing lawyers, judges and representatives of the relevant NGOs are invited to participate in the selection committee.

[647] Annual Report of the Legal Aid Service for 2010, Tbilisi 2011, p. 16.

The Legal Aid Service can also use other providers to deliver legal aid services. According to Article 18 of the Law on Legal Aid law a "provider of legal aid is a legal entity of private law or an attorney, selected through a tender, which provides legal aid on the basis of this Law and within the territorial boundaries determined by a contract". According to the same law, a provider is recruited through a public tender. The director of the Legal Aid Service has the function to ensure the conduct of a tender for acquisition of legal aid and the conclusion of a contract with the selected provider.[648]

Another option is to involve private lawyers. Such lawyers are appointed for court representation, for example when there are several defendants in the case and one of the parties is already represented by a lawyer under the legal aid scheme. Since this raises a conflict of interest, the lawyer from the legal aid bureau represents one party, while other party's interests will be represented by a contracted lawyer. Also in the regions where no legal aid bureaus are functioning consultations centres will appoint a lawyer from the Contracted Public Lawyers' Register.

The Contracted Public Lawyers' Register was created and started functioning from May 2009 and contains a list of private defence lawyers from the private sector who agree to render legal assistance at the expenses of the state budget. The payment of such lawyers is made according to an agreed amount which represents an average price of a private legal service. By June 2011 there were 84 private lawyers registered.[649]

Legal services under the Georgian legal aid scheme, as already mentioned, can be delivered only by qualified public or private lawyers. The law is completely silent on other categories of providers such as for example NGOs or paralegals. This can be

[648] Article 14 s) of the Law on Legal Aid.
[649] http://www.legalaid.ge/index.php?action=page&p_id=104&lang=eng

explained by taking into consideration the fact that the current Georgian legislation allows only lawyers to deliver legal services. However, the importance in cooperating with the civil society was acknowledged by the government when in May 2012 a Memorandum of Cooperation was signed between the Legal Aid Service and eleven NGOs that deliver legal aid establishing a framework for cooperation that will include the development of a referral system for clients and an exchange of information between state and non-state legal aid providers. This can prove to be an important mechanism. Legal Aid Service will be able to refer clients in certain situations to NGOs that are specialising in the delivery of legal aid, thus more persons could be served. In addition, NGOs have their own budgets to cover services that they provide and people tend to trust them. However some moments should be taken under very careful consideration, for example the quality control of the legal aid services provided by NGOs. The last ones are not formally under the state legal aid scheme and thus cannot be supervised by the Legal Aid Service directly. Some sort of a mixed control should be put in place for referred cases.

The legal aid scheme proved to be known among Georgians. A 2011 countrywide survey that included 4.318 respondents proved that Georgians are informed about legal aid providers. 53% of respondents have heard of the state- provided free legal aid service. 75% of court users have heard of state legal aid, a third stated that is helpful.[650]

2.3.7 Monitoring the quality of legal services under the legal aid scheme

The Law on Legal Aid does not elaborate too much on the monitoring mechanism of the quality of services delivered under the legal aid scheme. Article 20 introduces the

[650] Attitudes towards the judicial system in Georgia, Caucasus Research Resource Centre, January 24, 2012, p 15.

reporting mechanism to which all lawyers, including those registered in the Contracted Public Lawyers' Registry, are subjected. This mechanism obliges them to submit a report on provided legal services to the appropriate bureau. The report is prepared in accordance with the set form and submitted within established deadlines.

At the moment, the effectiveness and the quality of the legal assistance provided under the legal aid scheme is ensured through two mechanisms, namely through the development of a strong professional culture among legal aid providers and through a special evaluation system. In February 2008 the Operational Manual of the Legal Aid Service was adopted, which encompass professional standards and elaborates on the professional culture. It contains rules of the work within the bureaus and consultations centres and it regulates the working time and free time of the personnel. It also refers to the responsibility measures and other organizational issues. The second prong of the quality control mechanism is the evaluation system. The evaluation criteria were elaborated with a special focus on such issues as professional skills, business features, outcomes of the court's proceedings, activities related to the undertaken case and the evaluation of the legal services provided by the lawyer made by the defendant. The evaluation mechanism is implemented by the lawyers from the Monitoring and Analysis Department and the lawyer's supervisor, *i.e.*, the head of the Bureau. In essence, the evaluation of a lawyer's work is made through the glance of the activities taken in regard to the case, the outcome of the case and the defendant's evaluation of the lawyer's performance. The same criteria apply in relation to delivered primary legal aid.

From 2009 until now there was only one complaint filed against a lawyer of the Legal Aid Service, but it did not involve a problem related to the quality of service

provided under the scheme. It referred to the infringement of the legal restriction placed on the lawyers employed by the LAS full-time to be involved in another remunerative activity, except academic or scientific ones. There has been no dismissal of lawyers employed by the LAS so far for inappropriate execution of professional responsibilities.

According to a survey conducted by the LAS in 2011 it seems that the majority of its clients are satisfied by the outcome of the services. From 750 respondents 50% of the clients stated that they achieved their desired result and 25% achieved an outcome that is more or less desired.[651]

2.3.8 Funding and the development of the legal aid scheme

The annual public budget spent on legal aid in 2004 represented 69.760 Euros, the annual budget allocated to legal aid per capita inhabitant constituted 0.015 Euros.[652] In 2006 the annual approved public budget allocated to legal aid represented 53.000 Euros and the annual public budget allocated to legal aid per inhabitant constituted 0.01 Euros.[653] In the same year, for example, the total annual approved public budget allocated to the public prosecution system represented 8 mln Euros. In 2007 the first year of the new legal aid scheme there was a sharp increase in the public budget allocated to legal aid and it constituted more than half a million Euros. In 2008 the amount allocated to legal aid exceeded 1 mln Euros.[654] This budget was mainly formed from the state budgetary funds which represented 97% and grants which constituted 3%.[655] In 2010 the budget exceeded 1 and a half million Euros, from which 75% was used for

[651] Annual Report of the Legal Aid Service 2011, Tbilisi, 2012, p. 49.
[652] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2006 (2004 data), p.18-19.
[653] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2008 (2006 data), p.28.
[654] Annual Report of the Legal Aid Service 2008, *supra note* 636, p.24.
[655] *Ibid*.

remunerations. In this year the annual budget allocated to legal aid constituted to legal aid per inhabitant amounted to 0.2 Euro. This is quite a small amount comparing to the 7 Euro average spent in Europe to promote access to justice through legal aid. However the number is the biggest in the South Caucasus region, where Armenia spends 0.1 Euro per inhabitant and Azerbaijan 0.02 Euro.[656] Provision of legal aid remains exclusively focused on the criminal law field when it comes to court representation, civil legal aid being available only for legal advice and drafting documents. The number of cases granted with legal aid per 100.000 inhabitants in 2010 constituted 15,4 non-criminal cases and 211.5 criminal cases.[657] The average amount of legal allocated per case is 107 Euros.[658]

The legal aid system is developing quite fast and the budget is increasing in 2012 and 2013 the annual legal aid budget is around 1 mln and half Euros.

The LAS elaborated a Strategy for 2009-2013 which included aimed at increasing access to legal aid by developing LAS infrastructure, using modern technologies; opening of additional offices in regions; increasing mandate of LAS activities; ensuring uninterrupted functioning of contracted public lawyers. [659] Ensuring high quality of the rendered legal aid, was another goal, that was to be achieved through the creation of standards and a code of conduct for the employees of the LAS; development of the human resource system; continuous training of the staff; increase public awareness on LAS's activities, ongoing reforms and implemented events, on the offered service and

[656] European Commission for the Efficiency of Justice, "Evaluation of European Judicial Systems", Edition 2012 (2010 data), p.46.
[657] *Ibid* p. 68.
[658] *Ibid.*
[659] Strategy and Action Plan of the Legal Aid Service for 2009-2013, adopted by President Decree No. 591, 13 December 2008.
http://www.legalaid.ge/cms/site_images/Documents/LAS_strategy&action%20plan_2009-2013.pdf

relevant conditions; and creation of the Monitoring Council.[660] Accordingly it was planned that the entire reform of the legal aid system should be completed by 2013.[661] Though some of the above mentioned objectives were achieved, the main goal to complete the reform of the legal aid reform was not realized. Legal representation in civil and administrative cases was not implemented as predicted, now being postponed till 1 January 2015. The new Strategy of the Legal Aid Service for 2012-2015 expressly mentions the commitment of expanding the scope of legal aid to civil and administrative cases.[662]

Conclusion

During several years of the operation of the Georgian state legal aid, the scheme seems to be working. It provides the necessary service and ensures that it is delivered to all those entitled to it. Court representation in civil cases is not implemented so far. The implementation of qualified legal aid in non-criminal matters was already postponed several times due to financial considerations. However, it does not mean that persons in need are completely deprived of legal aid in such cases. They can enjoy consultations and public lawyers will assist them in preparing relevant legal documents, which also include drafting documents necessary for initiation of an action and those necessary to file consequent appeals. The legal aid scheme is quite generous and it reaches out to all persons in the light of the fact that there are no eligibility criteria for legal consultations. There are no other bureaucratic obstacles to obtain such help either, no need to submit multiple documents. According to official statistics consultations and drafting documents

[660] Strategy and Action Plan of the Legal Aid Service for 2009-2013, *supra note* 659.
[661] http://www.legalaid.ge/cms/site_images/Documents/LAS_strategy&action%20plan_2009-2013.pdf (in Georgian).
[662] Strategy of the Legal Aid Service for 2012-2015, adopted 2011.

for non-criminal matters represented more than 90% of the whole number of rendered consultations and drafted documents in 2010.[663] The same number is relevant for the following years as well. These figures indicate that Georgian society experience many legal problems of non-criminal nature and thus, once court representation for civil matters starts operating the number of cases for which legal aid will be sought will be quite big. This might raise questions of the legal aid scheme's sustainability. As already stated legal aid for court representation in civil matters was postponed several times due to scarcity of financial means. Money obviously helps but it is not the sole response.[664] It was initially decided that available resources be directed to the development of the infrastructure of the legal aid scheme first, the main aim being the expansion of the service to the whole territory of the country as well as the improvement of conditions for access. Indeed with a well established infrastructure and effective access to legal aid services, the operation of the qualified civil legal aid in non-criminal matters will have definite prospects of success. Taking into consideration that now the infrastructure is put in place and is well functioning, the Georgian government might consider instituting a pilot project in one or two legal aid bureaus that would provide court representation in civil and administrative matters and then slowly expand it. This will allow testing the ground and at the same time, determining if there is a need for further elaboration of legal norms regulating legal assistance in civil and administrative cases, what are the necessary resources and the approximate number of cases that could be expected, etc.

[663] http://www.legalaid.ge/cms/site_images/Documents/AIDLegal%20Annual%20Report-2010-small.pdf
[664] Flood, J., Whyte, *supra note* 41 at 96.

Overall, the Georgian legal aid scheme is viewed as a very positive development, and it represents a model for other countries.[665] However, it is premature to talk about the overall effectiveness of this scheme with regard to civil legal aid, since court representation for civil matters will start applying in 2015.

[665] UNICEF Regional Office CEE/CIS, Compilation of Good Practices, 2009.

