Case #1

# THE NEED FOR STATE SPONSORED LEGAL AID IN CIVIL CASES


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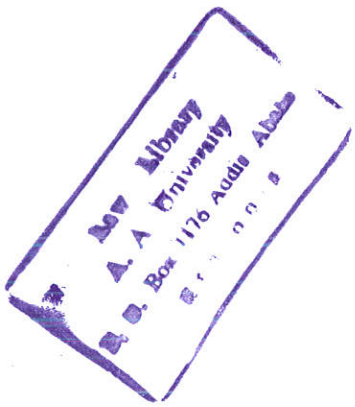
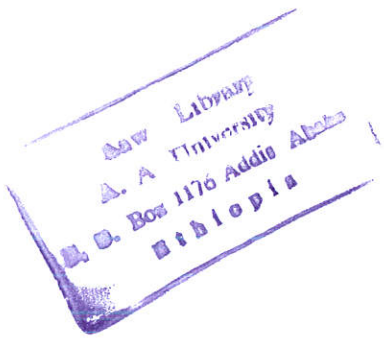
I thank you all. But I owe a special dept of thanks to my advisor Ato Seleshi Zeyohannes for his valuable comments and my brother Sharew for his overall assistance



**Dedicated to: Millions of Poor Citizens of Ethiopia**



# TABLE OF CONTENTS


| | Page |
|---|---|
| **Introduction** ..... | **i** |
| **Chapter One** ..... | **1** |
| **1. Historical Background of Civil Litigation and Legal Aid**..... | **1** |
| 1.1 Historical Background of Civil Litigation ..... | 1 |
| 1.1.1 Developments in Common Law System ..... | 1 |
| 1.1.2 Developments in Civil Law System ..... | 4 |
| 1.2 Traditional and Modern Litigation in Ethiopia ..... | 6 |
| 1.2.1 Traditional Mode of Litigation ..... | 6 |
| 1.2.2 Modern Litigation from 1942 - 1965 ..... | 8 |
| 1.3 The 1965 Civil Procedure Code ..... | 9 |
| 1.3.1 Combined Approach ..... | 9 |
| 1.3.2 The Role of the Parties and the Judge ..... | 11 |
| 1.4 Legal Aid Development in Civil Matters ..... | 14 |
| **Chapter Two** ..... | **20** |
| **2. Self Representation and its Problems in Ethiopia** ..... | **20** |
| 2.1 Reasons of Self-representation ..... | 20 |
| 2.2 The Role of an Advocate in Operating the Civil Justice Machinery System ..... | 21 |
| 2.3 Difficulties Pro Se Litigants Encounter in Civil Proceeding ..... | 22 |
| 2.4 Judicial Challenges in Dealing with Self-Representation ..... | 26 |
| 2.5 Advocate and His Client in Dealing with Unrepresented Party ..... | 28 |
| 2.6 Access to Court ..... | 28 |
| 2.7 Power of Court in Civil Proceeding ..... | 29 |
| **Chapter Three** ..... | **31** |
| **3. The Responsibility of the State to Provide Civil Legal Aid** ..... | **31** |
| 3.1 An Overview of the Legal and Constitutional Arguments for Legal Aid ..... | 31 |

3.1.1 Equality before the Law ..... 31
3.1.2 The Right to a Fair Trial ..... 35
3.1.3 Rule of Law ..... 38
3.1.4 Access to Justice ..... 39
3.1.5 The Right to an Effective Remedy ..... 41
3.1.6 Legal Aid as an Integral Part of the Justice System ..... 41
3.2 Why should the State be Responsible? ..... 43
3.3 Legal Aid to the Poor ..... 45
3.4 Alternative Mechanisms for Providing Civil Legal Aid ..... 49
3.4.1 Pro bono Service ..... 49
3.4.2 Legal Aid by Civic Organizations ..... 51
3.4.3 Para-Legal Training ..... 55
3.4.4 Legal Aid Services by Law Schools ..... 57
**Conclusion and Recommendation ..... 60**
End Notes
Bibliography
Appendix

# INTRODUCTION

Legal rights are worthless unless they can be enforced. To enforce and vindicate one's own rights in court of law, there arises a need to make the justice system accessible to all. Access to justice can be explained as lessening, as much as possible, obstacles for people to use the justice system. One of the major obstacles litigants face is the fee charged by lawyers. Since modern laws are too complex and voluminous, it requires a person knowledgeable in law to focus, develop, and present all relevant facts and legal arguments. However, the advocates' fee is only affordable to wealthy and corporate clients. And hence the poor who have no familiarity with the law is excluded from getting the necessary legal service which could help them greatly in vindicating their rights. Because of this, they are denied access to justice.

Here comes legal aid as one best solution for the above problem since it as an institution is one of the gate ways allows entry in to the justice for those whose socio-economic status otherwise bar entry. Even if legal aid is also advocacy to change laws or bring the benefits of existing laws to large groups of people, as well as public education campaigns to inform people of their rights, in this paper its scope is limited to legal advice and court representation. The provision of legal aid service to parties in civil cases saves the litigant from losing his meritorious case. It helps the litigant to exercise his right to a fair trial since the counsel is the equalizer, the one who places each litigant as nearly as possible on equal footing under the substantive and procedural laws in which he is tried.

Ethiopian civil justice system of litigation expects each litigant to discover the facts, research the law, convincingly present the case, stand ready to rebut the presentation of the adversaries, etc. Self represented litigants are unable to do this

since it requires familiarity with the law. In attempting to deal such issues, the paper has the objective to show the difficulties litigants face in their way to use the justice system. Some people consider civil legal aid as a charity but this paper will try to show the legal basis for claiming legal aid as of a right which can enable the poor litigant to demand the service from the government. It will also deal less expensive but efficient and effective modes of delivery of legal aid.

With this in mind, the first chapter deals the historical background of civil litigation and civil legal aid developments in some countries. In doing so, the Ethiopian mode of litigation and the role the parties and the judge can play as provided under the Ethiopian civil procedure code will be dealt

The second chapter assesses the problems surrounding self-representation in Ethiopia. The difficulties self represented litigants face in using the civil justice machinery, the judicial challenges and its impact on the represented party will be dealt. The role an advocate and the court have in limiting the problems and the challenges will also be discussed.

Chapter three deals the legal and constitutional arguments for the provision of legal aid and their implication on imposing responsibility on the state for the provision of the legal aid service. Modes of deliveries of the service are also discussed.

Finally the conclusion along with recommendation is presented.

# CHAPTER ONE

## 1. HISTORICAL BACKGROUND OF CIVIL LITIGATION AND LEGAL AID

### 1.1. Historical Background of Civil Litigation

The law of procedure is that part of the law which regulates the exercise of the judicial function. All advanced systems of law require conformity with certain rules of procedure on the part of those who seek remedies under the law. This requirement is imposed in the interest of good order, so that the administration of the law by the courts will be more regular, less confused and more certain than would be the case if no procedural requirements existed at all.[1]

Legal systems are divided in to common law and civil law systems and the historical development of civil litigation differs from one to the other legal system. The writer of this paper would like to present the essential feature of developments which have taken place in both systems

#### 1.1.1. Developments in Common Law System

There are four well-defined stages in the history of civil litigation in common law.

The first stage is described as the customary period. The procedure of this period was the mirror of the law of feudal and communal courts which belonged to the era of lay judges and a society organized in to small groups.[2] It influenced the common law because the king's court in England grew out of feudal jurisdiction in a conservative age.

A defendant must be summoned by the plaintiff to appear before the court and what was more so a plaintiff was well advised to take with him some witnesses

when he set out to call the defendant.[3] If the defendant fails to appear to a summons to attend the court, the result was what they call outlawry.[4] Outlawry is a judicial declaration removing the protection of the law from the outlaw and as a result he loses all rights of personal safety as well as any property unless and until he could "in-law" himself, for instance, by showing he was never summoned or was ill to attend.[5] Once the defendant had appeared before the court the plaintiff had to state his claim in formal words, since any slip in the precise formula might be fatal to the proceedings and the defendant had to reply equally in explicit terms.[6]

After the defendant had pleaded he was then called upon to give pledge or security that he would be abide by the judgment of the court and then the plaintiff presented his witnesses.[7] The witnesses did not swear to tell the truth of the claim but to the genuineness of the cause of action and there would not be examination.[8] Having satisfied the court of the existence of a claim which had some foundation, the plaintiff was entitled to an admission or denial by the defendant.[9] If the defendant denied the claim, then the court would direct upon whom the burden of proof should lay and it is benefit rather than a burden because the methods of proof favored the party giving it. Because of this the award of proof was virtually the decision upon the claim so far as the court was concerned since it was successful and nothing else remained for the court but to make execution of judgment.[10]

However, with the growing complexity of society, they no longer appeared to the community as methods of settling disputes either on rational or economic grounds and this leads to the second stage of civil litigation in common law system, the formulary period. The period was the time when the king's judge was first defining the civil rights they would recognize and the remedies they would grant.[11]

The distinctive feature of the formulary procedure is that one is not permitted to go in to the court and simply demand a remedy for a stated wrong instead he

is required to state the wrong in a specified formal way and prosecute an appropriate form of action in order to get the appropriate remedy.[12] This means there were varieties of procedures to afford a variety of remedies. A writ, well-known type of document already used in public administration, was given from the king and the writs summoned the defendant to appear before the justices appointed by the king to answer the claim made in the writ and failure to appear as ordered was a contempt of the king's writ sanctioned by pain of penalty.[13]

After appearance, the proceeding, which is oral pleading, were very formal, usually ending with a direction that one or other party should prove his case according to the old modes of proof.[14] Since at this period the jury system was used, even if not universal, questions of fact were decided by the jurors.[15]

The third stage was marked by the elaboration of the rules of civil procedure. By the time when the register of writs had ceased to expand, the judges started to offer a remedy in new cases by elaborating the old rules and there is high judicial authority for the view that mere novelty alone was never an adequate excuse for refusing an action on the case.[16] Another change was the introduction of written pleadings as opposed to oral. At this time two rules governed all pleadings. First, questions of fact must be stated so that they could be brought to an issue to which an answer might be given by a jury.[17] Secondly, points of law had to be expressed in terms of the forms of action and questions of law not arising out of the decision of the fact were dealt with by the justices of the court.[18] This gave, to their decisions on law, a peculiarly great authority and assisted in the growth of precedent.

