THE RESPONSIBILITY OF STATES TO PROVIDE LEGAL AID

The International Centre for Criminal Law Reform
and Criminal Justice Policy

1822 East Mall, Vancouver, B.C. Canada
Tel.: (604) 822-9875 Fax: (604) 822-9317

Paper prepared for the Legal Aid Conference
Beijing, China
March 1999

by Eileen Skinnider, LL.B., LL.M.
Director of Human Rights

THE RESPONSIBILITY OF STATES TO PROVIDE LEGAL AID

INTRODUCTION

Recently, with many jurisdictions experiencing a massive expansion in the amount of legal aid services provided and huge increases in the costs of providing these services, governments have begun to systematically 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 responsibility of states to provide legal assistance has been defined throughout this past century on several different bases, including moral, political, social-justice and legal terms. This paper will focus primarily on the legal obligations of states to provide legal aid arising from international human rights law. The remainder of this paper is divided into three parts. The first looks at the development of the concept of legal aid in western jurisdictions from the traditional view of formal equality to the broader concept of access to justice, recognising that existing legal aid schemes include elements of these concepts to varying degrees. The second part of this paper focuses specifically on the right to legal aid contained in international human rights law. From such a review, the right to state-funded legal assistance appears somewhat limited. However, the last part of this paper broadens the discussion of international legal obligations by reflecting on how other rights impact on the duty of states to provide legal aid and ensure equal access to justice. It should be noted that this paper does not attempt to assess the extent to which various states are in compliance with their international obligations respecting the provision of legal aid.

THE DIFFERING CONCEPTS OF LEGAL AID

From the Traditional Concept

In most jurisdictions, there has been a long tradition of states providing some form of legal aid to the poor. A rather primitive right to access to justice dates back to England in the 1400s where the Statute of Henry VII (1495) waived all fees for indigent civil litigants in the common law courts and empowered the courts to appoint lawyers to provide representation in court without compensation.[1] During the 19th Century, most Continental codes of law contained the principle codification of the "poor man's law", providing court fee waivers and appointment of duty counsel for the very poor[2]. Lawyers were expected to act on a professional *pro bono* basis. This early concept of legal aid was primarily seen in relation to assistance in court. Legal advice outside the court and covering broader social issues was left to voluntary organisations, such as trade unions and churches[3].

It was not until the 1940s and 50s, that formal comprehensive statutorily funded legal aid schemes were established. These earlier legal aid schemes, such as England's single national legal aid system established in 1949 and Ontario, Canada's provincial legal aid scheme established in 1951, were limited with respect to the coverage and scope of services offered. Patterned on the legal services then offered to paying clients, the scope of services provided was generally limited to legal advice and legal representation in court to those who could not afford to pay the market price. The goal of formal equality was thus met.

Coverage under these earlier schemes tended to give priority to criminal law matters. The argument being that in criminal law matters, as opposed to civil law, demand is determined

---

[1] Johnson, Earl *"Toward Equal Justice"* 5 Maryland Journal of Contemporary Legal Issues p. 204.

[2] Blankenburg, Erhard *"Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid"* contained in Volume II of the Conference Papers presented at the International Legal Aid Conference, Edinburgh June 1997 p. 2.

[3] As an example, in 1890 there was the development of legal aid advice centres instituted in trade unions and churches in Germany, discussed in Blankenburg, Erhard *"Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid" ibid.*, p. 4.

by the state and that an individual's liberty is at risk[4]. Defendants in criminal cases have no choice but to defend themselves against the power of the state, which can be considerable as states generally spend far more on police and prosecuting services than on legal aid. Legal representation in criminal matters is important as it ensures that the liberty of an individual is not jeopardised by the state due to the individual's inability to pay for legal services.

Under these earlier schemes, the primary providers of legal aid were lawyers and in particular, private bar members. The schemes in England and Ontario, Canada are still predominately delivery by a judicare or private bar model, which is one where the legal aid plan pays private lawyers a fee for service to provide individual case representation to those who are eligible. Individuals are allowed, to some extent, choice of counsel. Despite the development of statutorily-funded schemes, legal aid was still primarily provided on a voluntary basis by the private bar and seen as a charity rather than a right.