3. Legal aid in non-criminal matters in Moldova

The research reflects only the legal aid system in the Republic of Moldova, not including Transnistria, a separatist republic created after a war in 1992. Moldova has no *de facto* authority over this region.[666]

3.1 Remarks on the legal aid reform in Moldova

The legal aid reform in Moldova started in 2004 as a part of a broader effort to improve the justice system in the country. The main reasons that determined the reform process were the multiple shortcomings of the old legal aid scheme, a legacy of the Soviet era. The problems were related to the availability of the legal aid and the quality and low cost of the legal services delivered under the former system of publicly-funded legal services. The scope of the legal aid was limited in practice mainly to criminal cases, although it should have been delivered also in civil matters where legal assistance was mandatory under law. A study enumerated the following problems:

> "vague norms on entitlement for legal aid, lack of procedural norms for implementing the right to legal aid in non-criminal proceedings, lack of rules on appointment of legal aid lawyers that, in practice, put the latter in dependence on the criminal investigation bodies and judges, cumbersome rules for payment for legal aid and low fees that did not motivate lawyers to do good job for their defendants/clients."[667]

Additionally, legal aid lawyers were appointed in a very high percentage of criminal cases; due to the fact that remuneration was low many legal aid lawyers would often require extra payment from their clients also lawyers were not motivated to perform well

[666] *See Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, judgement of 8 July 2004.
[667] Osmochescu E. *et al.*, Legal Analysis of the Legal Aid System, commissioned by the Soros Foundation – Moldova, October 2003.

and were passively defending their clients.[668] For example "in 2003 the system was in a virtual collapse when legal aid lawyers refused to take more cases because of arguments over remuneration."[669] In addition, there was no entity that would bear the responsibility for ensuring access to legal aid, no unified budget, poorly defined eligibility criteria, lack of admission criteria for lawyers providing legal aid, and lack of any mechanism to monitor the quality of legal services delivered under the scheme. The former legal aid system was not centered upon the interests and rights of its beneficiaries, it

> "was portrayed not as an element of the access to justice policy but as a special protection for a limited number of particularly vulnerable participants in court procedures. In a sense it was mostly viewed as a guarantee for the smooth development of adjudication proceedings and not as a safeguard of individual rights … Philosophically, legal aid was based on the recognition that the defendants in criminal proceedings have much less powers (if any) in comparison to the mighty state apparatus represented by the police and prosecution."[670]

The old scheme was rather a social assistance scheme.

Following the findings of the mentioned studies the Soros Foundation – Moldova throughout 2004 and 2005 carried out multiple meetings, round tables and conferences in an attempt to raise the government's and Bar Association's attention on the state of the current legal aid and the need for reform. In this endeavour the Parliament proved to be the most responsive and a working group on preparing a concept paper on legal aid and drafting a new legal aid law was set up under the Legal Commission of the Parliament.

[668] Munteanu, V., Zaharia, V., Jigau, I., Study on Criminal Legal Aid Delivery in Moldova, 2004.
[669] Gramatikov, M., Hriptievschi, N., Impact Assessment of the Moldovan Law on State Guaranteed Legal Aid, Soros Foundation-Moldova and the Human Rights and Governance Grants Program, Open Society Foundations, Budapest, 2011, p. 7.
[670] *Ibid* p. 5

Subsequently, the Ministry of Justice, representatives of the Soros Foundation and the Bar Association joined the team.[671]

The state officially undertook the commitment to reform the legal aid system. This commitment was envisaged in the National Plan for the Human Rights for the years 2004-2008. The National Plan included *inter alia* the commitment to guarantee access to justice for indigents based on the principles of equality of arms and access to effective legal aid.[672]

In the context of the undergoing legal aid reform the Soros Foundation – Moldova in April 2006 set up a pilot Public Defender Office in Chisinau. The main objective of the office was to provide qualitative legal aid, test this model in the local context and collect data on legal aid delivery. The main mandate of the Public Defender Office was to provide legal aid in criminal matters. However, the office provided legal assistance in several civil cases, but only to test the ground. Overall it played an important role in shaping the legal aid system and was later included within the new legal aid scheme.[673]

The next crucial step in the reform process of the legal aid system materialized in the new law on legal aid. The law was developed by a legal aid working group which benefited from extensive assistance and support from international experts such as the Open Society Justice Initiative, the Council of Europe and European Commission Joint

[671] For more details on the legal aid reform in the Republic of Moldova *see* Hriptievschi, N., Legal Aid in Moldova – Prerequisites, Progress, Challenges and Expectations, Legal Consultant , Public Defenders Office Chisinau, Paper prepared for the Foundation for Legal Technologies Development, Minsk, Belarus, November 2008.
[672] National Plan for the Human Rights for 2004-2008, M. O. of the Republic of Moldova No. 235-238, 28 October 2003.
[673] Hriptievschi, N., *supra note* 671.

Programme for Moldova, OSCE Mission in Moldova, American Bar Association Rule of Law Initiative in Moldova, and JUSTICE UK.

The law addressed all above mentioned shortcomings. It enlarged the scope of legal aid to civil and administrative cases as well, introduced an entity responsible for managing and delivering legal aid, established a unified legal aid budget, put in place a new mechanism for monitoring the quality of legal services and admission requirements for the lawyers willing to join the scheme etc.

The Moldovan Parliament in 2007 voted unanimously to approve the new legal aid law.[674] The Law on the State Guaranteed Legal Aid increased access to legal aid by enlarging the scope of the legal aid to criminal, administrative offences but also civil and administrative matters, creating a mixed delivery system meant to stimulate competition among providers and accordingly increase the quality of legal services. The law guarantees both primary and qualified legal aid. The law has empowered a quasi-independent body under the Ministry of Justice, the National Legal Aid Council, to manage the legal aid system and implement the legal aid policy in the country, through a network of territorial offices.

3.2 The Moldovan legal framework on legal aid

3.2.1 The Constitution

Article 20 of the Constitution[675] echoes the right to free access to justice by stating that:

[674] Law on the State Guaranteed Legal Aid, No. 198-XVI, of July 26, 2007, M.O. No. 157-160, of 5 October 2007, entered into force on 1 July 2008.
[675] The Constitution of the Republic of Moldova, adopted on 29 July 1994.

> "(1) Every citizen has the right to obtain effective protection from competent courts of jurisdiction against actions infringing on his/her legitimate rights, freedoms and interests.
>
> (2) No law may restrict the access to justice."

In the same context, Article 26 refers to the right of defence, stating that: "(1) the right of defence is guaranteed" and "(3) throughout the trial the parties have the right to be assisted by a lawyer, either chosen or appointed *ex officio.*" However, this provision was conceived as targeting only the right to defence in criminal trials. It was not interpreted as extending to non-criminal matters by any competent authority.

3.2.2 The Civil Procedure Code

According to Article 77 of the Civil Procedure Code[676] the court is obliged to ask the territorial office of the National Council for the appointment of a lawyer if a party or intervener are deprived or limited in their capacity of exercise and do not have legal representatives or if the address of the defendant is not known; if the court finds a conflict of interest between the representative and the person with deprived or limited capacity of exercise; in cases provided under Article 304 and 316 and in other cases provided by law.

Article 304 of the Civil Procedure Code introduces mandatory court representation in cases when an individual is not assisted by a lawyer during the proceedings regarding the limitation of his/her capacity to exercise or declaration of incapacity the judge shall ask the coordinator of the territorial office of the National

[676] Civil Procedure Code of the Republic of Moldova, adopted on 30 May 2003, Official Gazette No. 111-115 of 12 June 2003, entered into force on 12 June 2003.

Council to appoint a lawyer. The lawyer's services in this particular case are free of charge.

According to Article 316 of the same Code if an individual is not assisted by a lawyer in proceedings where is decided upon his/her placement in a psychiatric stationary the judge shall ask the coordinator of the territorial office of the National Legal Aid Council to appoint a lawyer free of charge.

3.2.3 Law on the Legal Profession

According to Article 5(2) and (4) the state guarantees access to qualified legal assistance to all persons in accordance with the law. Moreover, in cases stipulated by law the remuneration for the qualified legal assistance is paid from the state budget. In addition, according to Article 5(5) lawyers may consider delivering qualified legal assistance to persons free of charge taking into consideration their economic status.[677]Since there is no obligation to report *pro bono* delivered legal aid there are no official statistics that would reveal the real number of legal assistance provided by lawyers to poor. In this context legal profession itself should undertake an active role in provision of free legal aid; especially that it represents an important actor in this field. Both the Council of Europe Recommendation No. R (2000) 21 on the freedom of exercise of the profession of lawyer,[678] and UN Basic Principles on the Role of Lawyers[679] recommend that lawyers assist the government in fulfilling its obligation to provide legal services to the poor by cooperating in the organization and provision of legal services.

[677] Law on the Legal Profession No. 1260-XV, adopted on 19 July 2002.
[678] Recommendation of the Committee of Ministers No. R (2000) 21 on the freedom of exercise of the profession of lawyer *supra note* 255.
[679] UN Basic Principles on the Role of Lawyers *supra note* 213.

3.3 The Moldovan Legal Aid Scheme

The Law on State Guaranteed Legal Aid was adopted by the Moldovan Parliament on 26 July 2007 and entered into force 1 July 2008. According to the Preamble the law was adopted by

> "Taking into consideration the need to protect the right to a fair trial guaranteed by Article 6 of the European Convention for Human Rights, including the need to ensure free and equal access to legal aid by organizing and delivering state guaranteed legal aid and by diminishing the economic and financial impediments in realizing the access to justice states."

The new legal aid covers criminal cases and administrative offences, but also civil and administrative cases. The new law also sets the conditions and procedure of state guaranteed legal aid delivery for the purpose of protecting human rights and fundamental freedoms and other legitimate interests of persons.[680] It introduced a completely new model of legal aid by providing a mixed system of legal aid delivery.

3.3.1 Definition and types of legal aid

In the context of the Law on the State Guaranteed Legal Aid, state guaranteed legal aid is defined as the "delivery of legal services provided from the financial means intended for the delivery of such services to persons that do not have sufficient financial means to pay for them and that meet the requirements provided in the law. The law creates two types of legal aid, primary and qualified legal aid".[681]

Primary legal aid represents provision of information regarding the legal system, the relevant legislation, the rights and obligations, the method of enforcing and exercising rights both in the judicial and extrajudicial proceedings. It also includes the delivery of

[680] Article 1 of the Law on the State Guaranteed Legal Aid.
[681] *Ibid* Article 2.

counselling on different legal issues, assistance in drafting legal documents (except procedural documents for court proceedings) and delivery of other forms of assistance that do not constitute qualified legal aid.[682] It is provided by paralegals and specialised NGOs.[683]

Unfortunately, the delivery of primary legal aid in practice is quite limited, since for instance in 2010-2011 primary legal aid was provided only in 30 villages throughout the country,[684] where Soros Foundation-Moldova is supporting a network of paralegals. There are no NGOs at the moment involved in the scheme. This is a serious drawback in the functioning and practical accessibility to primary legal aid, especially taking into consideration that a big number of non-criminal problems could be solved namely through appropriate legal consultations and assistance in drafting documents.

Qualified legal aid, in the context of non-criminal matters, represents delivery of legal services of counselling, representation and/or defence before courts of law in civil cases or cases of administrative jurisdiction, as well as representation before the public administration authorities.[685] It can be requested at any stage of proceedings and in civil cases even before the initiation of proceedings.[686] Delivery of qualified legal aid was diversified and can be provided by public or private lawyers that are willing to provide legal aid on the basis of a contract. Accredited NGOs might also be allowed to provide legal aid, with the condition that the representative of the organization is a qualified lawyer.[687]

[682] Article 2 of the Law on the State Guaranteed Legal Aid.
[683] *Ibid* Articles 16 and 17.
[684] Gramatikov, M., Hriptievschi, N., *supra note* 669, p. 10.
[685] *Ibid.*
[686] Article 19 (2) of the Law on State Guaranteed Legal Aid.
[687] Since January 2012 only qualified lawyers can represent in court.