The last stage in this development was the period of reform. The hardship of a technical system existing at the end of the 15th C led to the abolition of the forms of action. Reform, therefore, took place in England during the years 1832-1873 and the object of these changes was to make less depended on the legal rights of the party.[19]

The uniformity of process Act of 1832 made possible all personal actions to be commenced by a common form of writ on which the nature of the action was simply stated.[20] The common law procedure Acts, 1852 to 1860 more concerned with the substitution of a single common form of writ to commence all actions, in place of the numerous previously employed.[21] Under the Judicature Act, 1873 and succeeding statutes, rules of court have been made which govern the rules of pleading and practice and all these statutes aimed at simplicity of rules, however, unskillful pleading may still delay or even defeat a meritorious claim, unless it can be amended in time, but the risks are slight compared with the system prevailed on older times.[22]

### 1.1.2. Developments in Civil Law System

The history of Roman law is the history of actions (the modern civil procedure), then of the formula, with all the improvements that were gradually incorporated in it by legal technique and thus procedural rules were of first importance in the development of Roman law.[23]

The history of Roman law of actions, which mean the right to put the law in to motion, was divided in to three divisions.

#### 1. Legis Actiones (An action of the law)

It was the first and earliest in time which flourished during the Republic. They were called legis actiones either because they were legal in origin or because the forms of procedure were as formal, rigid, and exclusive as the laws themselves.[24]

There was division of judicial proceedings in to two distinguished sections, the proceedings 'injure' and the proceedings 'in judicio.'[25] The proceedings injure are the proceedings before a magistrate, judicial officer. It has the objective of formulating the legal issue which is called litis contestatio.[26] Litis contestatio

indicates the concluding act injure where by the parties settled what was the issue between them and thus made their dispute ready for hearing and decision by a judex or single private judge in the second stage of the procedure.[27]

The chief characteristics of legis actiones were: - they were open only to Roman citizens; the parties were obliged to appear personally before the magistrate and the judex; the proceedings were extremely rigid and formal; if the suit was once brought, there was an end of the matter; and the plaintiff could only claim restitution of the thing in dispute, not damages as a general rule.[28]

### 2. Formulary Procedure

It was begun under the Republic and flourished during the early Empire. Originally, the formulary procedure was introduced for foreigners but later it was made available for Roman Citizens.[29]

Even though the formulary procedure resembled the legis actiones system since in both systems there were two stages in the course of law suit; first, the settlement of issues before a Roman magistrate when the suit was said to be injure, and secondly, when the matter passed in to the hands of judex when it was said to be in judicio, formulary procedure was distinctly better than the legis actiones in two respects.[30] First, it was free from mysterious formality and hence changed the object of the proceedings injure since the formula had become the medium through which the litis contestatio was effected and secondly, it was infinitely more elastic and could be adapted so as to give effect to any claim which the judicial officer considered equitable.[31]

### 3. Extraordinary Procedure

The formulary procedure was abolished in 296 A.D. by Diocletian and the extraordinary procedure was substituted in its place.[32] It was called

extraordinary because, even during the period when system of formulary procedure was in operation, the magistrate sometimes used to decide the case himself without sending it on to a judex and it was sometimes called summary procedure.[33]

However, this exceptional system became the only form of civil process under which no judex is appointed since the entire proceedings were conducted before the magistrate injures and hence there was no litis contestatio.[34] The proceedings began when the plaintiff filed a written statement and the magistrate sent the statement to the defendant through officer of the court, and thus both parties appeared on the day appointed, either personally or through advocates, when the magistrate heard the case and passed judgment.[35] In general, therefore, the procedure in this period is not far away from which we are familiar in modern systems.

## 1.2. Traditional and Modern Litigation in Ethiopia

Ethiopia system of civil litigation can easily be classified as traditional and modern. The traditional mode is the one which was governed and operated by customary rules and practices while the modern system of litigation is operated by the enacted laws of the central government.

### 1.2.1. Traditional Mode of Litigation

Procedural law which, was transmitted from generation to generation by oral tradition was indigenous to Ethiopia and which marked a significant development in the last decades of the nineteenth century and the first three decades of the 20th century. This procedural law included the law of evidence with sophisticated technique of interrogation and cross-examination known as "Tatayyaq Muget."[36] The term 'Tatayyaq' literally means be interrogated, however, technically it is the traditional mode of litigation in court proceeding

and 'Muget' means litigation, and inclusive of all procedural aspects of the administration of justice.[37]

In those times litigation at the initial stage was a voluntary and spontaneous form of arbitration because a party to a dispute was entitled by most of the proclaimed laws preamble to call up on any passer-by to decide his case and if it was the rulings of the 'road-side' courts unsatisfactory that a case is instituted in a court of law that had jurisdiction in the matter.[38] A court proceeding began with securing guarantee by both the plaintiff and the defendant, and it was after this, the plaintiff would forward his claim.[39] Judges were the then officials. And if the claim was denied by the defendant, the plaintiff would present the issues involved with respect to the case and the defendant, in his turn, present his defense.[40]

After the case is instituted, the plaintiff laid a wager or bet, which was considered as part of the court fee, and the defendant either laid down the same amount of wager or admits the claim.[41] If he admits, judgment would be pronounced against him, in which no appeal was allowed from such a ruling. However, if the defendant denied at least some of the facts alleged against him, the plaintiff would introduce oral and/or documentary evidence to prove his allegation.[42] From each side three witnesses would be heard and if available, documentary evidence would have to be presented.

In principle, a witness was not required to tender an oath prior to giving his testimony but the party against whom the witness testified had the right to request the court to require the witness to tender an oath.[43] At the stage of Tatayyaq, the plaintiff would allowed to pose questions to the defendant and when he finished his questioning, the defendant would in turn start posing questions.[44]

While the examination and cross-examination had been finalized and before the judge gave his decision, the parties would resort to an art of advocacy which is

applied to convince the judge and the persons attending the court session by the use of poetry, and harass the other party by exposing some of the disgraceful acts committed by the opponent and shameful events that had occurred on his family background.[45] All these show the adversarial nature of our traditional mode of litigation. Then judgment would be pronounced and this would be the end of the matter unless an appeal was lodged to the next higher court. An appeal could be lodged based on substantive issues or procedural issues, including interlocutory matters.

### 1.2.2. Modern Litigation from 1942 – 1965

It was the 1942 administration of justice proclamation[46] that provided for the three divisions of courts: Supreme Imperial Court, the High Court and Provincial Courts, and gave the Afa Negus of the Supreme Imperial court and the President of the High Court with approval of the Ministry of Justice to make rules of court regulating the administration of the Court, and the institution, conduct and hearing of proceedings.[47] Pursuant to this mandate, Court Procedure Rules[48] for High Court and Provincial Court was issued which is the basis for our modern civil litigation.

This Court Procedure Rule provided that any suit shall only be instituted by presenting a statement of claim to the registry of the appropriate court and the contents of the statement of all is enumerated. After an action has been duly instituted, the court shall issue a summon and together with a copy of the statement of claim, it would be served to the defendant who, in his turn, has the obligation to file a statement of defense with-in the period prescribed in the summons.[49] After the defense is registered, it should be served to the plaintiff at his address.

On the day fixed for the hearing of an action, the plaintiff shall have the right to begin, and may state his case and produce his evidence; including documentary evidence in support of his claim and the defendant shall then produce his

evidence.[50] Then, the party calling a witness shall examine him and the adversary may cross-examine the witness, and after this, the party calling him shall have the right to re-examine on any point arising out of the cross-examination.[51] During the hearing of an action, the court can at any time put questions as it thinks fit to a witness and may recall a witness who has already been examined.[52]

At the conclusion of the hearing of an action, the judgment would be pronounced and the decree would be executed unless there would an appeal. An appeal in the Supreme Imperial Appellate Court can be lodged by filing a notice of appeal signed by the appellant or his advocate, in the Registry.[53] If the advocate signs the notice of the appeal, he shall attach to the notice his power of attorney. Appeal is allowed against an interlocutory order as it is expressly stated.[54] Unless an application for appeal was rejected, the Supreme Imperial Court would see the case and pronounce judgment which might be either the approval or the reversal of the decision of the High Court.