To the Broader Concept of "Access to Justice"

The 1960s saw, particularly in the United States, a broader approach develop with respect to the role of legal aid and legal services in general. U.S. President Johnson's "War on Poverty" had as its objective the elimination of poverty, rather than the extension of existing legal services to non-paying clients. There was a realisation that the poor faced a host of laws, powers and abuses of power that fee paying clients did not. Coverage under legal aid schemes was extended to address the "unmet needs" of the poor, which included housing, social security, family and debt issues. Legal needs which focused on the needs of the poor gave rise to salaried community offices as the main model for delivering services. This ideology spread to Canada, Australia and Europe giving birth to the clinic or law centre movement. In the earlier movement, these clinics focused on strategies to improve the conditions of the poor rather than on individualised services.

---

[4] **Legal aid-Targeting Need**. Lord Chancellor's Department, HMSO, CMND 2854, 1995 paras 4.38-40.

By the end of the 1960s and early 70s, this renewed concept of social justice gave rise to the "access to justice" movement. Access to justice means effective access to the law requiring not only legal advice and representation in court, but also information and education of the law, law reform and a willingness to be able to identify the unmet needs of the poor. Access to justice requires "policies which deploy every possible means toward attaining their goal, including reform of substantive law, procedure, education, information and legal services"[5]. The goal being the attainment of substantive equality, which recognises the structural discrimination of the poor.

The coverage of legal aid schemes evolved to include civil law matters, including family, housing, debt, social security and other like matters. It has been recognised that the immense power of the state as the opposing party is not just limited to matters of criminal law but also influenced particular civil law matters, such as child welfare laws, pensions and social security rights. There has also been a re-thinking of the concept of liberty to include situations of violence against women in the family and other family law matters that may include non-criminal law sanctions in addition to criminal sanctions to protect the victim from risk of harm.

Also within the 1960s, the assertion of "rights" was a strategy common to various movements, which characterised rights as a positive affirmation of a state duty rather than as a negative, as a protection against state interference. The European Conference of Ministers issued a declaration on legal aid in the late 1970s which considered the right of access to justice as an essential feature of any democratic society and firmly stated that legal aid no longer could be considered a charity but as an obligation of the community as a whole[6]. The resolution dealt with both criminal and civil legal aid, calling on states to assume the responsibility for financing these legal aid systems.

---

[5] Smith, Roger **Justice: Redressing the Balance** (Legal Action Group, 1997) p. 9.

[6] European Conference of Ministers, Legal Aid and Advice: Resolution 78(8) adopted by the Committee of Ministers of the Council of Europe on 2 March 1978.

Many existing legal aid schemes include elements of these concepts to varying degrees which are reflected in the nature, scope and method of delivering legal aid services. Most jurisdictions provide coverage for criminal and civil law matters, albeit, some argue that in these times of fiscal constraint and capped budgets, criminal legal aid as a proportion of all cases is increasing. Some jurisdictions are implementing cost-effective strategies that use non-lawyers to provide legal aid . Such strategies reflect a broad understanding that education and information can effectively allow individuals to access the justice system.

LEGAL AID UNDER INTERNATIONAL LAW

There exists a range of international norms and standards that are relevant to the question of a state's responsibility to provide legal aid, which began to be articulated by the international community after 1945 with the establishment of the United Nations and the development of international human rights law. These standards are contained in treaties, such as covenants and conventions, which are binding amongst the states that ratify them, as well as other instruments designed to provide guidance, such as declarations, principles, rules, recommendations and guidelines. The latter instruments, while not legally binding upon states, have been accepted by a large number of states and considered to have moral force.

Before addressing the specific provisions contained in the international instruments, it is useful to note how these international norms and standards are reflected in national laws. In some countries, with a dualist system, the international and domestic laws are viewed as two distinct systems of law and thus the treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, in order for a state to fulfil its obligations under a treaty, it is not necessary to incorporate the treaty directly into its own laws. A violation occurs only

when a standard of the treaty is contravened and not when a state party fails to incorporate the provisions of the treaty into its own laws. In other countries, with a monist system, international law and domestic law are viewed as one coherent system of law with international law being supreme. There is no need to incorporate the treaty provisions into domestic law as the treaty becomes part of domestic law upon ratification.