It has to be noted that qualified legal aid for criminal matters applied from the moment the Law on the State Guaranteed Legal Aid entered into force, however such aid in non-criminal matters started operating as of 1 January 2012.[688] In September 2011, a working group was created with the task of revising the legislation to extend the state-guaranteed legal assistance to non-criminal cases and strengthen the management capacity of the system of state-guaranteed legal assistance. The working group has developed proposals for amending legislation, which were submitted to the Government[689] and subsequently adopted in 2012.

3.3.2 Management of the legal aid system

The National Council for State Guaranteed Legal Aid (National Council) is a legal entity of public law in charge with the administration and management of the national legal aid system. Along with the National Council the administration of the system of delivering of legal aid is carried out by the Ministry of Justice and the Bar Association.[690] The Ministry of Justice retains the authority over the policy making in the field of legal aid.[691] The National Council reports on its activities annually to the Ministry of Justice, the Government and the Parliament[692] and submits quarterly reports to Ministry regarding the expenditure of the finances allocated for legal aid. The Ministry of Justice cannot interfere within the National Council decision making process and management of cases. At the same time the National Council advises the Ministry on legal aid policies and oversees the implementation of these policies. The Bar Association

[688] Article 37(1) of the Law on the State Guaranteed Legal Aid.
[689] Strategia de Activitate in Sistemul de Acordare a Asistenței Juridice Garantate de Stat pentru anii 2012-2014, aprobat de Consiliul Național pentru Asistență Juridică Garantată de Stat, Hotarîre nr. 16 din 21.12.2011 (in Romanian). Strategy of the Activity and Provision of the State-Guaranteed Legal Aid.
[690] Article 8 of the Law on the State Guaranteed Legal Aid.
[691] *Ibid* Article 9.
[692] *Ibid* Article 12(1) f).

participates in the management of the state guaranteed legal aid by being responsible for the development of the criteria for the selection of legal aid lawyers and those related to quality control of the services delivered under the legal aid scheme. It also participates in the monitoring of the activity of the legal aid lawyers.[693]

According to Article 11 of the Law on State Guaranteed Legal Aid the National Council is a collegial body consisting of seven members, namely two representatives delegated by the Ministry of Justice, two representatives delegated by the Bar Association, one representative delegated by the Ministry of Finances, one representative delegated by the Superior Council of Magistracy and one representative of the non-governmental organizations or of the academic field. Such a mixed composition was chosen with the purpose to guarantee its independence and portraying and impartiality in the eyes of beneficiaries and society. They meet in ordinary sessions once a trimester.[694]

The National Council has the following prerogatives:

"- implements the policy in the field of delivering of state guaranteed legal aid;
- insures the initial and continuous training, including through the National Institute of Justice, of the persons involved in the system of delivering of state guaranteed legal aid;
- compiles the practice of implementation and development of the recommendations for the purpose of ensuring the uniform enforcement of the legal aid law;
- keeps record of persons, who deliver state guaranteed legal aid;
- insures the functioning of the territorial offices;
- drafting annual reports on the activities in the system of delivering of state guaranteed legal aid and submits them to the Ministry of Justice, the Government and the Parliament;
- submits to the Ministry of Justice the quarterly report on the use of the financial means allocated for the delivery of state guaranteed legal aid;

[693] Article 10 of the Law on the State Guaranteed Legal Aid.
[694] *Ibid* Article 13.

- cooperates with foreign organizations, international and non-governmental organizations, which are involved in the field of state guaranteed legal aid;
- insures the implementation of the pilot-models for delivering of state guaranteed legal aid."[695]

In order to accomplish its functions, the National Council fulfils the following main prerogatives:

a) "conducts the process of delivering of state guaranteed legal aid;
b) assesses the costs, plans the expenditures related to the delivery of state guaranteed legal aid and submits proposals to the Ministry of Justice to be included in the state budget;
c) manages the budgetary funds allocated for the purposes of delivering of state guaranteed legal aid;
d) establishes the rules on organizing the contests for the selection of the coordinators of the territorial offices and organizes such contests;
d^1) establishes the rules on organizing the contest for the selection of the candidate for the executive director position, organizes this contest, appoints and terminates labour relations with the executive director;
e) develops the methodology of calculating the income, determines the level that allows the delivery of qualified legal aid and proposes them to the Government for approval;
f) approves the forms of the acts for obtaining and delivering of state guaranteed legal aid, provided by the present law;
g) develops and approves the criteria for the selection of the lawyers for delivering of qualified state guaranteed legal aid, in coordination with the Bar Association;
h) determines how the contests for the selection of the lawyers, who will deliver qualified state guaranteed legal aid will be held and organizes such contests;
i) establishes the method and the conditions for the remuneration of persons that deliver state guaranteed legal aid, ensures their remuneration;
j) establishes and revises periodically the standards of activities and professional training of lawyers, paralegals, as well as other categories of people, who deliver state guaranteed legal aid;
k) develops, in coordination with the Bar Association, the criteria for assessing the quality of state guaranteed legal aid;
l) monitors the process of delivering of qualified state guaranteed legal aid, organizes the process of evaluating the quality of state guaranteed legal aid delivered by authorized persons;
m) collects and analyzes the information on state guaranteed legal aid delivered, with the view to improve the functioning of the system of delivering of state guaranteed legal aid."[696]

[695] Article 12 (1) of the Law on the State Guaranteed Legal Aid.

The Law on the State Guaranteed Legal Aid entrusted the National Council with very important functions and tasks. Unfortunately, up to 2009 its members were not remunerated and there were no permanent personnel. For some time the National Council worked in fact more like a council of experts with decision-making powers but without a distinct budget and administrative staff. [697] Already at the end of 2011 concrete proposals were submitted to the Government, which aimed at strengthening the management and capacity of the legal aid system by establishing the administrative structure of the National Council. [698] According to the new paragraph of Article 11(7^1) the Council has an administrative apparatus composed of the Executive Director and staff members. The Executive Director is selected through an open contest.

The National Council has five territorial offices located in the jurisdiction of five appeal courts districts covering the whole territory of the country in Chişinau, Balţi, Cahul, Comrat and Bender (Cauşeni). Territorial offices have status of legal persons of public law which ensure the implementation of the legal aid policy and delivery of state guaranteed legal aid locally. They are in charge of conclusion of contracts with lawyers included in the lists of persons delivering legal aid, eligibility determination, appointment of lawyers delivering qualified legal aid, including emergency legal aid, conclusion of cooperation agreements with paralegals and non-governmental organizations that deliver primary legal aid, reviewing the legal aid lawyers' reports, making the payments,

[696] Article 12 (2) of the Law on the State Guaranteed Legal Aid.
[697] For shortcomings in the *modus operandi* of the National Council *see* Hriptievschi, N., National Report: Moldova, Paper prepared for the International Legal Aid Group Conference: 1-3 April, 2009, Wellington, New-Zealand, p. 10.
[698] Strategy of the Activity and Provision of the State-Guaranteed Legal Aid, *supra note* 689.

collecting statistical data on the needs in legal aid and on the level of their coverage in the territory.[699]

3.3.3 Eligibility for legal aid

According to Article 6 of the Law on State Guaranteed Legal Aid legal aid is delivered to citizens, foreign citizens and stateless persons "in the proceedings and cases that refer to the competence of the public administration authorities and of the courts of law of the Republic of Moldova"[700].

Depending on the type of legal assistance rendered to the beneficiary, the law has provided for different eligibility criteria.

Primary legal aid is provided to any person on any legal issue disregarding his/her financial status.[701] Anybody can benefit from primary legal aid without having to prove his/her financial status. With the view to limit the abuse of such legal aid, according to the law a person cannot come twice with the same legal issue, unless there are new discovered circumstances that need to be considered.[702]

The rationale behind the fact that primary legal aid is not subject to eligibility criteria is the consideration of promptness and effectiveness of such aid. Usually primary legal aid involves quite simple legal problems and the imposition of some additional eligibility criteria would hinder the population from using the legal aid services. [703] The law states that primary legal aid has to be provided immediately upon request or at least in three days after the request. If during the delivery of primary legal aid, it is discovered

[699] Article 14 of Law on the State Guaranteed Legal Aid.
[700] *Ibid* Article 6 (2).
[701] *Ibid* Article 2.
[702] *Ibid* Article 17.
[703] Hriptievschi, N., *supra note* 671 p. 6.

that there is a need to deliver qualified legal aid, the applicant is informed about the conditions, on which he/she can receive such aid, and, upon request, he/she shall be assisted in writing a request for qualified legal aid.[704]

The lack of eligibility criteria with regard to primary legal aid represents a liberal approach that goes beyond the minimum requirements established by the human rights standards, which suggest that in principle it will suffice to ensure access to legal aid to those in need. Such a far reaching provision of primary legal aid is welcomed because it enables representatives of the middle class facing legal problems to have access to legal aid scheme if necessary. However, as mentioned above at the moment primary legal aid *de facto* does not operate at its full extent and is conditioned by the availability of financial resources, a factor that could significantly reduce access to justice for those experiencing civil problems.

Qualified legal aid in regard to non-criminal matters started operating as of the beginning of 2012. The eligibility criteria for this type of legal aid consist of two prongs: the means and the merits test.

The means test limits the coverage of the qualified legal aid to persons whose income is lower than minimum existence level per capita in the country determined by the government.[705] This rule does not apply to persons who are entitled to receive mandatory legal aid.[706] The calculation of the applicant's income is done with a view of the average monthly income and profits for the last 6 calendar months prior to the month

[704] Article 17 of the Law on the State Guaranteed Legal Aid.
[705] According to the Regulation approved by Government Decision nr. 902 of 28.08.2000 for the third quarter of 2011 the average minimum level of existence constituted 1386.4 MDL that is approximately 84.50 EUR .
[706] *See* Articles 77, 304 and 316 of the Civil Procedure Code of the Republic of Moldova.

when the request has been submitted.[707] Applicants should attach to their requests for legal aid their income declaration. This declaration is prepared by the applicant and he/she has full responsibility with regard to the data provided and might face criminal liability for false statements to public authorities. If the there are any doubts about the applicant's declaration data is verified with competent authorities. In practice this is a bit complicated since "territorial offices do not have access to the databases of tax authorities to ascertain income and property. They also do not have the necessary human resources to verify even a small sample of the requests." This means that they must "rely purely on declarations compiled and deposited by the applicants"[708] and thus there is space for abuse.

Those entitled to mandatory legal aid in civil matters and persons receiving social assistance in accordance with the law during the six months before the month in which the request for legal aid is submitted are not subject to means test.[709]

The merits test in non-criminal matters dictates that the beneficiary's case has to be "complex from the legal or procedural point of view" in order to qualify for legal aid.[710]

The establishment of eligibility criteria is in line with the ECHR standards, since the right to legal aid under Article 6(1) of the Convention is not an absolute one and the legislator is free in providing criteria that would limit the availability of such aid to certain categories of persons and/or types of cases.[711] Both financial capacity of the

[707] Article 21 of Law on the State Guaranteed Legal Aid.
[708] Gramatikov, M., Hriptievschi, N., *supra note* 669 p. 18.
[709] *Ibid* Article 20.
[710] *Ibid* Article 19 (1) e).
[711] *See Gnahore v. France*,supra note *358* para. 41.

applicant and the complexity of the case are criteria reflected in the case-law of the ECtHR.[712]

In terms of costs covered by the qualified legal aid there can be fully or partially free qualified legal aid. In the former case the costs are fully covered by the state. In the last case, qualified legal aid is provided in cases when the person, whose income is bigger than the level of income established by the Government in the view of receiving legal aid, is capable to cover a part of the expenses for legal aid. Qualified legal aid can be delivered with the financial contribution of the beneficiary, if this contribution does not exceed his/her financial and material possibilities.[713] However, the material possibilities benchmark is quite vague. Therefore, the legislator has to provide for clear and precise indications as to the minimum income below which partial legal aid is provided in order to ensure transparent and accessible procedure. It has to be noted that the provision of partially state guaranteed free legal aid is a step forward towards the insurance of meaningful and effective access to justice, since representatives of the middle-class will be able to settle their civil problems via state guaranteed legal aid if necessary. At the moment the indigence ground plays the most important role in the delivery of the legal aid, partially free qualified legal aid is barely functioning.