## 1.3. The 1965 Civil Procedure Code

Our Civil Procedure Code by repealing the previous enactments on civil procedure rules, come up with its own elaborate and inclusive court proceeding rules. It has its own system of litigation and gives the parties and the court different roles on the process of litigation. The system of litigation it has and the role it gives to the parties to the proceeding and the court will be dealt in the following discussions.

### 1.3.1. Combined Approach

Continental law and common law have their own system of litigation. While continental law is inquisitorial in style, common law follows the adversarial system of litigation. The two systems have differences in their way of litigation. The adversarial system has neutral and passive decision-maker who

is expected to let the opposing parties call the witness and ask them questions while in the inquisitorial system the judge is responsible for calling witness and asking questions.[55] It is the responsibility of the parties, in adversarial, to define the legal issues in the case and present the evidence supporting their positions.[56] In inquisitorial, for instance in Germany, the court has the duty to clarify the cause and lead the parties toward full development of their respective positions and it guides the parties to any necessary further explorations of facts and theories, and may suggest appropriate allegations, proof offers, and demands.[57]

Under Ethiopian law, the witnesses ordinarily are called by the parties and the examination in chief, the cross-examination, and the re-examination is conducted by the party which is a feature of adversarial system.[58] Thus, one of the characteristic features of the process of litigation as it exists in Ethiopia is party representation. Each party must present his version of the case to the court or he must allege facts to support his claims or defense and introduce evidence that will prove the existence of those facts.

However, the court has broad powers and thus active decision-maker which is the feature of inquisitorial system of litigation. The court has the power to compel the attendance of witnesses and the production of documents and generally to obtain evidence that it considers necessary to enable it to decide the issues in suit.[59] It may call as a witness any person even though he has not been called by the parties and may order any such person to produce any document that he has with him. The court may at any time put a question to a witness and it may do so while he is being examined by the parties or at the conclusion of his testimony or at both times.[60] The court has the duty to exclude an inadmissible document even if no objection is made and if the judge believes that certain oral evidence is irrelevant, he should disregard that evidence even though the opponent has made no objection.[61] Thus, one can say that Ethiopian courts have significant power in directing the litigation process which is purely the characteristics of inquisitorial system.

Thus, the writer of this paper is in a position that Ethiopian civil procedure code has a combined approach as to the system of the litigation process. It incorporates both the adversarial and inquisitorial modes of litigations. Other writers also share this position. Sedler sates that Ethiopian system of litigation is not purely adversarial rather it is a modified form.[62] Other writer also concluded that Ethiopian follows more of adversary system of litigation with some grain of the inquisitorial system.[63]

### 1.3.2. The Role of the Parties and the Judge

The role the parties play and the powers of the court have a close link with the system of litigation Ethiopian civil procedure code follows. Since Ethiopia, as I said above, follows the combined approach, both the parties and the judge have indispensable role in the process of the proceeding. And hence the role the parties to the litigation and the judge have, even if not exhaustively, will be dealt.

Plaintiff initiates proceeding by filing a statement of claim in the registry of a court having jurisdiction over the case.[64] He must also see to it that the defendant is summoned before the court, that is, is made a party to a suit. This is accomplished by notifying the defendant that a suit has been filed against him and directing him to appear and defend. This is as to the institution of the suit and the service of process.

The hearing in the court of First Instance is divided in to two stages: the pleading and pre-trial stage, and the trial stage.

The pleading and pre-trial stage is the stage at which parties present their allegation to the court and it is during this stage that the issues to be determined at the trial are developed. Issues are nothing but the points on which the parties disagree and pleadings are the written documents originating proceedings or

filed in reply thereto.[65] In his pleading each party sets forth the facts, his version of what happened. The court must examine a statement of claim to determine whether it states a cause of action,[66] as it does a statement of defense where it contains a set-off or counter-claim.

The primary purpose of the pleadings is to develop the issues for trial. At the first hearing, the court frames the issues for trial, and issues are generally framed on the basis of the allegations of fact contained in the pleadings. As a general principle, if an allegation is not contained in the pleadings and, therefore, not put in issue by the court at first hearing, evidence to support that allegation can not be introduced at trial. However, the court may permit an amendment to pleadings to include the allegation as to which evidence is sought to be introduced and thereby put the allegation in issue.[67]

The defendant must respond to each allegation of fact contained in the statement of claim, admitting or denying it at the stage of pleading and pre-trial. Any factual allegation not denied in the statement of defense specifically or by necessary implication is deemed to be admitted.[68] This means that the defendant does not contest it, and consequently no issues arise as to that allegation. Thus, at trial, the plaintiff would not ordinarily be required to introduce evidence to prove that allegation. However, the court may, in its discretion, require any fact so admitted to be proved at the trial despite the admission.[69] The court may require proof of that fact despite the admission.

Where a party makes mistakes during the pleading and pre-trial stage, his substantive rights could be affected. In order to minimize this possibility our civil procedure code gives the court a good deal of control over the litigation during this stage and can relieve a party from the consequences of pleading mistakes.[70]

At the first hearing, the court examines both parties to determine their respective positions, rules on any preliminary objections raised by the

defendant, and frames the issues for trial.[71] In framing the issues, the court considers the allegations in the pleadings, the contents of the documents produced by either party, and the oral allegations made by the parties.[72]

It is at the trial stage that the issues developed in the pleadings and at the first hearing are resolved, a judgment rendered on the merits, and a decree passed. The witnesses and the documents listed in the pleadings would be produced, by the parties, at this stage. Even though the responsibility for the attendance of witnesses and the production of documents rests with the parties, the parties' inaction will not prevent the court from obtaining evidence when the court desires to do so. This is because the court is given broad powers to compel the attendance of witnesses and the production of documents and generally to obtain evidence that it considers necessary to enable it to decide the issues in the suit.[73]

The primary responsibility for the examination of witnesses rests with the parties.[74] Examination-in-chief is conducted by the party who calls the witness and the cross-examination by the opponent. The re-examination is also conducted by the party who calls the witness for a second time. During the presentation of his case, the party will introduce into evidence the documents on which he is relying and the court may at any stage of the suit reject any document which it considers irrelevant or inadmissible.[75] The court has also broad powers with respect to the examination of witness and the production of documents at the trial.[76] It may put at any time a question to a witness. It may also call as a witness any person present in court, even though he has not been called by the parties and may order any such person to produce any document that he has with him. The court may also provide that the evidence of a particular witness is to be taken immediately, even before the hearing.[77] It can appoint a commissioner to make a local investigation for the purpose of elucidating any matter in dispute or a ascertaining the market value of property.[78]

After all the evidence has been presented and parties have presented their final arguments, the court gives judgment[79] and then the court reduces the judgment to a decree,[80] the operative part of the judgment which involves the relief to be given.

## 1.4. Legal Aid Development in Civil Matters

Civil legal aid is used as shorthand for legal assistance of any type, to people who are poor disenfranchised or otherwise excluded from society, on any thing other than criminal matters.[81] The core of civil legal is providing direct assistance to individuals on standard civil law problems such as evictions and divorces, to pick two very common issues. But legal aid is also advocacy to change laws or bring the benefits of existing law to large group of the people, as well as public education campaigns to inform people of their rights.

Civil legal aid or granting legal assistance and representation to litigants forms an important part of the justice system even though it is not the sole means of measuring the success of the system. Because legal aid as an institution is one of the gateways allows entry in to the justice system, for it opens the door to justice for those whose socio-economic status otherwise bar entry.[82]

Legal rights are worthless unless they can be enforced and many people can not afford to cover the expense to enforce their legal rights and are therefore denied access to justice.[83] However, many countries, to grant access to the justice machinery, employ the legal aid services to civil litigants especially to the poor section of their society and thus the writer of this paper attempts to deal with experiences of some countries.

### A. England

In England the position concerning legal aid in civil cases before 1949 was unsatisfactory in that besides applying only to the very poor, it also depended

substantially on the goodwill of lawyers prepared to act voluntarily.[84] However, the system of state-funded legal help in this country goes back almost half a century when the government introduced a range of measures designed to address the huge inequalities between the rich and the poor in 1949 by issuing a law which included the National Health Service and the Legal Aid Scheme.[85] The Legal Aid Scheme was designed to allow poor people access to legal advice and representation in court which would be provided by lawyers in private practice. It was the state, rather than the client, that was made to cover all or part of the fees.

By the 1980's, the system had developed into six different schemes among others the legal advice and assistance, assistance by way of representation and civil legal aid schemes, covering most kinds of legal cases.[86] Each scheme has its own rules on eligibility and some include means and/or merits test. A means test assesses eligibility on the basis of the applicant's disposable income, the balance left after paying for certain essential living expenses; and sometimes savings.[87] Merits tests are assessed on the basis of whether the applicant's case is likely to succeed, and whether it is sufficiently important to justify state funding even if the specific details of the means and tests vary according to the type of legal aid.[88]

The growing cost of these schemes was, however, causing concern and the then government solution was to reduce financial eligibility for the schemes which in turn led to criticisms that the government is indirectly affecting access to justice.[89] As a result of all this, the present government has passed the Access to Justice Act 1999 which makes major changes to the system and replaces the six schemes of 1980s. This act creates a new body, the Legal Services Commission, in place of the old Legal Aid Board.[90] The Commission is charged with responsibility for the public provision of legal advice and assistance in both civil and criminal matters, and administrating the legal aid budget through the Community Legal Service for civil legal aid and through

the criminal Legal Defense Service for criminal legal aid.[91] This body is still in operation for the provision of legal aid service with in England.