The International Covenant on Civil and Political Rights

It is principally the United Nations *International Covenant on Civil and Political Rights*[7] *(ICCPR)* that set out specific obligations of states to provide state-funded counsel for indigent persons. Article 14(3)(d) of the *ICCPR* requires that an accused offender is entitled "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it"[8]. This provision for legal aid in Article 14(3) is set out among the minimum guarantees to which everyone is entitled, in full equality, in the determination of any criminal charge. Therefore the right to free legal counsel is rooted in the idea of equality; however, this right is only specified in the context of the criminal justice system. An acceptable limitation on the availability of legal aid is provided for in international law as States are required to provide legal aid only where "the interests of justice so require". Another accepted limitation to the right to counsel when it is provided by the state is that counsel may be assigned rather than a choice of counsel being given. The entitlement to this right is based on the costs of the legal representation and the inability to afford such costs.

---

[7] *The 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.

[8] Article 14(3) of the ICCPR: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.

The Human Rights Committee, which is the treaty monitoring body established by the *ICCPR*, has developed jurisprudence over the years addressing issues such as the scope and form of legal representation. The Committee, under the *Optional Protocol* to the *ICCPR*, is entitled to hear individual petitions that challenge a state's compliance under the provisions of the *ICCPR*. The decisions rendered by the Committee, while not binding upon state parties to the *Optional Protocol*, are considered to have persuasive force. While providing some direction, the jurisprudence does not provide all the answers. Generally, the Human Rights Committee views individual cases in order to determine if there is a requirement to provide legal assistance in that particular case. The Committee does not see its role as an evaluator of whether or not a state's comprehensive legal aid scheme is in compliance with the *ICCPR*. It has, however, made the comment that counsel should receive adequate remuneration for providing legal assistance under a legal aid plan[9].

Some of the Committee's decisions provide scope to certain elements of Article 14(3). For instance, although choice of counsel is conferred to all those who have been charged with a criminal offence, it seems that the state may "assign" legal representation in cases of indigence. The Committee has held that while choice of counsel may not be required by the state in these cases, such assigned counsel must be competent and independent from state authorities. The Committee, therefore, has focused not on the issue of choice of counsel, but on the way in which the administration of the legal aid service might infringe upon the freedom of lawyers to act on behalf of their clients.

In elaborating on the meaning of when the "interests of justice" would require free legal representation, the Committee considers the severity of the charge and the complexity of the case in making the determination. Therefore, in a case where the accused was charged with a minor criminal offence which would have likely resulted in a fine, the Committee

[9] *Reid v Jamaica*, Communication No. 250/1987 (20 July 1990)

found that the state was not required to provide state-funded legal assistance[10]. The Committee has also found that accused persons might have a right to legal advice prior to trial requiring the state to appoint legal counsel during the pre-trial contact with the criminal justice system. However, it is still unclear whether or not this right exists immediately upon detention.

The regional treaty, *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (the *European Convention*), provides for criminal legal aid in the same terms as the *ICCPR* and its jurisprudence has often been cited by international bodies in interpreting the requirements under the *ICCPR*. In determining whether the interests of justice require states to provide legal aid, the European Court has identified a number of factors to be addressed: the complexity of the case; the capacity of the particular accused to present the case him or herself; and, the seriousness of the offence and the possible penalty that could be imposed.

The Convention on the Rights of the Child

It is recognised that children should be treated differently from adults when they are accused or convicted of criminal conduct. With respect specifically to the situation of young persons charged with a crime, the *Convention on the Rights of the Child*[11] (the *Children's Convention*) requires states to ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. It further provides the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence.

---

[10] *O.F. V Norway*, Communication No. 158/1983 (26 October 1984)

[11] *The Convention on the Rights of the Child*, adopted by the General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990. Article 37: State Parties shall ensure that: (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.

Article 40(1) States Parties recognise the right of every child to...(a)(ii) to be informed promptly and directly of the charges against him or her, and if appropriate, through his parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; .....(a)(iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance....

While not creating an automatic right to public-funded legal counsel, the *Children's Convention* does create a responsibility on the part of the state to provide a child with legal assistance in the preparation and presentation of his or her case when assistance is not otherwise available. The exact nature of the legal assistance to be provided has not been specified. It is interesting to note that while the *Children's Convention* does not specifically address the issue of state-funded legal assistance for children, there is a provision that provides for the right to free assistance of an interpreter if the child cannot understand or speak the language used.