3.3.4 Applying for legal aid

There are two different application procedures depending on the type of legal aid.

Persons who want to benefit from primary legal aid have to address a verbal or written request directly either to paralegals or specialised NGOs authorized to deliver

[712] *See Santambrogio v. Italy*, *supra note* 361*; P., C. and S. v. United Kingdom*, *supra note* 370.
[713] Article 22 of the Law on the State Guaranteed Legal Aid.

such assistance within the area of their permanent domicile.[714] As already mentioned primary legal aid is provided immediately upon request or in maximum three days from the moment the request was filed. If however the beneficiary's legal issue is complicated, the person should be advised to contact a lawyer or to come later if the provider can have a solution in maximum three days.

Persons who are in need for qualified legal aid have to fill in a special model form approved by the National Council and attach to the request an income declaration.[715] The request for qualified legal aid can be also submitted by relatives or representatives of the applicant, in person or by mail. The request for the delivery of qualified legal aid needs to be submitted to the territorial offices of the National Council or to the court of law which shall send the request, with attached documents, to the territorial office within three working days at most from the date of its receipt. The decision on the delivery of qualified legal aid is taken by the coordinator of the territorial office and is brought to the attention of the applicant within three working days at most.[716]

The law provides the grounds for refusing qualified legal aid, namely the request for legal aid is manifestly ill-founded; the applicant does not have the right, for which the legal aid is requested, which results from the presented documents; the claim's value is considerably lower than the legal aid costs; the applicant is able to fully cover the expenses for the delivery of legal services from his/her own property, except for the goods, which in accordance with the legislation in force, cannot be impounded. In addition, in accordance with the amendments introduced to the law in 2012 there are

[714] Article 17 of the Law on the State Guaranteed Legal Aid.
[715] *Ibid* Article 25.
[716] *Ibid* Article 26.

several types of non-criminal matters that are excluded from the coverage of qualified legal aid. Accordingly, legal aid shall not be delivered when the request for the delivery of legal aid is related to the applicant's commercial activity; value of the claim is less than half of the minimum existence level, calculated in accordance with the manner approved by the Government; applicant is already enjoying qualified legal assistance on the same issue; the request relates to damages caused by harm to honour, dignity and professional reputation; the request relates to disputes with regard to neighbouring rights, except when it relates to removing the danger of a falling or collapsing, compliance with distance for construction and disputes related to boundary.[717] These categories of cases are excluded from the initial phase of the coverage of the civil legal aid.[718] The principal rationale behind the exclusion of such cases is that some of them have a less serious nature and could be settled outside the judicial realm, for example actions with a claim smaller than the subsistence minimum or disputes between neighbours. Other cases such as those related to defamation are susceptible to abuse.

Under ECHR the legislator has the margin of appreciation when it comes to provision of legal aid to types of matters. Article 6(1) of the Convention does not imply the obligation to provide legal aid for every dispute relating to a civil right.[719] However, under Article 6(1) states may sometimes be obliged to provide legal aid when this proves indispensible for an effective access to court in the light of the complexity of the procedure of the case.[720] That is why a total exclusion of some types of civil matters from

[717] Article 24 (1^1) of Law on the State Guaranteed Legal Aid.
[718] Raport de Monitorizare privind implementarea Legii nr. 198-XVI din 26 iulie 2007 cu privire la asistență juridică garantată de stat, Minsiterul Justiției, Chișinău. 2012, p.9 (in Romanian). Report on Monitoring the Implementation of the Law on State-Guaranteed Legal Aid.
[719] *See Airey v. Ireland, supra note* 84.
[720] *Ibid.*

the reach of the qualified legal aid might be problematic. Though unavailability of legal aid for certain types of cases is not contradictory to the ECHR, a complex case might trigger the necessity for legal aid as for example in *Steel v. Morris* the lack of legal aid for a serious defamation case was in violation of Article 6(1) guarantees. In addition, a survey showed that approximately one in four Moldovans faced a serious and difficult to resolve non-criminal legal problem in the past three and a half years and that disputes between neighbours are amongst the most frequently occurring problems.[721] But again a gradual approach in the implementation of civil legal aid might be preferable taking into consideration the fact that the legal aid system in Moldova has been recently introduced and institutionally and financially is still not entirely stable.

According to the law the refusal to deliver qualified legal aid has to be reasoned and can be appealed in administrative jurisdiction proceedings within 15 working days since the communication of the decision. [722] This means that the applicant should appeal the refusal before a high-standing official and if the appeal is dismissed, then the person can bring his/her challenge before a court. The obligation introduced by the legislator with regard to the motivation of a refusal of legal aid is an important guarantee against arbitrariness and satisfies the requirement under Article 6(1) of ECHR according to which the refusal "should be reasonably and objectively justified, based on legal grounds".[723] Subsequently, the applicant may, if disagrees with the grounds for denial of legal aid, bring a challenge before a higher authority and then before a court. The last tier

[721] Gramatikov, M., Met and Unmet Legal Needs in Moldova, 2011, p. 3.
[722] Article 24 (2) of the Law on the State Guaranteed Legal Aid.
[723] *See Aerts v. Belgium, supra note* 356.

for challenging the refusal is considered an effective remedy under the ECHR and thus satisfies the requirements imposed by Article 6(1) of the Convention.

The law provides for the possibility of reimbursement of expenses for qualified legal aid. In case of delivery of judicial decisions in civil cases or in administrative jurisdiction cases in favour of the beneficiary of qualified legal aid, the party that lost the trial shall pay out the expenses for qualified legal aid delivery. Also, if the beneficiary, who received qualified legal aid by submitting false or untrue information, including about his/her financial situation, misleading the territorial office, is obliged to reimburse the expenses for the delivery of legal aid. If, during the trial or during the enforcement of the judicial decision, the financial situation changed and the person has totally or partially lost the right to qualified legal aid, he or she is obliged to reimburse the expenses for the delivery of legal aid.[724]

3.3.5 Number of cases

From the moment the new legal aid system was launched in 2008 it covered only criminal cases. During the first six months of 2008, legal assistance was granted in 4935 cases, compared to 6000 cases in the whole year of 2006. In 2009 this number increased substantially and reached 18.096 matters. In 2011 there were 26.056 cases for which legal aid was delivered.[725]

During 2009 and January-March 2010 the Public Defenders' Office in Chisinau rendered qualified assistance and urgent legal assistance on criminal and administrative

[724]Article 23 of the Law on the State Guaranteed Legal Aid.
[725] Strategia de Activitate in Sistemul de Acordare a Asistenței Juridice Garantate de Stat pentru anii 2012-2014, aprobat de Consiliul National pentru Asistenta Juridica Garantata de Stat, Hotarire nr. 16 din 21 decembrie 2011 (in Romanian). Strategy on the Functioning of the State-Guaranteed Legal Aid System for 2012-2014.

matters to beneficiaries according to the Law on State Guaranteed Legal Aid. It also undertook as a matter of experiment several civil cases. Totally during 15 months the office provided qualified legal aid in 329 non-criminal cases. In the same period the Public Defenders' Office delivered primary legal aid for 330 persons, a total of 194.15 of hours (on average 35 minutes per person). Primary legal aid mainly concerned issues related to: housing, family relations (divorce, alimony), property (donation, privatisation), social protection (pension, social allowance), administrative procedures, labour relations, execution of court decisions, civil procedure (legal assistance in civil cases, appeals) etc.[726]

As of 1 January 2012 the norm regulating the delivery of the qualified legal assistance under the state legal aid scheme took effect for civil matters and administrative procedure cases. In the first month of 2012, 156 requests for qualified legal aid in non-criminal matters were received.[727] According to the official available data in the first three months of 2012, 424 beneficiaries received legal aid in non-criminal matters.[728] On the basis of this data it is difficult to objectively evaluate the overall success of the scheme in regard to provision of legal aid in non-criminal matters. It remains to be seen how legal aid will be implemented in civil and administrative matters in the future. One fact is clear, once the scheme starts operating at its full extent the requests for legal aid in

[726] Activity Report for 2009 and January-March 2010 prepared by the Director of the Public Defenders' Office in Chisinau for Soros Foundation-Moldova within the framework of the project regarding the Implementation of the Public Defenders Office Model on the basis of the Law on State Guaranteed Legal Aid in the Republic of Moldova. March 30 2010.
[727] According to sources from National Council.
[728] Report on Monitoring the Implementation of the Law on State-Guaranteed Legal Aid, *supra note* 718, p. 5.

non-criminal matters will significantly increase in the light of the fact that on average the courts in Moldova review annually around 40-45.000 civil matters.[729]

As already noted primary legal aid although regulated in the law is not sufficiently developed and was provided so far only in rural areas by a network of 30 paralegals established and supported by a project of Soros Foundation. Between November 2010 and December 2011 paralegals rendered 5986 consultations and legal counselling. That means that each paralegal offered on average 15 consultations per month.[730] The paralegals' work also focused on the delivery of trainings, public lectures and dissemination of information on human rights and involvement of the community in activities of public interest.

3.3.6 Legal aid providers

The Law on the State Guaranteed Legal Aid creates a mixed model of delivery of legal services, including in the list of providers lawyers and public defenders for qualified legal aid and paralegals and specialized NGOs for primary legal aid. This precise model has many benefits. First of all opting for diverse legal aid providers the quality, accessibility and the costs of the delivery can be ensured much easier. Moreover, this model provides healthy competition. It was possible to adopt such a model because the legislation allowed delivering legal services in non-criminal matters by non-lawyers. However, according to the latest legislative modifications as of 1 January 2012 only

[729]Report on Monitoring the Implementation of the Law on State-Guaranteed Legal Aid, *supra note* 718 p. 8.

[730] Hriptievschi, N., Principalele concluzii ale unui proiect-pilot şi recomandări pentru extinderea reţelei de parajurişti în Republica Moldova, 2012, p. 11 (in Romanian). Main Conclusions regarding a Pilot-project and Recommendations on the Expansion of the Paralegals' Network in Moldova.

licensed lawyers will have the right to represent in court.[731] This will not affect the current settings of the legal aid scheme because qualified legal aid in non-criminal matters is delivered strictly only by lawyers as in the case of criminal proceedings.