### B. USA

In USA, private legal aid societies predated federally funded legal services by almost 90 years since state funded legal aid service was founded as part of Lyndon Johnson's "War on Poverty" in 1960s which started its job by offering direct grants to already established legal aid organizations.[92] The programme has funded 265 grantees and employed over 2,000 attorneys in 50 states and it was uphold on providing the poor with the same scope of civil representation that was available to persons able to afford attorneys.[93]

In 1974 the US government set up a quasi-independent government corporation which is named as Legal Services Corporation.[94] It exists primarily to provide legal counsel in civil matters and some say without it, America's poor would have been deprived of civil legal representation. Since it was set up as a quasi-independent government corporation, it was able to withstand accusations that it promotes an activist, ideological agenda in the name of its poor clients, and it has survived numerous attempts aimed at abolition or reforming the system.[95]

The American Legal Aid Service is now more advanced in the use of a multitude of legal and quasi-legal agencies to develop access to justice programs even through modern technological means[96] since they begin on-line legal advice and assistance through the internet.

### C. Netherlands

In Netherlands legal aid money is used to fund both private sector lawyers providing legal advice and representation and also law centers, called Buros voor Rechtshulp.[97] The genesis of the law centers or Buros can be found in the university based initiatives of the 1970s that provided free advice. As with the

English experience, a network of advice centers grew out of the initiatives of individual lawyers dedicated to the provision of socially useful advisory work.[98] Unlike the English law center network, Buros operate as independent foundations, receiving funding from the Ministry of Justice, providing a service to their local communities without any formal links with that community.

In 1994 dramatic changes were implemented in the system of subsidized legal aid in Netherlands because of the substantial rise in costs and the corresponding burden posed on the budget of the Ministry of Justice, because of abuse and improper use, since there was no budget control and adequate supervision on funding aid.[99]

The new legal aid act that came in to force in January 1994 had four main objectives:

> *Firstly, the Dutch Legal Aid Act enables those who themselves have insufficient financial capacity, to call on government funded legal aid. Secondly, the Act provides a sufficient source of legal aid funded by the government.*
> *The third objective focuses on the financial management of the system*
> *The fourth objective of the Act is directed at modernizing the administrative organization in order to be able to implement a control and supervision of the system.*[100]

The Act creates a scheme or programme for providing legal aid, which includes both legal representation and legal advice to people that are entitled to it and since it provides a sufficient source and there is controlling mechanism of the system, it is more effective than the older one.

### D. Canada

Legal aid was seen as a charitable service provided to a few individuals through the goodwill of the legal profession and it was in 1960s this emphasis on charitable basis was replaced by a gradual realization that legal aid is a necessary public service and a governmental responsibility, parallel in some ways to society's shift toward state funded medical care.[101]

In Canada, legal aid is administered at the state, rather than federal level. Because of this different legal service societies and legal aid clinics, which are funded primarily by their respective state governments and somehow by the federal government, are established.[102] For instance in 1979, the legal services of society of British Columbia, one of the states in Canada, was formed to provide an integrated system of both legal aid and public legal education and information and the funding for the society comes primarily from the British Columbia government.[103]

In February 1999, the Canadian government adopted a framework agreement which is known as the "Social Union" to facilitate federal, provincial and territorial relations and the document calls for a strong foundation for a stronger federal role in legal aid.[104] However, at present time, the Canada's legal aid service is under threat mainly because of services under funding by governments.

### E. Italy

In Italy, the requirement that a litigant must generally be represented is regarded as having its basis in the general principle now embodied in Article 24(2) of the 1947 Republican Constitution, which provides that the right of a defense is inviolable at every stage and grade of proceedings.[105] This principle is applicable both to civil and criminal matters. The Constitution also provides

that appropriate institutions are to be established to furnish legal service to the litigants with the means of bringing and defending actions before any jurisdiction.[106]

In civil and administrative causes both the grant of legal aid and the appointment of a legal representative are made by legal aid communities which exist at every Tribunale and are composed of judicial officers and attorneys.[107]

Italy by incorporating the right to have civil legal aid in its constitution shows her commitment to the full realization of access to justice machinery which would be beneficial to the poor if other states follow it.

# CHAPTER TWO

## 2. SELF REPRESENTATION AND ITS PROBLEMS IN ETHIOPIA

Being self represented is a right, however, if exercised by a person with no or little legal knowledge, has many problems. Its effect extends from denying a civil litigant from vindicating his rights to undermining the justice machinery system as a whole. And hence it goes against the FDRE Constitution and the objective of the civil justice system which aims primarily at protecting and securing one's own right in court of law. With this, the reasons and details of problems of self representation will be dealt in the following discussions.

### 2.1. Reasons for Self-representation

Self represented litigants are the ones who try to use the justice system without the assistance of a person knowledgeable in law. Sometimes they approach advocates for legal advice and preparing pleadings. In Ethiopia, there is an increasing use of self representation. The increase in self representation is attributable to multiple factors.

One obvious explanation is the unavailability of the legal service. Ethiopia is a place where the shortage of lawyers is highly visible. In spite of this, they are only concentrated on some cities. Because of this, for the majority of our population, legal service is not accessible. Inability to afford the fee charged by advocates is also another main reason why litigants go unrepresented. Except the raporters' fees, the advocates' fees are high and affordable only by wealthy or corporate clients. In areas where a legal service is available to the public, cost of civil litigation is the main reason for the increase in self representation.[1] There is a legal aid center at the province of Federal High Court, which is

established by Ethiopian Bar association and Action Professionals Association for Peoples. It provides free civil legal aid service to users of the court. They gave service to 800 users in 2002/03, 750 in 2003/04, 600 in 2004/05. This shows the need for legal service. For the poor and uneducated, the cost of litigation becomes a barrier to enter in to the justice machinery system. This is a hard reality.

Ignorance of the need for and the value of legal services and knowing not of where to find a lawyer and whom to choose is a factor for self-representation. There is also certain element of the public who distrust and resent advocates. Litigants may perceive themselves as more factually expert in their dispute and more able to manage their case than a lawyer. In small claims, litigants prefer to go alone since the fee of an advocate is greater than the amount of money involved in the case. All such reasons contribute to the increase in self-representation. To appreciate the problem of the increase in self-representation, it is better to deal the role the advocate plays in the civil justice system which is the next focus of this paper.

## 2.2. The Role of an Advocate in Operating the Civil Justice Machinery System

As we can see from the discussion under Chapter One, Ethiopian Civil Procedure Code incorporates both the adversarial and inquisitorial modes of litigation. However, our system of litigation expects each litigant to discover the facts, research the law, convincingly present the case, stand ready to rebut the presentation of the adversaries, and protect his constitutional and other legal rights. Such rights may include protection against a decision which is arbitrary, a biased judge. The system depends mostly on the ability of the parties to present adequately their side of the story.

Since our laws are too complex and voluminous, it requires a person knowledgeable in law to focus, develop, and present all relevant facts and legal arguments. In most cases, justice in decision-making becomes meaningful only when each party has the aid of a person versed in law, familiar with court procedures and loyal to his client.[2] While persons of wealth, large corporations, and governments may employ more able counsel than the poor and uneducated, such proceedings will function properly only if each party is represented by a person who is familiar with the substantive and procedural law and skillful in communication.[3] In Ethiopia context, litigants are not equal since they vary in resources, education, ability to communicate, and experience and familiarity to the law and majority of our population can not afford the fee charged by advocates.

The primary role of counsel is to act as champion for his client. In this capacity, he is the equalizer, the one who places each litigant as nearly as possible on equal footing under the substantive and procedural in which he is tried.[4] Unless the system requires the appointment of counsel, the adversary party can gain victory through concealment or trickery rather than through the substantive merits. As it is civil proceeding, we employ preponderance of evidence and hence a litigant with poor pleading work or inability to present evidence at trial may lose a case that would have been won. This is due to the inability to operate the justice machinery system for vindicating the right he has in law which in turn undermines the system.

### 2.3. Difficulties Pro Se Litigants Encounter in Civil Proceeding

A litigant in person runs considerable risks and has to overcome a series of formidable obstacles before he can win his case. The substantive law today is a vastly complicated structure. There is an ever increasing quantity of parliamentary and delegated legislations. For a layman without the knowledge of the methods of indexing and digesting of legal sources, the law must appear

a trackless jungle. The litigant may overlook principles and rules which are vital to his case. Thus, many actions are lost which should never have been brought or should have been based on different causes of action.[5] Identifying the jurisdiction in which his case will be tried is another problem faced by unrepresented litigant. Without the assistance of an experienced person, knowing the proper jurisdiction is a problem for most of poor uneducated persons.[6]

Even if the poor litigant can successfully research the law relevant to his case, he is also faced with a complex system of pre-trial practice and procedure through which his case must go. Pre-trial procedure is certainly an expert task to take the case through all its stages, and to some extent cases may be won or lost by procedural rules. There is a strong possibility that litigants in person may be denied justice through their inability to cope with the technicalities of procedure. Moreover, it can not be denied that experts in procedure can exploit the system so as to prejudice their opponents and take advantage of the complexities of the system, and of their unrepresented adversaries' ignorance.