Other Relevant International Standards

Other international instruments which are relevant for an individual to access state-funded counsel include the *United Nations Basic Principles on the Role of Lawyers*[12] which stipulate that governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. The *Principles* state that professional associations of lawyers should cooperate in the organization and provision of services, facilities and other resources.

The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[13] provides that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he/she does not have sufficient funds to pay. The *United Nations Standard Minimum Rules for the Treatment of Prisoners*[14] provide for untried prisoners to be allowed to apply for legal aid where such aid is available.

---

[12] *The Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

[13] *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988.

[14] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Economic and Social Council resolution 663 (XXIV).

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*[15] provide that, throughout proceedings, juveniles have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country. The *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and are to be able to apply for free legal aid where such aid is available.

Some remarks

All the international instruments mentioned above, except for the *Basic Principles on the Role of Lawyers*, require some form of legal aid to be available to ensure that persons charged with a criminal offence who cannot afford counsel have the ability to retain and instruct counsel. These specific provisions on legal aid support the traditional concept of legal aid, focusing on matters of criminal law in terms of representation and advice in court proceedings. The specific reference to legal aid in terms of right to counsel in criminal matters reinforces the importance of the right to counsel to ensure a fair trial. The right to counsel would have little effective meaning if on the basis of one's income an individual could not afford that right.

Shortcomings often cited by commentators on plain reading of the right to legal aid contained in the *ICCPR* include the fact that the Covenant fails to address, in specific terms, the right to civil legal aid. Another concern mentioned is that this provision is too trial centred without the proper recognition of fairness and equal access to justice.

Moreover, the international norms and standards do not specifically address the question of how to ensure legal aid is provided. The development of comprehensive systems of legal aid has been only briefly mentioned during the first UN Conference on Human Rights in Teheran, 1968. A resolution regarding legal aid called upon Member States to

[15] *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* General Assembly resolution 40/33 of 29 November 1985.

guarantee progressive development of comprehensive systems of legal aid, including devising standards for granting legal assistance and to simplify procedures so as to reduce the financial burdens of individuals seeking redress[16]. 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. There has been a lack of follow-up within the United Nations regarding the progress made by countries in developing comprehensive legal aid systems.

The 1990 instrument, the *Basic Principles on the Role of Lawyers*, while not specifically mentioning comprehensive legal aid schemes, does refer to the obligation of governments to provide funding for legal services to the poor and calls upon professional associations of lawyers to assist in the organising of these services, including resources and facilities.

IMPLICATION OF OTHER RIGHTS ON LEGAL AID

Various other rights contained in these international instruments implicate the right to state funded counsel and equal access to justice. These rights, which involve principles that are generally considered to be requirements for a legitimate legal system, allow for a broader interpretation of the duty of states to provide legal aid than as set out in Article 14(3). Regional instruments, such as the *European Convention on Human Rights and Fundamental Freedoms* and the *Charter of the Organization of American States*, provide another source for interpreting the scope of these rights.

The Principle of the Rule of Law

In 1948, the Member States of the United Nations unanimously proclaimed the adoption of the *Universal Declaration of Human Rights*, which recognised the interdependence of

[16] General Assembly resolution 2449 (XXIII), *Legal Aid*.

human rights and the rule of law. It has been said that the one normative justification for legal aid flows out of the state's commitment to the rule of law[17]. The principle of this rule implies that a government in all its actions is bound by rules fixed and announced beforehand. These rules make it possible for individuals to foresee with a fair degree of certainty how the authorities will use its coercive powers in given circumstances. Individuals can then plan their affairs on the basis of this knowledge. Protection under the rule of law would be an empty promise if individuals could not avail themselves of the law. This means that individuals require more than knowledge of the law but also effective access to it. According to some, it leads to an obligation on governments to provide resources necessary for individuals to know the law and to get access to it[18]. The rule of law guarantees equal access to those rules.

The *Charter of the Organization of American States* sets out the broad principle of the rule of law in Article 44 where it states that human beings can only achieve the full realisation of their aspirations within a just social order when Member States provide adequate provision for all persons to have due legal aid in order to secure their rights[19]. This reference to legal aid in securing rights covers both civil and criminal law matters as it relates to effective recourse to ensure all human rights.