Public defender is "a person that has the right to practice law in conformity with the Law on the Legal Profession, selected on the basis of certain selection criteria to provide free or partially free qualified legal aid from the financial means intended for the delivery of state guaranteed legal aid"[732]. Public defenders enjoy the same rights and guarantees and have the same obligations as lawyers under the Constitution, Law on the Bar, and Code of Ethics for lawyers in Moldova.[733] Public defenders are practicing in individual offices or associations of public defenders. Their offices are created in accordance with the rules established by the Law on the Legal Profession and any additional relevant legal rules.[734] Currently a Public Defender Office operates in Chișinău with seven public defenders working in it.[735]

Paralegal is a completely new concept for the national legal system. The law defines a paralegal as

> "a person that enjoys high respect from the local community, who has incomplete legal education or complete higher legal education that does not practice law and is specially trained and qualified to deliver primary legal aid to members of the community from the financial means intended for the delivery of state guaranteed legal aid".[736]

[731] Law on the State Guaranteed Legal Aid, Article 8. This amendment was introduced by Law No. 102 from 28 May 2010.
[732] Article 2 of the Law on State Guaranteed Legal Aid.
[733] Article 3, Regulamentul de activitate al avocaţilor publici, aprobat prin Hotărîrea Consiliului Naţional pentru Asistenţă Juridică Garantată de Stat nr.18 din 6 octombrie 2008 (in Romanian). Regulation on the Activity of Public Defenders.
[734] *Ibid* Article 5.
[735] http://avocatii-publici.md/pagini/rom/1/
[736] Article 2 of the Law on the State Guaranteed Legal Aid.

The remuneration for services delivered by paralegals is provided from the state budget as well as from other sources not prohibited by law, on the basis of the cooperation agreement concluded with the territorial office which delivers these services within its scope of activity.[737] The paralegals are mainly meant for rural areas, providing consultations on community's members' legal issues and teaching the local members how to exercise and assert their rights. At the beginning of 2012 there were 30 paralegals listed in the National Registry of Legal Aid Providers.[738] This network of paralegals was established and developed between 2009 and 31 January 2012 in the framework of the project entitled "Legal Empowerment of Rural Communities through a network of Paralegals" supported by Soros Foundation-Moldova.

Specialized NGOs were also introduced as legal aid providers because of their active past involvement in delivering legal aid. In order for an NGO to be able to deliver primary legal aid it has to conclude a cooperation agreement with the National Council.[739] At the moment there are no NGOs listed in the National Registry of Legal Aid Providers.

Private lawyers that provide legal aid on request are the "persons who, in accordance with the Law on the Legal Profession, have obtained the right to practice law and who can be asked to deliver qualified legal aid out of the financial means intended for the delivery of state guaranteed legal aid".[740] The lawyer, who wishes to be included in the list of lawyers, who deliver legal aid upon request, has to submit the necessary

[737] Article16 of the Law on the State Guaranteed Legal Aid.
[738] Registrul Național al Persoanelor care Acordă Asistență Juridică Garantată de Stat, aprobat de Consiliul Național pentru Asistență Juridică de Stat, Hotărîrea nr. 17/1 din 06.10.08, data introducerii ultimelor modificări: 04.01.2012 (in Romanian). National Register of Persons Providing State-Guaranteed Legal Aid.
[739] Law on the State Guaranteed Legal Aid, Article 17 (2).
[740] *Ibid* Article 31.

documents to the National Council. Consequently, the territorial office shall conclude contracts with the lawyer, who is included in the list of lawyers, who deliver legal aid. Such contracts can be concluded with lawyers who work in individual or associated lawyer offices. The National Council maintains the list of public defenders, as well as the list of lawyers, who deliver legal aid upon request. The territorial office drafts and maintains on monthly basis the list of lawyers on duty and the schedule of their work, which are brought to the attention of the courts of law and other interested authorities.[741] In 2008 there were 258 lawyers eligible to provide legal aid on request, 277 lawyers in 2009, 331 in 2010 and 501 in 2011. According to the National Registry of Legal Aid providers in 2012 there were 560 private lawyers listed.[742] Availability of private lawyers is a crucial moment, especially after the introduction of qualified legal aid in non-criminal matters. Overall apparently there are no problems at the moment in convincing private lawyers of the benefit of the new legal aid system. However, the "shortage of legal aid lawyers is more visible in remote areas where in general the number of practicing lawyers is small."[743] This could prove an important constraint in delivering qualified legal aid in civil and administrative matters in the regions.

In cases where there are no private lawyers that provide legal aid on request listed under a court jurisdictions or they are unable to deliver legal aid, Article 31^1 of the Law on State-Guaranteed Legal Aid states that the territorial office of the National Council appoint an *ex officio* lawyer from among those that are not registered under the legal aid scheme whose offices are within the jurisdiction of the respective territorial office. An

[741] Article 33 of the Law on the State Guaranteed Legal Aid.
[742] National Register of Persons Providing State-Guaranteed Legal Aid, *supra note* 738.
[743] Gramatikov, M., Hriptievschi, N., *supra note* 671 p. 16.

appointed lawyer is obliged to provide qualified legal assistance, but the amount of work should not exceeding 120 hours per year. They are paid under the same conditions as private lawyers that provide legal aid upon request.

3.3.7 Monitoring the quality of legal services under the legal aid scheme

According to Article 36 the National Council is entrusted with the power to control the quality of services delivered by lawyers. The quality control is realized through monitoring, requesting and through verifying the information from the territorial offices on the amount and type of the legal aid delivered, by examining complaints from the beneficiaries of qualified legal aid and from other interested institutions. The National Council with the Bar Association monitor the process of the delivery of qualified legal aid by lawyers.

In accordance with the National Council Decision, Chișinău territorial office monitors the quality of services provided by each tenth lawyer of lawyers included in the list of state-guaranteed legal assistance. Bălți territorial office monitors the quality of services provided by each fifth lawyer of lawyers included in the list of state-guaranteed legal assistance. Cahul, Bender and Comrat territorial offices monitor the quality of services provided by each third lawyer of lawyers included in the list of state-guaranteed legal assistance. Subsequently, territorial offices include the results of the monitoring process in their quarterly report by reflecting data on the use of funds allocated for legal assistance guaranteed by the state and the activity of the territorial office, which is presented to the Ministry of Justice and National Council.[744]

[744] Hotărîre CNSAJ Cu privire la asigurarea prin monitorizare a calităţii asistenţei juridice garantate de stat, Nr. 25 din 28 octombrie 2009 (in Romanian). Decision of the National Council on ensuring quality of the state-guaranteed legal assistance through monitoring.

The data obtained as a result of the monitoring and controlling of activities are delivered to the Bar Association and can serve as grounds for applying to lawyers the disciplinary sanctions, provided for in the Law on the Legal Profession.

The activity of the public defenders is monitored in accordance with the provisions of the Regulation of activity of public defenders and quality standards established in the "Handbook of public defenders",[745] which regulates the internal organization of the office and how legal assistance is delivered. The Manager of the Public Defenders' Office, which is selected for five years trough a contest by the National Council,[746] oversees the compliance with the provisions of the "Handbook of public defenders" by the members of the office by ensuring the supervision of the quality and quantity of legal assistance provided by public defenders by a Joint Commission and examines complaints received from clients.

The failure to deliver qualitative legal aid can serve as a basis for dissolution of contracts concluded with public defenders and lawyers that provide legal aid on request.

In practice this model of monitoring the quality of delivered legal assistance under the legal aid scheme has some deficiencies mainly because the National Council and its territorial offices were limited in administrative, human and material capacity. In addition, there are no explicit quality standards for lawyers in general. These standards should serve as benchmarks for evaluating the quality of lawyers' services in all cases, including those delivered under the legal aid scheme. The National Council does not have the mandate to establish separate standards. Moreover quality of state-guaranteed legal

[745] http://avocatii-publici.md/pagini/rom/12/
[746] Article 29 of the Regulation on Activity of Public Defenders, *supra note* 733.

assistance should not be distinguished from best practices in the field. The Bar Association currently is working on the development of a set of criteria and professional standards for legal profession, and also a mechanism for monitoring the quality of services. These standards will also serve as a reference for lawyers providing legal assistance under the legal aid scheme.[747] At the same time it has to be noted that there is an overall improvement of the quality services rendered under the legal aid as compared to the pre-2008 system.[748]

3.3.8 Funding and development of the legal aid scheme

In 2004 the annual public budget spent on legal aid was 124.100 Euros. At the same time the annual budget allocated to legal aid per inhabitant constituted 0.037 Euros and the annual budget allocated to legal aid per inhabitant as percentage of per capita GDP was 0,006%.[749] In two years the figures did not change radically. When the 2006 data of the budget allocated to the legal aid system are compared with the 2004 data, there is no considerate increase of the budget. The total annual approved public budget allocated to legal aid in 2006 was 126.614 Euros or 0.04 Euros per inhabitant that is 0.005% per inhabitant of per capita GDP. In addition, the legal aid budget constituted in all these years only a very small portion of the total annual approved public budget allocated to all courts, public prosecution and legal aid which was 7.264.586 Euros.[750]

In 2007 the annual budget for legal aid was 278.728 Euros. However, this included only financial means for criminal legal aid and no money at all for the

[747] Strategy on the Functioning of the State-Guaranteed Legal Aid System for 2012-2014, *supra note* 725.
[748] Gramatikov, M., Hriptievschi, N., *supra note* 669, p.3.
[749] European Commission for the Efficiency of Justice, Evaluation of European Judicial Systems, Edition 2006 (2004 data).
[750] European Commission for the Efficiency of Justice, Evaluation of European Judicial Systems, Edition 2008 (2006 data).

administration of the legal aid system. There was a significant increase in the public budget dedicated to legal aid with the adoption of the new law on legal aid. The annual budget for legal aid in 2008 was 274.286 Euros and in 2009 and 2010, 496.200 Euros.[751] This increase is significant taking into consideration the overall economic situation of the country. However, comparing the average public budget allocated in 2010 to the legal aid per inhabitant in Council of Europe Members States, which represents 7 Euros, Moldova spends on average only 0.1 Euro per inhabitant to promote access to justice through the legal aid system.[752]

The annual legal aid budget in 2011 constituted more than half a million Euros and in 2012 it constituted around 1.5 mln Euros. The increase was determined by the fact that starting with 2012 state guaranteed legal aid covers also court representation in non-criminal matters.[753] But it was also determined by the increase in requests for qualified legal aid in criminal matters and the need to strengthen the National Council. This significant increase in the budget for 2012 is a clear indication that access to justice is a priority and that the government took seriously the fact that qualified legal aid in non-criminal matters started operating from the beginning of 2012.

Despite the financial and administrative restraints the National Council managed to work and administer the newly created legal aid scheme. Much support came from the Soros Foundation – Moldova and the Joint Programme between the Council of Europe and the European Commission on Increased Independence, Transparency and Efficiency of the Justice System of the Republic of Moldova, UNICEF and UNDP.

[751] Hriptievschi, N., *supra note* 671.
[752] European Commission for the Efficiency of Justice, Evaluation of European Judicial Systems, Edition 2012 (2010 data), p 46.
[753] Strategy on the Functioning of the State-Guaranteed Legal Aid System for 2012-2014, *supra note* 725.