The struggle to translate disputes in to a legal form or pleading is perhaps the most important, and the most difficult, aspect of the pre-trial system. The illiterate poor litigants do not know anything as to how pleadings are written.[7] Even raporters, whose fees are less as compared to advocates, made errors of procedure.[8] The errors are not limited to the format but the substance too.[9] If not properly done, pleadings limit the ambit of the trial by defining the issues in dispute and restricting the admissibility of evidence to matters relevant to the issues and a party may have difficulty in raising at the trial issues not raised in his pleadings. Because of this is if a party makes mistakes during the pleading stage, his substantive rights could be affected.[10]

> *If the defendant fails to deny an allegation in the statement of defense, he is deemed to have admitted it. If the defendant*

*fails to plead a defense, he may not raise subsequently. The result was that substantive rights were often adversely affected because of pleading errors.*[11]

Before proceeding with the trial of the suit, Ethiopian courts decide on preliminary objections.[12] For most pro se litigants, raising preliminary objections such as period of limitation, res judicata etc. is unthinkable.[13] Litigants are ignorant of such concepts since they are not familiar with the laws.

Ignorance of trial procedure and tactics is another further obstacle. Ethiopian law has many highly technical rules governing the conduct of a trial and the manner in which matters in dispute may be proved. Many unrepresented parties do not know the rules about the attendance of witnesses and documents and letters must be proved. The rules of evidence also govern the manner in which the witness may be questioned. Leading types of questions, as a rule, are not allowed during examination.[14] This and other types of rules provide an obstacle for unrepresented litigants since most of them do not understand the art of questioning a witness.[15] The current trend is inclined to oral presentation, however, poor litigants let alone to argue persuasively, they are unable to fully explain the implication and the message their evidence conveys.[16] Because of this, even the litigants whose pleadings are prepared by advocates face challenges in presenting orally and persuasively.

At the end, all such problems faced by self-represented litigants boils down to one thing i.e. it can greatly influence the probability of winning the case. The errors, mistakes and difficulties the litigants' encountered certainty have impacts on the probability of winning their case.[17] When legal merits are about evenly balanced, a represented litigant has a better chance of winning his case. If it were not so, there would be no point in going to the expense of employing lawyers.[18]

Assuming that the layman successfully won the case, there would be execution proceeding. As this is one other stage of the litigation process, unless the litigant gets the aid of a counsel, he will face difficulties in executing the decree passed in favor of him.[19] One thing, the proceeding involves different applications with different requirements and if one does not complied with such rules, the court has the power to reject the applications.[20] If a litigant does not know the law, it is difficult to differentiate properties which can be attached and which cannot. There are also different complications while we are dealing with execution proceeding like sale procedure which made successful completion in the justice machinery system to the poor litigant difficult.

Under Ethiopian law the person who loses the case has the right to lodge appeal against the judgment of the lower court.[21] The unrepresented litigant is expected, in the memorandum of appeal, to set forth concisely the grounds of objection to the judgment appealed.[22] Here lies the problem. One can say that since they stay in the litigation process of the lower court, they are somehow familiar with court procedure and court room environment. Nevertheless it is difficult for the poor illiterate litigant to expose the arbitrariness of the lower court judgment.[23] It requires knowledge of the substantive and procedural law of Ethiopia. The litigant is required to show the errors both as to applying the law and facts of the case. It is impossible, for most of poor unrepresented litigants, to reason out the mistake made by the lower court in appreciating the fact and erroneously applying the law. Because of this and other problems like knowing mode of taking additional evidence, their right to lodge appeal and get reversed the judgment of the lower court remains unasserted right. The same difficulties lie in cassation since the litigant is required to identify basic errors of law of the judgment.[24]

## 2.4. Judicial Challenges in Dealing with Self-representation

An Ethiopian judge has the duty to act as an impartial arbiter between contesting parties. Self-represented litigants present judges with many tough challenges. Civil litigation is essentially a matter for the parties. They are free to determine what matters are in dispute and what matters are not. The fair working of the system therefore depends on the correct use of pre-trial procedures, and the availability of comparable skills on both sides. The judge must therefore find himself in difficulties whenever these conditions are not fulfilled. He loses the benefit of legal argument on one side and may have to supply deficiencies out of his knowledge. He may have to try to clarify the matters about which he is complaining. If the judge leans too far to help one party, it is difficult for him to maintain his impartiality.

On this issue, the judge whom the writer of this paper has interviewed stated that what matters most is the extent of the assistance and guidance the judge gives.[25] If the judge gives guidance to the self-represented party to focus his presentation on the issue framed by the court, it is not being partial instead it is the judge's duty to do so. However, if he says that it is barred by period of limitation; in this case the judge is losing his impartiality. At the current situation, in the Federal High Court, when judges face litigants with no legal knowledge, they refer him to the free legal aid center which is a good practice.

Judges also tend to resent the time they often have to waste through the amount of unnecessary and irrelevant material put before them. They also face other challenges like getting self-represented litigants to understand courtroom practices and rules, getting unrepresented parties to understand their burden of proof of asserting or defending causes of action, getting litigants to understand the judges' role of impartiality etc.

Self-representation can also be a cause of delay. This is mainly due to lack of proper pleading. More often than not, litigants do not fulfill the requirements of proper pleading. The court adjourns so as to give time to either one of the litigants who fails to plead properly be it a statement of claim or defense and other written statements to prepare it properly.[26] In one case, because of lack of proper pleading, the case was adjourned for nine times.[27] The failure of the parties to enlighten the courts on the major issues is a cause of delay and hence if pleadings are properly utilized, they can significantly assist in expediting the litigation process since the trial will be limited to those questions or which there is actually disagreement.[28]

The problems surrounding self-representation can erode public's trust and confidence in our courts. Since litigants are unable to navigate the law, in applying law to facts and forging a persuasive legal argument, to identify the most appropriate relief etc., the one who holds the truth can become the loser. If such trend continues, the public will start to question the purpose and role of the judiciary and hence this can lead to loss of public confidence in our justice machinery system.[29] We can not expect that every litigant will express satisfaction with the result in each case, but they should be able to acknowledge that the process of decision was fair, and that it justifies the confidence of potential litigants in general. With out public confidence and trust, courts lose legitimacy. Self-representation therefore visibly seen that it is a major challenge to the judicial system. So long as self –representation presents challenges to the judicial system, by necessary implication, it would have impacts on adversaries of the pro se litigants which is the next focus of the discussion.

## 2.5. Advocate and His Client in Dealing with Unrepresented Party

It will have emerged from the foregoing that, when legal merits are about evenly balanced a represented party has a better chance of winning his case. Nevertheless he is subject to a number of disadvantages. This is because ignorance of pleadings and other procedures and consequent requests for adjournments by a litigant in person can be an added cause of expense and inconvenience to a represented party. An experienced litigant can also be tempted to embark on appeals during preliminary stages or after trial, which a lawyer would regard as fruitless and this can put the defendant to unnecessary worry and expense. All these cost the attorney time and money.

Self-represented party may sometimes be allowed more latitude in the way he conducts his case, and thus gain an advantage over counsel who has to keep strictly to the rules. The attorney also faces difficulty in both zealously representing his client and not taking undue advantage of unrepresented litigant. He is bound to press his client's interests but advocates Code of Conduct Regulation warns the advocate to refrain from acts that would mislead his opponent.[30] Here, knowing which acts mislead the litigant and which are not is a challenge to the advocate.

## 2.6. Access to Court

All civil courts require plaintiffs, and usually defendants as well, to pay certain court fees, and to post-pond which will cover costs in the event that they lose the case.[31] These fees and costs often prevent the poor from having any hearing at all on the merits of their case. This barrier is arguably a worse discrimination against the poor than the failure to provide counsel. If the indigent litigant can get in to court, he has at least some chance of convincing a judge of the merit

of his case or defense, even if he has no lawyer to put his case for him. Where he can not even gain access to court, he has no chance at all.

Most countries, including Ethiopia, have now civil in forma pauperis laws. Under Ethiopian law a suit can be instituted by a pauper. A pauper is the one who has no sufficient means to enable him to pay at least part of the court fee.[32] He has the duty to adduce in proof of his pauperism.[33] If he succeeds in the suit, it is recoverable from the unsuccessful party.[34]

However, the right to bring or defend a lawsuit with out an accompanying right of counsel is, in most cases, hollow.[35] One could not long reconcile granting a right of access to the courts with denial of the rights which makes access effective.[36] A litigant has got effective access to court if he can operate the justice system and enable to vindicate his constitutional and other legal rights. As we see before most poor litigants in Ethiopia face difficulties in asserting their rights. And hence without access to legal aid, effective access to courts is unthinkable. Yet our system is so arranged that legal service is beyond the reach of a significant proportion of the population.

## 2.7. Power of Court in Civil Proceeding

Ethiopian civil procedural law gives the court a good deal of power which make possible for it to control the process of litigation. It has significant power in directing the litigation. As it is shown in chapter one, the court has broad powers. It can examine a statement of claim to determine whether it states a cause of action, as it does a statement of defense where it contains a set off or counter-claim. At the first hearing, the court also frames the issues for trial.