The Right to a Fair Hearing

The right to a fair hearing is included in Article 14 of the *ICCPR* and extends not only to the determination of criminal matters but also in the determination of people's "rights and obligations in a suit of law"[20]. While the *ICCPR* has not elaborated on the meaning of a

---

[17] Dyzehhaus, David *"Normative Justifications for the Provision of Legal Aid"* in **A Blueprint for Publicly Funded Legal Services** (Volume 2 of the Report of the Ontario Legal Aid Review, 1997) p. 475.

[18] *ibid.*, p. 477.

[19] *The Charter of the Organization of American States* as Amended, Article 44.

[20] Article 14(1) of the *ICCPR*: 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...

right to fair trial in terms of civil matters, guidance can be had from reviewing the jurisprudence of the European Court of Human Rights.

The right to a fair hearing is guaranteed in civil and criminal matters in Article 6(1) of the *European Convention*. As in the case of the *ICCPR*, the *European Convention* only refers specifically to legal aid in detailing the minimum guarantees in criminal cases.[21] The European Court on Human Rights, in *Airey v Ireland,* has interpreted the right to a fair trail in civil cases to mean effective access to the courts. This requires the state to provide publicly funded counsel in civil matters when it is in the interest of justice. The court has determined that the interest of justice criteria can be met if it is shown that the assistance of a lawyer is indispensable for the effective access to court either because legal representation is rendered compulsory or by reason of the complexity of the procedure or the case. Therefore the right to legal aid has been extended to civil cases through judicial interpretation.

In *Airey v Ireland,* the European Court issued a powerful statement about governments affirmative obligation to provide equal access to justice for lower income citizens: "the obligation to secure an effective right of access to the courts falls into this duty". The Court pointed out that the *European Convention's* guarantee of a right to a fair hearing in civil cases does not require governments to provide free counsel to poor people in all forums. Governments can satisfy the Convention by establishing, or continuing, forums which are simple enough in both procedure and substantive law to allow citizens to have a fair hearing without the assistance of a lawyer.

The Right to Equality

The *ICCPR*, in Article 26 and 14, provides for equality before the law; equality under the law; equal protection of the law; and equal benefit of the law. These suggest both formal

[21] Article 6(1) of the *European Convention*: 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...

equality, meaning the application of the law, and substantive equality, meaning the result and benefits of applying the law. For these equality rights to be effective, individuals must be given the ability to obtain legal assistance when required and thus effective access to the courts and the legal process.

Achieving equality has always been a goal of legal aid. In the earlier development of legal aid, the focus was on formal equality, assuming that legal aid clients required the same kinds of services as fee paying clients. There had been little recognition of the institutional structures that may impinge differently on specific groups. The concept of equality has been evolving in international law to include an analyses of substantive equality to address the reality that the systemic abuse and deprivation of power that a group experiences cannot be meet only by ensuring formal equality. The access to justice movement recognises the structural inequalities in our society and seek to implement policies that will assist the poor in achieving effective "equal" access to the law.

Economic and Social Rights Coupled with the Right to an Effective Remedy

The *Universal Declaration of Human Rights* sets out in Article 25 the right of everyone to a standard of living adequate for the well-being of himself and his family, including food, clothing, housing and medical care and necessary social services. These rights are further elaborated in the *International Covenant on Social, Economic and Cultural Rights*. The *Universal Declaration* also establishes the right of an effective remedy. It has been argued that the unmet legal needs of the poor focus on the violation of these economic rights and that access to justice would be meaningless to them if they do not have at their disposal an effective remedy.

CONCLUSION

International human rights law stops short of providing for an automatic right to legal aid for all individuals in criminal or civil law matters who lack the means to purchase such services. As can be seen from a review of the international standards, there is little question of the existence of a basic state obligation to ensure legal aid in some form. Even though there has been controversy about the extent of the obligation, the nature of funding and kinds of services covered, there is consensus that states are obliged to provide legal aid services to ensure access to justice.

It is impossible to say what level of expenditure would be necessary to comply with the standards in the conventions. Amounts actually spent by Member States differ considerably both over time and between jurisdictions. Both international and regional bodies that monitor compliance of these instruments have avoided setting limits in terms of financial support of legal aid schemes. The tendency on these matters is to allow member states a considerable margin of latitude.

Recalling the principles cited at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, all legal systems should provide readily available, less costly and non-cumbersome procedures for the peaceful settlement of disputes and litigation and arbitration, so as to ensure prompt and just action for everyone. The right to legal aid is basic to ensuring effective access to justice.