The Strategy of the National Council for 2012-2014 explicitly refers that it aims at protecting the right to a fair trial set out in Article 6 of ECHR, including free and equal access for all persons to legal assistance guaranteed by the state and also reducing economic impediments with regard to access to justice. In this sense, the Strategy encompasses a strong commitment to the diversification of the range of legal services of the state-guaranteed legal assistance, especially in the light of the fact that from 2012 qualified legal aid extends to non-criminal matters. The National Council is very much oriented toward innovating delivery of legal services, in this context it plans to develop and test primary legal aid system through community paralegals and/or paralegals integrated into the network of social workers; develop and test the mechanism of primary legal assistance through NGOs; institutionalize the primary legal aid system for rural and urban areas; pilot some new models of legal assistance guaranteed by state, oriented to the needs of socially vulnerable beneficiaries. The Strategy also puts accent on the capacity building of the National Council and its territorial office, as a prerequisite for an effective management of the scheme, also on the improvement of quality control and thus improvement of the quality of state-guaranteed legal assistance, and ensuring transparency of the system and access to information for the public. [754]

Conclusion

The new Moldovan legal aid scheme is quite innovative and aims at establishing an accessible, non-discriminatory and cost-effective system. Conceptually it is a well conceived scheme, which puts in the centre the needs of the beneficiary and the goal to guarantee an effective access to justice. The system *de jure* corresponds to human rights

[754] Strategy on the Functioning of the State-Guaranteed Legal Aid System for 2012-2014, *supra note* 725.

standards in terms of securing access to legal aid in non-criminal matters both when legal assistance is rendered compulsory or by reason of the complexity of the procedure of the case. At the same time it exceeds the human rights standards in the light of the fact that it extends legal advice and drafting documents to any person notwithstanding his/her capacity to pay. The establishment of eligibility criteria, quality control of the services rendered under the scheme and guarantees against the arbitrariness of a refusal of granting legal aid were also tailored in the light of the human rights standards.

At the moment the scheme is overall operational but the right to legal aid in non-criminal cases became effective as of 2012 and is still in its initial phase. The available data shows that in the three months of its operation more than 400 persons received civil legal aid. This is not a big number and could be explained by the fact that Moldovan population is not sufficiently aware about the legal aid scheme and in particular about the fact that it started covering qualified legal aid in non-criminal matters.[755] Hence the competent authorities need to concentrate more on raising awareness about the legal aid system, especially now that the scope of the legal aid increased towards civil matters.

Primary legal aid, which consists both of legal advice and drafting documents is applicable to everyone and covers any legal issues (criminal and non-criminal) disregarding financial status of the applicant. In practice primary legal aid was delivered by a network of only 30 paralegals placed in rural areas. This means that only a limited number of people had access to such aid as it does not function at its full extent. There are no eligible and bureaucratic obstacles impeding access to such aid. This was quite a reasonable step, especially in the light of the fact that theoretically a big portion of the

[755]Report on Monitoring the Implementation of the Law on State-Guaranteed Legal Aid, *supra note* 718 p. 17.

population would qualify for it anyways in the light of low life standards in the country, especially in the regions. In this juncture, concentrating on legal advice, information and law education may be a good basis for satisfying legal needs of non-criminal nature, but also preventing their appearance. Though still limited in its application till 2012 this was the main tool in meeting needs of those encountering civil problems. Paralegals documented the problems encountered by their clients and there is a clear trend that the most frequently requests for such legal aid refers to family issues, social protection and social security; employment; disputes between neighbours; and property rights.

Also, the scheme has potential to meet the legal needs of those with moderate means as well, it provides for partial legal aid. But again in practice this is not applied so far.

There were some constraints and deficiencies related to the capacity of the National Council that lacked permanent administrative staff and a separate budget, though it was entrusted with the overall management of the legal aid scheme. This is very important, especially in the light of the fact that legal aid extended to non-criminal matters, which increased considerably the volume of work of the National Council and its territorial offices.

Practice also showed that the current verification mechanism of the applicants' ability to pay for legal assistance proved to be inefficient and thus cases of abuse were difficult to exclude. The means test does not work for several reasons, *inter alia*, because of the lack to directly access certain databases (tax, cadastre, registry, etc.), the inability to obtain the required evidence, the lack of technical means for exchanging information with the regions. This is an alarming drawback. Therefore the ability to exclude cases of

abuse must be strengthened[756] in the light of the fact that legal aid covers non-criminal matters as well. Connection to the databases of tax and registry authorities should be provided.

The diversification of legal aid providers is a clear advantage that needs to be noted. Though in practice NGOs are not yet participating in the scheme and there is a limited number of paralegals, the legislator created a healthy spirit of competition among the legal aid providers thus, determining in long run a higher responsibility and a potential increase in the quality of legal aid services. People in many societies tend to trust more the representatives of NGOs who have good reputation in the field of human rights defence. Moreover, NGOs specialize in certain areas hence, being able to assist better people when encountering some specific issues. Also NGOs receive financial resources from donors thus, being able to use additional financial means and not only those coming from the government. At the end of the day the state is not the sole bearer of the expenses, which for countries with shallow economies might be a viable solution. The only serious drawback in such a diverse model is the creation of effective monitoring mechanisms overseeing the participation of such various subjects in different procedures and proceedings. This is a matter of careful consideration for the legislators.

It is too early to objectively predict if the legal aid scheme will work in practice. The upcoming years are crucial with regard to the capacity of the legal aid to cover non-criminal matters. In this sense, the considerable increase of the legal aid budget for 2012 is welcomed. This will allow allocating resources both to legal aid providers' fees and to the National Council for an effective management of the scheme.

[756] Strategy on the Functioning of the State-Guaranteed Legal Aid System for 2012-2014, *supra note* 725.

Overall the model has prospects of success in relation to non-criminal cases as at the *de jure* level the legislator put in place a well conceived model concentrated on meeting the needs of the beneficiary and guaranteeing access to justice.

4. Conclusion: A new model of legal aid?

Every legal aid scheme is a result of legal, social and political considerations within a specific context and period of time. Leaving in a century when human rights is part of modernity and progress it is logical that states would and often must, in the light of the undertaken obligations, look for inspiration in the human rights realm. International human rights standards do not dictate a particular legal aid system, but they do contain minimum requirements that need to be put in place for such an aid to be effective. If a state fails to appreciate the importance of the right to legal aid and to tailor accordingly an accessible and effective system, the result is that access to justice remains a mere illusion. All three jurisdictions, Bulgaria, Georgia and Moldova have relatively new legal aid schemes, which were created almost under similar conditions and considerations of human rights. The process of creation of the new legal aid schemes shows that there was an explicit new concept of legal aid determined by a trend of legal reforms in the realm of justice. In all three countries the reform in the legal aid was externally-driven by the same actors. At the same time, there was a large degree of support for provision of legal aid from the governments. To a large extent, the roots of the development of the legal aid schemes can be ascribed namely to new reforms, which brought the issue of access to justice on the front page of state agenda. Overall, the creation of the schemes was mainly driven by the considerations of the rule of law and access to justice that were dictated partly by either the accession to EU in case of Bulgaria and or the adherence to European standards in case of Moldova and Georgia. That is why the ideological and theoretical vision of such reforms is *ab initio* a little bit

different from the original considerations that determined the nature for example, of the oldest European legal aid scheme in UK, mainly developed under the welfare state.

The human rights based approach determines the appearance of a new type of legal aid schemes that may be labelled as being "consumerist type". The most important is that such model of delivery of legal aid places the beneficiary at the centre of the system. The starting point represents the necessities and needs of potential "consumers" of the legal services delivered under the scheme. This shift seeks to change the approach towards legal aid by placing the individual and his/her legal needs always in the centre. As showed in the research dedicated to the three schemes under the review, all legislators placed the potential beneficiary's legal needs at the very centre and this fact predetermined all the constitutive elements of the scheme. In this context, the "consumerist type" of legal aid schemes provides usually for a wide scope of legal aid covering both criminal and non-criminal matters, lower levels of eligibility, greater choice of providers, and a wider range of services. Also, some emphasis is placed on information and education and non-contentious matters. It is definitely easier for people to find out about their options through advice which is comprehensive, sometimes universally available and free. All three legal aid schemes at different degrees bear actual characteristics of the "consumerist type" of legal aid.

All three legal aid schemes do not distinguish between criminal and non-criminal matters. Evidently, that does not mean that the degree of legal aid provision for each type of proceedings cannot differ. All three jurisdictions *de jure* reflect this rationale. In Moldova and Georgia the implementation of the qualified legal aid in non-criminal matters was postponed, thus criminal matters were prioritized. However, this does not

mean that at the theoretical level by doing this the legislator categorized cases according to their importance, but rather taking into consideration the scarcity of financial means had to give priority to representation in criminal matters for some time.

Another important reality is that when legal aid is granted under the "consumerist type" of scheme, it is granted as a matter of right and not as a mere service that comes from the idea of a charitable grant. This consideration determines the content of the legal aid. The ideology of legal aid in all three countries clearly presupposes a public duty to provide legal aid to all who qualify. An application cannot be denied on the ground that funds are lacking, and this entitlement can be enforced if necessary in all three jurisdictions. The specialized laws provide for concrete tools of redress when legal aid is denied.

Another innovation driven by the human rights rationale is related to the fact that the present legal aid schemes created a much larger spectrum of services guaranteed by the state. Legal aid in non-criminal matters was not limited only to cases of mandatory defence. The scope of the legal aid in all three jurisdictions covers cases in which representation is mandatory according to law, as well as all other cases in which the applicant does not have adequate financial means for a lawyer but wishes to have one and the interests of justice so require. In addition, the "consumerist type" of legal aid schemes allows for the idea that the right to legal assistance is probably somewhat hollow if it extends strictly to those who cannot afford such assistance. For example, in the case of Moldova the legislator provided for partial state guaranteed legal aid giving the possibility to the middle-class to access the legal services covered by the scheme. At the

same time, in Georgia and Moldova the legislator went even further by opening the access to legal advice to everyone regardless of the income of the person. Of course, at some extent such a liberal approach might be subject to criticism as it involves some risks. It is true that at the end of the day, this might put an excessive burden on the state, especially taking into consideration that the state is obliged to cover legal expenses also for those who, in practice, might have their own means to hire a lawyer.[757] *Prima facie* this fear is reasonable. However, the legislator *de jure* created (may create) some obstacles for an eventual misuse of the scheme. For example, in Moldova the Law on State Guaranteed Legal Aid clearly states that the same person cannot come twice with the same legal issue, unless there are new discovered circumstances that need to be considered.[758] Moreover, it has to be kept in mind that primary legal aid as a rule, involves very simple issues, thus the promptness rationale dictates that access to such aid should not be hindered by bureaucracy. Plus bureaucracy costs. So with no bureaucratic rules (at least for some time), especially, in jurisdictions with transitional economies where a very large portion of population theoretically qualifies for such assistance, substantial money could be saved and directed to the beneficiaries. The overall goal of the schemes is to try to provide legal services to large segments of the population. And even though, all three schemes contain an indigenous clause for court representation, as already mentioned the Moldovan and the Georgian scheme provide legal advice to all segments of the population disregarding the economic status. Actually, at this point the

[757] Roagna, I., Garlick, P., Experts' Opinion regarding the legislation of the Republic of Moldova with regard to the approximation of the status and of the rights and obligations of the lawyer in the process of defence of the clients with the European standards and practices, Strasbourg, 3 August 2009.
[758] However, the legislator did not provide in Article 18 of the Law on the State Guaranteed Legal Aid the consequences of the client acting in bad faith.

main source of covering non-criminal legal needs in Georgia is satisfied through primary legal aid because qualified legal aid will start functioning from 2015. For instance in 2012 17.557 consultations were delivered of which 87% were rendered in non-criminal matters. In Moldova primary legal aid is still not operating at its full extent being provided at the moment of the research only in several rural areas by a network of 30 paralegals. At the same time, in Bulgaria the national scheme covers both primary and qualified legal aid in civil and administrative matters but both of them are subject to the indigent clause.