Even if evidence to support an allegation which is not put in issue can not be introduced at trial, the court may permit an amendment to pleadings to include the allegation as to which evidence is sought to be introduced. Failure to deny

specifically has consequences but the court has the discretion to require any fact so admitted to be proved at the trial despite the admission pursuant to the law.

Even though the responsibility for the attendance of witnesses and the production of documents rests with the parties, the court can obtain evidence when it desires to do so. The court has also broad powers with respect to the examination of witness and hence it may put at any time a question to a witness. It has also the duty and the power to exclude inadmissible documents and irrelevant oral evidence even if no objection is made.

Nevertheless, such powers of the court can not relieve the self-represented litigant from the difficulties he faces even if it minimizes the risks.[37] The judge can not replace the role the advocate has to his client. He can not raise grounds of objection; specify remedies; present the evidence smartly to the honorable court; attack the adversary's contentions, evidence, and witness; etc. All these situations affect the substantive rights of the litigant in person. The judge's role places limits on the extent of the injury the litigant suffers but it can not be the ultimate solution.

# CHAPTER THREE

## 3. THE RESPONSIBILITY OF THE STATE TO PROVIDE CIVIL LEGAL AID

The responsibility of states to provide legal assistance has been defined through out this past century on several different bases, including moral, political, social justice and legal terms. However, this paper will focus primarily on the legal obligations of the states to provide legal aid arising from domestic and international law.

### 3.1. An Overview of the Legal and Constitutional Arguments for Legal Aid

Different principles enshrined under the FDRE Constitution, and international agreements ratified by Ethiopia, like due process of law, equality before the law and access to justice etc. suggest that with out the provision of legal aid to the needy, protection and enforcement in the full sense of their meaning would be difficult. An attempt to make these principles and rights effective calls for legal assistance to litigants in court of law.

#### 3.1.1. Equality before the Law

Equality is at the very centre of social justice in the creation of a viable justice system. The argument advanced is that people should be similarly equal without compromise in relation to access to law and legal remedies. To translate equality before the law principle in to practice, it is essential that individuals have equal access to law and are equally subject to it. Even if the FDRE Constitution incorporates such principle, at the current structure of the legal system this is not the case.

There are three theories as to equality. Equality of opportunity, the first theory, states that it is by giving power back to individuals that they are able to realize their opportunities and by investing in the citizen, the state enables the citizen.[1] Here, the role of the state ought to be centered on isolating those who are not served by the existing system and thus require assistance to ensure that their opportunities are equal to those of everyone else. The second theory is equality of outcome.[2] However, ensuring equality of outcome in legal terms creates difficulties. In terms of litigation it is impossible to ensure that the parties are equal in any meaningful sense without displacing the authority of the court to reach an unfettered decision. A third context of equality is equality of provision.[3] This aspect focuses on the rights of citizens to receive public service. As an echo of the universal principle, it appears for all citizens to have equal rights to use public services as a result of their citizenship.[4] This is the type of equality which must be the fundamental principle in the provision of justice.

For some, the context of equality which is most apposite in a society where citizenship is predicated on a balance of rights and responsibilities conceived of and enforced by law, is equality of access and for others, it is closer to equality of opportunity. With reference to the justice system, a notion of law which is capable of being used by citizen to defend rights and to advance aspirations is a legal system based on some equality of opportunity. It is not an issue of outcome because the ultimate outcome is a question for the judiciary and the legal system. The only meaningful outcome is the ability to be represented by a lawyer and access to court without the barrier of cost.

Each citizen is to be entitled to access legal services regardless of wealth or other factors. The opportunity in this case is the access to advice and representation in the resolution of a dispute or in the development of a legal right. And hence, legal

aid enables access to lawyers who the citizen chooses and therefore equalizes the very poor with the very rich in court in terms of their representation.

> *In civil litigation, the litigant who is poor may not be able to retain an advocate to represent him and in his position vis-à-vis someone who is financially well placed and hence able to have legal representation can hardly be regarded as one of equal access to the court in all sense of the word*[5]

Once there is disaggregation of power between litigants at the level of access to justice, that is, in the context of procedural rules, the operation of substantive legal rules will necessarily be biased. And hence a meritorious case or good defense may be lost to the poor litigant and whatever rights he may have to equal dispensation of justice are rendered illusory.

The core of Hume's argument is that individuals are free because they are equally constrained and unconstrained by law.[6] At the heart of this position is the understanding that all individuals are equal before the law. In theory, that is indeed the case. However, in practice, nothing is further from the truth. People who are unable to afford a lawyer, or who can not sufficiently educated about the rights to which they are entitled, are less equal before the law than those who can afford lawyers or who have access to the necessary knowledge.

The FDRE Constitution under Article 25 states that "All persons are equal before the law and are entitled without discrimination to equal protection of law....on grounds of sex, property or other status." The principle is a testimony to the goal that is insight by the nation. If Ethiopia advocates such a principle, it is also evident that equality before court of law is protected. One writer suggests the following on this regard:

*A question may be raised here about the situation where a person who comes to court without an advocate and loses his case because of want of legal representation able to invoke this article for overturning the decision against him. And if the ordinary court decides against him does he have a valid case at the Council of Constitutional Inquiry or in the House of Federation? I.e. does he have a case that can initiate constitutional interpretation to grant him relief? My belief is he certainly has as long as he can show the bodies above that he lost the case because of his economic problem to get an advocate's help since property is a ground of discrimination in Article 25.*[7]

Article 25 is also a good legal support for requiring civil legal aid for poor civil litigants who can show their poverty and the seriousness of the case, for instance, damages to body, cases about shelter, livelihood etc.

The International Covenant on Civil and Political Rights (ICCPR), in Article 14 and 26, 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 equality, meaning the application of the law, and substantive equality, meaning the result and benefits of applying the law.[8] 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. Other international instruments such as UDHR also provide for equality before the law as a fundamental principle.

Nevertheless, equality before the law is meaningless if people are prevented from enforcing their rights. True equality requires that barriers, for instance financial, be removed for the poor section of our society. For a citizen who has not the financial

means required to afford the expense of a lawyer there is no concrete meaning or benefit to be derived from the principle of equality in the eyes of the law as between himself and his rich, powerful opponent, as he has no one to represent or advice him concerning his legal rights, and he can not afford the expense of the litigation.

It would appear that in order to achieve equal justice in practice and to give reality to international law and the Constitutional guarantee of equality before the law, a legal aid program providing help to an impoverished litigant should have to be devised to render justice available to those who can not afford to buy it since access to legal aid is one of the means by which persons are able to attain equality before the law, with out it, they do not have equal protection or equal benefit of the law in the broader sense.

### 3.1.2. The Right to a Fair Trial

The FDRE Constitution provides that Ethiopians have the right to the ownership of private property subject to limitations prescribed by law in the public interest and the rights of other citizens.[9] When we read Article 40(1) and (8) of the same Constitution cumulatively convey the idea that no Ethiopian may be deprived of private property save as determined by law in the interest of the public and other individual citizens, thus, denoting the notion of due process of law.

The concept of due process of law can be summarized as law in regular course of administration through courts of justice according to those rules which have been established for the protection of private rights.[10] It has a dual aspect, substantive and procedural. Procedural due process may be defined as:

> *the aspect of due process which relates to the requisite characteristics of proceedings looking toward a deprivation*

> *of life, liberty or property; procedural due process makes it necessary that one whom it is sought to deprive of such right must be given notice of this fact, he must be given an opportunity to defend himself, and the problems of the propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness.*[11]

An opportunity to be heard and to defend in orderly proceeding adopted to the nature of the case are the essential elements of due process of law that should be given due consideration by the judicial body in administering justice. And hence fair trial is fundamental requirement of due process of law. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel[12] because a civil trial is conducted under technical rules of evidence and procedure which demands skill in marshaling and presenting facts. Even the intelligent and educated layman has small and sometimes no skill in the science of law, let alone the poor illiterate litigant. And hence the right to legal aid is an indispensable part of due process of law or fair trial.

Due process is not merely a procedural safeguard; it includes substantive due process which is a constitutional guaranty against the deprivation of life, liberty, or property by legislation.[13] Due process of law is standing guaranty of substantial justice and prevents arbitrary action as would deny a litigant a substantially fair trial.

The right to a fair hearing is included in 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.[14] While the ICCPR has not elaborated on the meaning of a right to fair trial in terms of civil matters, guidance can be had from

reviewing the jurisprudence of the European Court of Human Rights.[15] The right to a fair hearing is guaranteed in civil and criminal matters in Article 6(1) of the European Convention of Human Rights. As in the case of the ICCPR, the European Convention only refers specifically to legal aid in detailing the minimum guarantee in criminal matters. "The European Court on Human Rights, in Airey V. Ireland, has interpreted the right to a fair trial in civil cases to mean effective access to the courts. This requires the state to provide publicly funded counsel in civil matters."[16] Therefore, the right to legal aid has been extended to civil cases through judicial interpretation.