Another important idea behind the "consumerist type" of schemes is that the assistance under the scheme should be similar to the services that lawyers offer to clients who pay from their pocket for legal services. When an applicant is eligible he/she is entitled to the full spectrum of legal services. Except issues, which directly result from contentious matters a modern legal aid scheme may cover non-contentious matters as well. *De jure* all three countries include a quite large range of services under the legal aid scheme which can be divided in two types of legal aid: primary legal aid (consultations (limited to reaching an agreement out of court room, in Bulgaria; on different issues in Georgia and Moldova) and drafting documents) and qualified legal aid (court representation and representation before public authorities). Indeed, free legal aid should not be restricted to proceedings before court but should be available also in regard to legal advice, providing legal information, drafting documents, representation before administrative bodies, extra-judicial attempts of alternative dispute resolution, etc.

Also the human rights rationale allows for legal aid services to become not only a emanation from the legal forums but, in some jurisdictions, where possible, certain cases

are also handled by quasi-legal entities such as specialized NGOs, paralegals, public defenders, etc. Thus, the traditional nexus between delivery of legal aid and legal profession is transcended. For example, when the Moldovan and Georgian schemes were established, there was a widespread understanding that the legal profession had far too small influence and power to provide decent coverage under a pure *judicare* scheme. Also, taking into consideration that the evidence from other jurisdictions suggests that mixed models might be the cheapest and the most efficient option for delivering legal aid the public attorneys' model (with the possibility to contract private attorneys in case of conflict of interest) was preferred in Georgia and a diverse model was adopted in Moldova.

From all three countries, Moldova has the most diverse model of delivery combining different categories of legal aid providers: paralegals, qualified lawyers, public defenders, *ex oficcio* lawyers, and specialised NGOs. The creation of such a model was determined by the fact that the relevant domestic legislation did not limit the representation in non-criminal cases only to lawyers, also allowing other persons called "representatives" to protect the allegedly infringed rights. As already noted, according to the latest changes introduced in the Law on the Legal Profession the court representation in non-criminal matters as of 1 January 2012 is limited only to licensed lawyers. However, paralegals and specialized NGOs will be till able to provide primary legal aid. Such a diversification was a clear advantage from many points of view. First of all by not opting for a strict *judicare* system the legislator created a healthy spirit of competition among the legal aid providers thus, determining in long run a higher responsibility and increasing the quality of legal services delivered under the scheme. Also, people in many

societies tend to trust more the representatives of NGOs who have good reputation in the field of human rights defence. Moreover, typically NGOs specialize in certain areas hence, being able to assist better people when encountering some specific issues. In addition, NGOs receive financial resources from donors thus, being able to use additional financial means and not only those coming from the government. At the end of the day the state is not the sole bearer of the expenses, which for countries with shallow economies might be a viable solution. The only serious drawback in such a diverse model is the creation of effective monitoring mechanisms overseeing the participation of such various subjects in different procedures and proceedings. This is a matter of careful consideration for the legislators.

In Bulgaria, on contrary, the scheme remained almost completely under the auspices of the legal profession. There are some considerations that have to be taken into account when introducing a *judicare* legal aid. Such models may yield serious problems, especially in countries where quality of indigent legal services is low. The problem with the *judicare* scheme is that the private lawyers gather most of their incomes from paying clients, or at least tend to do so, thus delivering legal services for some of them may be perceived as being not on the equal foot as that delivered when the legal services are paid directly by the client. It will be quite difficult to combine legal aid services with the professional image that will still make the lawyer attractive to clients from the upper segments of the society. In Bulgaria there was an opinion among the legal profession that the legal aid is predominantly source of income for lawyers who have problems with their competitiveness.[759] However, it is important to note that such a model is not necessarily

[759] Gramatikov, M., *supra note* 534.

deemed to failure as nowadays the legal profession has reached the stage of organization at which it is able to recognize and deal with the community problems and needs. However, an inactive bar association may be a huge problem for a legal aid scheme. Also, when the legal profession institutes its monopoly over the legal aid scheme there can be problematic issues resulting from the inherent interests of the bar to promote the economical and professional interest of its members sometimes in the detriment of the beneficiaries of the scheme. In the Bulgarian case the fact that the management of the legal aid scheme was put in the hands of an independent body, NLAB could at some extent cure such risks. Though, the fact that in the composition of the NLAB three of five members are lawyers appointed by the Supreme Bar Council is somehow problematic. Actually, many experts during the legislative phase expressed their concerns in this regard raising the issue according to which the predominance of lawyers may have a negative impact on the independence of the body. Eventually, the situation could be solved through legislative amendments that would allow the representatives of the civil society or any other representatives of relevant public authorities to participate in the leadership of the NLAB. Otherwise, the present composition of the members of the NLAB gives evident advantages to the Bar.[760]

Unlike the old legal aid schemes the new schemes in all three jurisdictions were put under the management of independent or quasi-independent regulatory bodies. This represents one of the hallmarks of the modern legal aid systems as the administration of the legal aid scheme is a very important moment. The NLAB in Bulgaria, Legal Aid Service in Georgia and National Council in Moldova administer the provision of legal aid

[760] Gramatikov, M., *supra note* 534.

and the distribution of budget expenditures, as well as monitor and control the quality of legal services provided under the scheme. In addition, in order to guarantee some coherence in the access to legal aid, these bodies were provided with separate budget from the judiciary budget, which make it easy to plan legal aid spending in an effective way. In essence, the creation of such bodies represents a serious institutional safeguard for an efficient and high quality legal aid. Such bodies may indeed ensure society's perception that the legal aid scheme is a transparent system for granting legal aid and that funds are managed in an appropriate manner. Moreover, dividing responsibilities between government and a separate body to administer the legal aid scheme contributes to success by shielding the state from making decisions in individual cases on who should or not be granted legal aid. In Georgia and Moldova such bodies have the exclusive right to review all the applications for legal aid and accordingly grant legal aid, in Bulgaria the trial court is entitled to review the application for court representation under the legal aid scheme. However, the management of financial means is in the competence of regulatory bodies. The monitoring the quality of the legal services rendered under the schemes is either under the competence of such bodies or divided with the bar association. Dividing the providers of legal services from the management of the financial means and policy implementation (at some extent) has created a clear mechanism of checks and balances between the providers and the bodies that administer the system.

Unfortunately, though such bodies represent a clear advantage there are some problems when it comes to their day-to-day activities. For example, as it was discussed already in the context of the Bulgarian legal aid scheme there are some problems that the NLAB encounters. That is mainly because the Legal Aid Act does not have clear

distinctions between the functions and competence of the legal services providers and those of service regulators. Administration of legal aid at the local level is entrusted to the bar councils. The bar councils appoint a lawyer and also they assess his/her performance. In this context NLAB lacks power over the appointment of the lawyers and monitoring of their work. In addition, taking into consideration that in case of court representation the person applies directly to the court in case legal aid is needed, the NLAB does not have any role in the establishment and determination of the eligibility criteria, as this is done by judiciary. All these moments, places the NLAB, the main body which administers the legal aid scheme, in poor position when it comes to development and implementation of the legal aid policies.[761] These moments should be reconsidered by the Bulgarian legislator, especially in the light of the fact that such a body should be real policymaking and policy-implementing authority.

The National Council in Moldova also encounters difficulties, especially in the light of the fact that it lacks funds for its own administration. This issue leads to the problem of the allocation of financial resources for the legal aid schemes.

Despite well designed legal provisions of legal aid in non-criminal matters a number of shortcomings and barriers appear to its implementation. It seems that the biggest problem in all three jurisdictions is the fact that the legal aid budgets in these countries represented a very small part of state expenditure. Funding for legal aid is inadequate especially in the light of the fact that legal aid demand is increasing. On the other hand, the budget for administrative costs should be sufficient for development of

[761] Gramatikov, M., *supra note* 534.

sound human and technical resources. The special bodies which were created as managers of the schemes need to be fully functional with local structures that conduct selection of providers and control the quality of services. The main idea behind the need for fully functional administrative entities is that these institutions represent the interests of justice, taxpayers, and state and legal aid beneficiaries. Thus, any deficiencies surrounding the institution including those referring to insufficient funding should be excluded. It is definitely not sufficient to proclaim the legal aid system formally and disregard its proper implementation.

Considering that the three analysed schemes are still in their initial development phase it is premature to talk about an overall effectiveness, but it can be definitely concluded that they belong to a new generation of "consumerist type" of legal aid schemes.

CONCLUSION

In all democratic societies based on the rule of law "justice for all" became a general motto. The point when justice must be administered equally for all the members of the society has been reached. This percept made its way into many legal systems. Legal norms nearly always guarantee to everyone the "equality before the law" or in all court proceedings they guarantee "fair trials" rights. Thus, if notwithstanding this general motto there is still a perception that justice is for those who can pay for it the whole idea and philosophy of justice is at risk. It is the duty of the state to guarantee that all individuals enjoy access to justice. This is an axiom. Legal aid is one of those tools through which people could enjoy their legal rights. According to many:

> "Legal aid is at the core of what it means for a government to provide justice for the people it governs. A formal system of justice can be designed to utter perfection; yet if individual are not able to obtain justice for themselves through the legal system because of the practical impediments, then the legal system is no longer a "justice system"".[762]

We witnessed how legal aid emerged and develop throughout the history which goes back to Ancient times. The analysis of the historical development of the legal aid as a concept and as an institution shows that the rationale for the provision of the legal aid in each period is very closely linked to the social, political and legal philosophy of the time.[763] Chapter one represented an incursion into the history that tried to trace down the way legal aid as a concept and as an institution emerged and developed over time. It also presented a broad range of social factors and key actors involved in its creation and

[762] MAKING LEGAL AID A SUCCESS in Preface, Public Interest Law Initiative, 2009.
[763] Cappelletti M., *supra note* 9.

development. In this context, different theories that tried to explain the nature of the institution at stake and the reasons of its emergence were considered. It was concluded that the puzzling issue related to a theory that would plausibly explain the creation and evolution of the legal aid through an ideological vision should adopt a cumulative approach. As reflected in the research some theories and approaches pursued by the scholarly take account of certain practices and factors historically involved in its formation. Either these refer to a particular social issue or class, or its specific culture or religion, or group interests. While factors such as for example industrialization, modernization and societal development, religion, divorce, political unrest, etc. may and frequently do have an impact on the development of legal aid, as could have been noticed from the analysis given in this chapter they are not determinative. Thus, as already highlighted a cumulative absence or presence of some, many or all of the social factors and key actors will be likely to have an impact on the state of creation and development of legal aid within a jurisdiction. Yet, in some instances there must be additional reasons leading to the development of legal aid in some jurisdictions, and not in others. Thus, in addition to a cumulative approach that would take into consideration all necessary social factors and actors that might influence the content of legal aid the theory should have a conjectural character taking into account the context and follow the emergence and development of legal aid according to a particular context. Moreover, from the moment of introduction of a legal aid scheme in a certain jurisdiction usually with time such a scheme adapts to meet changing demands. Society's social and legal needs, economic well-being and development as well as various governments' priorities change, often significantly. Subsequently legal aid is frequently subjected to reform and is refocused to

reflect these new priorities and respond to new needs. It evolves in response to political, economic and social environment. Therefore, it is also necessary to pay due attention to the possibility that the content of a legal aid scheme might be subject to a certain type of changes according to specific developments.

Though this thesis by no means sought to elaborate a theory regarding the emergence and development of legal aid but rather to identify a theoretical justification for civil legal aid valid for current times, the incursion of the first chapter was a necessary theoretical exercise that revealed how legal aid appeared and why through history and which social factors and actors stood behind the institution. These identifications were more than necessary especially when trying to understand how it was and how it could be. If the Roman patron served his clients because it was a matter of honour to him, the medieval ecclesiastic lawyer sought his rewards in the spiritual realm and the English Sergeants carried on the traditions[764] then nowadays, the concept of legal aid can be placed within the remit of the human rights rationale.

The second chapter sought a justification for the theoretical assumption of the present research, *i.e.*, one of the modern justifications of the civil legal aid that gives an expansive approach stems from the human rights rationale. First the research considered the existence of the state responsibility to provide legal aid in non-criminal matters through the glance of several legal principles. Reference has been made to those principles that clearly bring civil legal aid in the human rights ambit, though they are not exclusively about human rights. The boundaries of the principle of enforcement of rights,

[764] Bradway, J.S., *The Challenge to Organize Legal Aid*, 22 Texas Law Review 327, April 1944.

equality before law, fair trial, equal access to justice and access to courts, equality of arms and the principle of rule of law bear ideals of justice, fair resolution of conflicts, and certain images of law and of institutions that make laws and of those that enforce it. From the viewpoint of these principles legal aid serves as the basis for individuals to avail to the law and justice and seek observance and enforcement of their rights. It has been argued that one of the justifications for the provision of civil legal aid stems from the states' commitment to these principles, many of which, if not all, have a constitutional value. This chapter's arguments emancipated the rationale and the justification that can be found in the human rights vocabularies in regard to legal aid in non-criminal matters. Then the chapter went on in considering binding and non-binding documents that expressly provide for a state obligation to ensure legal aid in non-criminal matters or those that bear a premise for such an obligation. The main human rights instruments such as the two UN Covenants and ECHR lack an express guarantee regarding the right to civil legal aid. The Charter of Fundamental Rights of the European Union includes such a provision. The former documents however enhance the rationale according to which provision of legal aid could be a matter of a state obligation to provide legal aid to those in need in the light of its duty to ensure fundamental rights guaranteed by the international and regional human rights instruments, and as showed in the second chapter at least in the light of the right to fair trial, effective remedy and equality before the law.

Actually, a frequent pitfall in identifying justifications for civil legal aid is the tendency to focus on the periphery of the issue rather than on the core of the concept. In this sense, legal aid was not merely judged as "an instrumental good of little salience to

its ostensible beneficiaries"[765] but rather the starting assumption, that at the end came as a conclusion, was that legal aid in non-criminal matters is as an independent institution and right, which placed within the human rights rationale is self-standing and its past inherent limitations dictated by its once exclusively charitable nature or welfare characteristics can be easily disregarded, though currently, as Chapter three reflecting on the scope of the general obligation to provide legal aid showed, the nature of the right in a substantive sense is still limited. However the fact that the development of this right's scope and content is still ongoing, process reflected in the same chapter, towards broadening those two, shows that it is very important to place this right into a certain rationale dictated by the reality and its necessities. The third chapter revealed the scope and content under the international and regional human rights regimes of the state obligation to guarantee to individuals a right to civil legal aid. At the same time the research concentrated on highlighting and describing the rationale behind such an obligation. The analysis made in Chapter two showed that the general human rights law stops short in providing for an automatic general right to civil legal aid. Only the European law expressly provides for legal aid as a matter of a right. However, the relevant bodies responsible for the supervision of the implementation of the international and regional human rights law went considerable way towards securing such principles as rule of law, access to justice and equality, by instituting a basic state duty to provide for a right to legal aid in non-criminal matters though, in a limited way. This can be explained at some extent by taking into consideration the fact that the interpretation of the relevant provisions much depended on the issues actually raised before them and the interpretation that those

[765] Abel, R., *supra note* 43 at 784.

bodies assigned. Nevertheless, the jurisprudence of the international and regional human rights bodies provides some guidance as to what is the scope of the states' general obligation to provide legal aid in non-criminal matters. In principle states are not under a positive obligation to establish general legal aid schemes for civil cases and that there is no general right to civil legal aid.[766] However, states may be sometimes compelled to provide civil legal aid as a matter of guaranteeing an effective right to access to court or where basic needs are at stake. The issue whether the provision of legal aid is necessary may be determined on the basis of the complexity of the case, financial capacity of the litigant and the prospects of success.[767] In addition, the state has to ensure that services provided under the legal aid scheme are qualitative. This means that the general obligation to provide legal aid in certain civil matters comes hand in hand with such requirements as adequate and timely appointment of a lawyer, effective conduct of the appointed legal aid lawyer, rapid replacement of the legal aid lawyer in case of necessity, reasoned decision with regard to denial of legal aid, etc.[768]

In addition, the international and regional community elaborated on many issues regarding the scope civil legal aid by means of soft-law, which does not represent binding documents but nevertheless include valuable guidance. In principle, the main rationale behind UN and Council of Europe soft-law is that states have to create comprehensive systems of legal aid to those who need it in order to protect their human rights, fundamental freedoms and be able to enforce their legal rights and challenge unlawful

[766] *See Airey v. Ireland, supra note* 84.
[767] *See Gnahore v. France, supra note* 358 ; *Renda Martins v. Portuga, supra note* 358; *Fabre v. France, supra* note 359; *P., C. and S. v. United Kingdom, supra note* 370; *Santambrogio v. Italy, Steel and Morris, supra note* 208.
[768] *See A.B. v Slovakia, supra note* 384, *Bertuzzi v. France, supra note* 385, *Sialkowska v. Poland, supra note* 392, *Tabor v. Poland, supra note* 402.

acts without any distinction whatsoever between civil and criminal proceedings.[769] When providing legal aid in non-criminal matters states may consider that all persons should have a right to necessary legal assistance taking into account their financial resources. At the same time states are encouraged to provide partial legal aid when a person is able to pay part of the costs proceedings. The denial of legal aid should be subject to appeal.[770] Under the recommendations of the Council of Europe legal aid should be made available at all stages of non-criminal proceedings both in pre-trial phase and in court proceedings[771] Finally, UN and Council of Europe highlighted the responsibility of governments to adequately fund legal aid in order to promote and protect human rights.[772]

One should not forget that the international human right norms introduce minimum standards for states. So, certainly one is entitled to at least a minimum level of guarantee provided by the human rights treaties. The states are definitely free in adopting rules concerning legal aid in non-criminal matters and even though there is no certainty regarding the extension to which a government should ensure one's right to civil legal aid there is a consensus on one point that states are obliged to create a basic right to legal aid in non-criminal matters. That is why it is for the governments to institute a general right to legal aid in civil cases. In this context, the human rights rationale embodied in the

[769] *See* UN General Assembly Resolution 2449 (XXIII) Legal Aid 1968; UN General Assembly Resolution on Human Rights in the Administration of Justice, 20 February 2002, A/RES/56/161; UN Basic Principles on the Role of Lawyers adopted on 27 August to 7 September 1990; Action Plan on Legal Assistance Systems of the European Committee on Legal Cooperation (CDCJ), adopted on 31.05.2002; Resolution 78 (8) of the Committee of Ministers on legal aid and advice, adopted on 2.03.1978.
[770] Resolution 78 (8) of the Committee of Ministers on legal aid and advice, adopted on 2.03.1978.
[771] See Recommendation No. R (93) 1 of the Committee of Ministers, on Effective Access to Justice for the Very Poor, adopted on 08.01.1993; Action Plan on Legal Assistance Systems of the European Committee on Legal Co-Operation (CDCJ), adopted on 31.05.2002.
[772] *See* UN General Assembly Resolution on Human Rights in the Administration of Justice, 20 February 2002, A/RES/56/161; Action Plan on Legal Assistance Systems of the European Committee on Legal Cooperation (CDCJ), adopted on 31.05.2002, CDCJ (2002).

relevant international standards can serve as a starting point for any state aiming at creating or transforming an existent legal aid into a modern one based on the human rights considerations. This rationale provides for an extensive approach for the creation of the right to civil legal aid. The issue of responsibility of the states to provide legal aid becomes one of the most important features in the restructuring or establishing of legal aid systems as it provides the overall rationale for them. In this context, Chapter two and three identified one of the modern rationales for the obligation of the state to provide civil legal aid. The main conclusion of these chapters is that the human rights' vocabularies embedded in the legal principles and in the international and regional human rights law allows a theoretical expansive interpretation the concept of civil legal aid.

The research made in Chapter four was employed to explicate the tentative justification of the civil legal aid through the glance of the nature and characteristics of three real legal aid schemes pertaining to Bulgaria, Georgia and the Republic of Moldova. The analysis in the last chapter of the domestic transformations in the field of legal aid points to the direct link between the theoretical assumption of this project and the reality. The review of the three legal aid schemes affords an interesting view on the perspectives of legal aid in general and civil legal aid as by-product of the human rights rationale. Nowadays, the creation of the new legal aid schemes or the reform of the old ones reveals that human right considerations can be an important basis for any such processes. This vision gave birth to a new model of legal aid schemes called "consumerist type". The three analyzed legal aid schemes fall within the ambits of this model. In all three jurisdictions the analysis points to a number of common elements, the most important of which is the fact that the beneficiary and his/her legal needs is

positioned at the heart of the scheme. Moreover, this type of legal aid system has an overall holistic approach and a commitment to move towards providing sustainable legal aid services in terms of quality, quantity and accountability. As already stated the "consumerist type" of legal aid creates a culture of client and focuses on individuals. Of course, the achievement of the goals of any type of legal aid schemes is influenced by a number of factors such as the rationale behind the schemes but also for example the financial resources. But only systems which manage to find sensible balance between three dimensions of justice – 'truth, time and cost' – can also manage to acquire financial access. [773] One of the biggest challenges that any legal aid scheme faces, old or new, is finding this balance and ensure credibility. At this point the three legal aid schemes are still in the development phase thus it is premature to talk about an overall effectiveness. At this point, especially in the case of Georgia and Moldova the provision of legal aid to civil matters is still quite limited. Much work in relation to provision of legal aid in non-criminal matters now lies ahead. However, the ideological vision behind the schemes will influence the content and the extent of the schemes and will persist and determine their overall direction. An important point is that whether the ways employed to deliver legal aid enable the schemes to function effectively is a question of time but also of the general approach undertaken. Overall, the answer depends on the objective that is pursued. All three jurisdictions revealed that the objective of the legal aid schemes is to provide holistic legal aid in the form of a wide range of legal services to a large number of persons both in criminal and non-criminal matters. The relevant analysis showed that there are enough tools to achieve such a goal, though there is still room for improvement.

[773] Zuckerman, A.A.S., Justice in Crisis: Comparative Dimensions of Civil Procedure in ed. Zuckerman CIVIL JUSTICE IN CRISIS, COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE, 1999, p.46.

The legislators made sure that the legal aid legislation regulates clearly the scope and eligibility, that the there is a clear purpose behind the legal aid scheme *i.e.* to ensure that all qualifying members of the society exercise their rights.

Recently, many jurisdictions experience a massive expansion in the amount of legal aid services provided and huge increases in the costs of providing these services, as response governments have begun to reconsider the nature, scope and method of delivery of existing legal aid services. In many cases, major structural and program policy changes are being contemplated or implemented. The issue of responsibility of the state to provide legal aid becomes important in the restructuring or establishing of legal aid systems as it provides the overall rationale for them. The key to establishing a right to a broader idea of legal aid lies in understanding the role of the state from a human rights perspective. Legislatures and policymakers should be aware of the fact that than only a well organized, systematic, and purposeful response will fulfil this obligation. When analyzing the international standards on legal aid it was clearly seen that none of the norms prescribe any particular system of legal aid. They do not provide for a blueprint but set out minimum standards. It is for the national governments to devote significant attention to the issue of importance and efficiency of a legal aid system and give an adequate response to it.

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