The council of Europe resolution also declares the right of all persons to legal aid and legal advice, so that no one is prevented by economic obstacles from pursuing or defending his right in the court in civil, commercial, administrative, social or fiscal matters.[17] The African Commission of Human and peoples' Right has also the same declaration.[18] It states that access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to high cost of court and professional fees. It is the duty of governments to provide legal assistance to poor litigants in order to make the right to a fair trial more effective. In another document it is stated that the party to a civil case has a right to have legal assistance assigned to him where the interest of justice so require, and with out payment by the party to a civil case if he does not have sufficient means to pay for it.[19]

The FDRE Constitution provides that fundamental rights and freedoms specified in the constitution shall be interpreted in a manner conforming to international conventions.[20] Due process of law is one of the rights envisaged under Article 40 and hence it should be interpreted in line with international instruments adopted by Ethiopia such as ICCPR. As we can see, due process of law requires fair trial and conventions and declarations, discussed above revealed that without legal

assistance fair trial can not be achieved. Thus, the right to civil legal aid is incorporated in the notion of due process of law.

Fairness is the heart of our justice system. Ours system of litigation mainly depends up on a contest between two roughly equal parties. If there is a serious disparity in the power balance between the parties, the fairness of the procedure and the outcome is uncertain. Questions of fairness arise whenever one party is represented in a legal proceeding and the other is not or where there is a large imbalance in the resources available to the parties. Fairness in battle can not be achieved if only one party is armed. This is not an abstract principle but a hard reality. In civil cases, this is especially evident where an unrepresented litigant has a case against the sate or a financially powerful private litigant. In such situations if a person is not provided with legal aid, this would amount to denial of fundamental fairness requirement of due process of law incorporated in the Constitution.

### 3.1.3. Rule of Law

In a concise form rule of law implies that a government in all its actions is bound by the rules fixed and announced beforehand.[21] 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. The concept of rule of law is now understood to include the principles that laws must be publicly disclosed and that there must be meaningful access to laws and legal resolution of conflict.[22] 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 realization of their aspirations within a just social order when member states provide adequate provision of all persons to have due legal aid in order to secure their rights.

The FDRE Constitution in its preamble expressly provides that rule of law is the basis of our democratic order. Parties to Universal Declaration of Human Rights, including Ethiopia, also recognize the interdependence of human right and rule of law.[23] Protection under the rule of law would be an empty promise if individuals could not avail of themselves of the law.[24] This means individuals require not only knowledge of the law but also effective access to it. The state's obligation to provide some form of legal aid is fundamentally based on this dedication to the use of legal rules to organize society and regulate conflict within it.[25] Today our laws are very complicated and most citizens will need a lawyer to help navigate the legal system. The rule of law is undermined if that assistance is not forthcoming and the citizen can not afford to pay for legal representation.[26]

The more the state decides to implement policy through legal rules and more complex the legal rules become, the greater will be the requirement for legal aid. This because as the complexity of legal rules increase, the difficulties the litigant faces in navigating the law and vindicating his rights and need for counsel increase. Hence, to make justice accessible to all, rule of law calls for the provision of legal assistance to those persons who want to use the justice system.

### 3.1.4. Access to Justice

Access to justice means effective access to law and it is the legal right of every individual to have his grievance determined on the merits by an independent judiciary.[27] Under the FDRE Constitution a right of access to justice is guaranteed which states that "everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."[28] On a workshop held at Addis Ababa to discuss on the Justice System Reform program, the issue of access to justice explained as lessening, as

much as possible, obstacles for people to use the justice system and the simplest form would be the provision of legal aid.[29] And hence the right of access to justice guarantees the right to civil legal aid.

The idea is to try to remove impediments of access to justice at all levels. This may be achieved by making legal services less expensive, making justice institutions more accessible, making sure that legal services are not time consuming, formalistic and full of procedural pitfalls, and that execution is not delayed. Although an apparent reading of access to justice seems to suggest that the right is limited to traditional representation during legal proceedings, a broader interpretation may lead to a more desirable result and this line of interpretation has been also noted by Dr. Fassil Nahum.[30] Such an approach suggests a broader societal scope that augments the reach of one of lawyers' to that of people and most of the countries that have undergone law reform developed somewhat of a similar approach in this regard which is often translated in to the creation of justice centers, judicial defenders, paralegals etc.[31]

Protocol to the African Charter on Human and peoples' Rights on the Rights of women in Africa also under its Article 8 entitled access to justice and equal protection before the law, call state parties to take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid.

And hence one can safely conclude that an effective guarantee of access to justice is a good ground for requiring the provision of legal aid since it is impossible to access the justice machinery, especially by the poor section of the society, with out the assistance of skilled person in law. In the absence of it the right to get an effective remedy for violations of the law would be an empty promise.

### 3.1.5. The Right to an Effective Remedy

Civil litigants, where they face violation of rights, want to use the justice system in enforcing and vindicating their rights in court of law. However, they run considerable risks and have to overcome a series of formidable obstacles before they can win their cases. With out counsel, the law appears for them as trackless jungle since they are unable to operate the justice machinery system.

In these situations, absence or inadequacy of the provision of civil legal aid violate obligations of Ethiopia under international human rights law in that they deny poor people effective access to the courts to seek a domestic remedy for violations of their rights under ordinary domestic law, the FDRE Constitution and international human rights law.

This denial is contrary to Ethiopian government's obligations under international law to ensure that any person whose rights have been violated shall access to an effective remedy, including Article 3 of the UDHR, Article 2 of the ICCPR and the ICESCR.[32] To discharge its obligations, there arises a need for the provision of civil legal aid to the impoverished that are unable to get effective remedy for their grievances.

All these suggest that legal aid plays significant role in operating the justice system and without it, it is difficult to have a viable justice machinery system accessible to all.

### 3.1.6. Legal Aid as an Integral Part of the Justice System

The right to be provided with counsel in civil litigation, however, does not depend upon the ultimate resolution of the above issues discussed. The evenhanded application of justice is so fundamental a tenet of the legal system that counsel may be constitutionally required for the disadvantaged litigant in court.[33]

Legal aid is a fundamental aspect of justice system and democracy. A government funded legal aid program has become a justice-related part of the modern state.[34] It is an integral part of one's country justice system. Law is a corner-stone of a democratic community. A society's strengths and weaknesses are measured by the height of the barriers standing before its system of justice.[35] Legal aid as an institution is one of the gateways in to the justice system for those whose socio-economic status would otherwise bar entry.

For the poor section of the society legal aid is synonymous with access to justice. To those engaged in the justice system, either as professionals, as users of the system or as those who are denied access to the system, the crucial importance of legal aid is obvious.

Even if in Ethiopia, there is a justice reform program, without access to legal aid; these reforms are likely to be severely compromised with adverse consequences for all participants in the justice system.[36] Until legal aid is available, it is hypocritical to continue spending money to supposedly improve the law people can not access.[37] And hence, law and justice system reform must go hand in hand with the provision of legal aid.

Under Ethiopian civil procedural law primarily it is the party who present the evidence, advice the court as to the applicable law and disclosing the weakness of the other. The system depends mostly on the ability of the parties to present adequately their side of the story. Conversely, to the extent that one side is handicapped by inadequate advocacy the system it self is undermined. As it discussed in chapter two, the absence of legal aid has costs in terms of the additional burden to the impact on the justice it self in terms of increased

unfairness and the blot it places on legal and constitutional values calls for the provision of legal aid.

Once it is grasped that justice fails radically unless citizens, irrespective of means, have access to the professional assistance necessary to vindicate their legal rights, legal aid is seen to be as natural and as essential a component of legal justice as the judiciary, the court buildings and the court staff.[38] In sum, legal aid is an essential public service because the justice system can not function with out it.

### 3.2. Why Should the State be Responsible?

As it is discussed above, equality before the law, fair trial, access to justice and rule of law provisions of the FDRE Constitution guarantee civil legal aid as a right incorporated with in them. The current structure of the justice system is not accessible to poor litigants and the government can only make it accessible through the provision of legal aid service. The government's responsibility to enforce such right emanates from the Constitution since it has the duty to implement the rights enshrined therein. Our Constitution clearly stipulates that the government and its officials have the duty to ensure the observance of rights and benefits incorporated in the Constitution.[39] Ensuring that civil legal aid is provided to the needy poor litigants is imposed as an obligation on the state. And the state has the duty to discharge its obligations. Failing to observe such duty is contravening the supreme law of the land and leaving its citizens helpless. Article 13 of FDRE Constitution guarantees the same thing. It says that; "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and the duty to respect and enforce the provisions of this chapter."[40] The phrase "this chapter" refers to chapter three of the Constitution which enumerates fundamental rights and freedoms of individuals where civil legal aid is incorporated as a right. To fulfill such duty the legislature be recognizing the right,

should enact law which clearly shows that civil legal aid can be availed of as a right by the needy poor litigant. The executive particularly Ministry of Justice, should exert effort to make the scope wider for which legal service is provided. Since our existing laws are sufficient to claim civil counsel, the judiciary should be ready to enforce such rights.

As it is shown by the domestic law, the state has the responsibility to provide civil legal aid. However its responsibility extends to international law from both from customary international law and the treaty based conventions. Since all international agreements ratified by Ethiopia are an integral part of the law of the land[41] and customary law is binding upon every state; and international conventions and customary international law have regard civil legal aid as a right which would be exercised by individuals, Ethiopia has the duty to observe and enforce the rights envisaged on such international documents.

The Universal Declaration on Human Rights in its preamble is proclaimed as a common standard of achievement for all peoples and all nations, to the end that every individuals and every organ of the society shall strive to the recognition and observance of such rights.[42] The standards set by the UDHR although initially declaratory and non-binding have by now, through wide acceptance and recitation by nations as having normative effect, become binding customary law. Ethiopia as a member of the world community is bound by such law and thus obliged to enforce the rights therein.

The most significant source of obligations of states for the protection and enforcement of Human Rights are international treaties and conventions on human rights. Such treaties and conventions create clearly and directly the obligation for the state parties. The most notables are the UN Charter and ICCPR in which equality before the law, fair trial, rule of law etc. are guaranteed; provide that each

state party is under obligation to respect and to ensure the observance of rights recognized in these documents.[43]

Hence, the government of Ethiopia has the responsibility, both under the Constitution and international human rights law, to provide civil legal aid service to those who are barred entry in to the justice machinery because of their inability in financial terms. Secondly, as compared to the civil society, the government has the means to reach all parts of the country. And thus it is better if the legal aid service is given by the state.

### 3.3. Legal Aid to the Poor

The indigent criminal defendant is constitutionally entitled to be provided counsel in many countries including Ethiopia. Debate now rages over the potential extension of such right to an indigent civil litigant. The recognition of a right to counsel in criminal proceedings discloses much to us who contemplate the extension of similar right in civil cases. The relevance of this recognition should not be discounted merely because they arise in a different legal context. Surely, no negative inference can result from the existence of the constitutional guarantee in criminal cases.

The core elements of the case for criminal legal aid are fairly simple: the state can not deprive someone of liberty without a fair trial; there can not be a fair trial with out legal representation; fundamental principles of justice require that the state provide a lawyer if the accused can not afford one.

In order to determine whether counsel is necessary to a fair hearing in civil causes, one must inquire in to the lawyer's relative importance in civil and criminal processes. In the criminal sector, the US courts have come to realize that the

layman's unfamiliarity with the intricacies of the legal system renders legal assistance an integral facet of fair trial.[44] As we can see in chapter two of this paper, the unskilled litigant is unable to prepare his pleadings, conduct adequate investigation, familiarize himself with the rules of evidence, or persuasively argue in court because of the complexity of the civil judicial process. Our typical civil proceeding requires the skill and knowledge of a lawyer. And hence, a lawyer has a good deal of role in fair civil hearing.

The other standard which makes the aid of counsel a constitutional requirement in criminal cases is a loss of liberty which can generally be expected to occasion more severe effects than a property loss, in most civil cases. However, there are cases civil in form but affecting the personal liberty of a party. Examples are habeas corpus, juvenile court, civil commitment, probation revocation and deportation proceedings.[45] In cases which do not cause of loss of liberty, the civil litigant escapes the social stigma and legal impediments created by a criminal conviction. He also retains, in most instances, his personal freedom of movement and the nominal opportunity to improve his condition.[46] Nevertheless, these distinctions between civil and criminal processes do not form the basis for a convincing or permanent differentiation between the respective rights to counsel. This is because "... civil cases undoubtedly arise in which a deprivation of property causes consequences as grave as loss of liberty."[47] For instance, the poor person who permanently loses his home, a government job, a required license may, in many circumstances, receive a more crippling blow than the criminal who serve a jail sentence.[48]

The notion that, a right is to be provided counsel in criminal trials is also derived from the equal protection principle.\That is to say poverty can not be the basis for invidious discrimination. The state deprives the indigent of equal protection whenever it fails to furnish him with legal services equivalent to those that the

affluent defendant can obtain. The same is true in civil matters if he is not provided with legal aid where his opponent is represented by a counsel.

Some say also that since civil cases are primarily private matters, if the state gives legal aid to the one litigant, it is discriminating the other litigant. The judge whom the writer of this paper has interviewed on this issue stated that it is discrimination but positive discrimination which the FDRE Constitution supports in many instances.[49] And hence it is not contrary to the law. Instead it is in line with our law, for instance equality before law, since there can not be any real equality in the right to sue and be sued unless legal aid is available to poor persons in civil proceedings. Without it, there is a virtual denial of civil justice.

All such denials of justice emanates from poverty. Poverty is a condition of helplessness of inability to cope with the conditions of existence in our complex society. We know something about that helplessness. It is the inability of a poor and uneducated person to claim a right in court of law and to defend himself unaided by counsel. We have to begin asserting rights which the poor have always have in theory but which they have never been able to assert on their own behalf. Unasserted, unknown, unavailable rights are no rights at all.[50] Helplessness doesn't stem only from the absence of theoretical rights. It can stem from an inability to assert real rights. Their inability arises because of the putting of a price tag on justice. The price, advocate's fee, denies the poor to access justice. Effective representation for the indigent accused of crime is one part of this need but of equal importance for the poor is the assertion of rights in areas of law involving property which is a fundamental right as enshrined in our Constitution and international law.

To ensure justice, fair hearing for the needs and grievances of the poor litigants is required. However, a fair hearing is not possible without representation. Because

the intricacies of the law and the technicalities it involves for its operation in the court requires the guiding hand of lawyer at every step of the proceeding. Poor litigants are not in a position to hire a lawyer and hence unrepresented in civil proceeding. These states of affair create difficulties for economically weaker party to litigate on equal footing with the party in a better financial condition such as the sate and bodies corporate.

As it has been discussed, the state has the responsibility to provide legal aid service to the poor litigants and it follows that it should render the service to the poor in cases where the interest of justice would be jeopardized. We can get the guidance as to where the interest of justice requires in civil cases from the draft principles and guidelines on the right to a fair trial and legal assistance in Africa. It states that the interest of justice can be determined by considering the complexity of the case and the ability of the party to adequately represent himself, the rights that are affected, the financial position of the adverse party, the likely impact of the outcome of the case on the wider community, etc.

Nevertheless, the capacity and ability of the government to provide the legal assistance is constrained by budgetary problems. At the current situation, the government faces difficulties to deliver the service to all needy litigants. But, it can supply the service to certain cases where the interest of justice very much requires. Even the government can get funds from the international community. For instance, the United Nations Development program wants to assist in making the justice system more accessible.[51] By doing this the state can render the legal aid service to poor litigants when they face an opponent with big resource and counsel. Such instances can happen where the state, wealthy persons and bodies corporate appear as a litigant.

At the moment the Ministry of Justice, Civil Affairs Department, provides legal information, advice and representation to civil poor litigants who are unable to claim damages for bodily harms and human rights violation.[52] This can be considered as government's recognition of the rights of poor civil litigants.[53] However, its scope is very limited and hence not satisfactory. It is stated that this is due to budgetary constraints.[54] The Ministry is not doing well in collecting funds in widening the legal aid service scope of application to other grievances of the wider community. It has also problems in making people more aware of its services. All theses problems make the legal aid service ineffective and it is better if other means of delivery are effected which will be discussed in the next section.

## 3.4. Alternative Mechanisms for Providing Civil Legal Aid

It is known fact that the operation of legal aid scheme in poor country like Ethiopia where quite large number of the population are in need of the legal assistance service is very difficult. Nevertheless, the government can operate the scheme, with little fund, in a specified area for certain classes of poor litigants and limited types of cases by participating advocates and law students in public legal service, giving training to Para-legal, and facilitating and promoting civic organizations which are involved in rendering the legal assistance service.

### 3.4.1. Pro bono Service

Pro bono is the rendering or giving of service to the interest of the public. The rationale for pro bono service by advocates rests on two premises: first, that access to legal services is a fundamental need, and second, that advocates have a responsibility to help make those services available.[55] Advocates have a special obligation to ensure a legal system that protects the rights of individuals. The practice of law is a regulated industry, infused with the public interest and

requiring an advocate to denote a limited amount of time to a justice-related cause is not unreasonableness. Advocates have a central role in the administration of justice which imposes the special and affirmative duty to assure fair and proper working of the laws.[56] A democratic nation is founded on the principle that rights are determined and disputes are settled in accordance with law; not position, power, wealth, and other facts not related to the merits. When resolved by wealth or power, etc., the law and lawyers lose their central role in society and the state has failed its commitment to equal justice under the law.

By recognizing such rationales, the legislature impose pro bono obligation on advocates. It provides that any advocate shall render at least 50 hours of legal assistance, in a year, free of charge or upon minimum fee to the poor and to organizations which do justice-related matters.[57] Here, services with reduced fee and services with no charge are put for a lawyer as alternatives. Legal services to the poor are inclusive of both civil and criminal matters. And hence civil legal aid can be provided to the poor based on pro bono obligation.

Unfortunately, most advocates in Ethiopia are not carrying out the pro bono obligation and some are even ignorant of the existence of such obligation required by law.[58] It is members of Ethiopian Bar Association who are now discharging their pro bono obligation by rendering the service in the legal aid center established by the Association and Action Professionals Association for People at the province of Federal High Court in Addis Ababa. The non-observance of such obligation is mainly attributed to the government's failure to devise mechanisms for the effective implementation of the obligation. However, if an effective mechanism of implementing lawyers' pro bono obligation is devised, it would have great importance in assisting the poor section of our society in their legal problems and remedies for such problems.

Even if one of the grounds to revoke or suspend the advocates' licenses is non-observance of the provisions of the regulation[59] and failure to discharge pro bono obligation is a violation of the regulation, the Ministry of Justice while renewing and charging fees do not ask and control whether advocates are rendering pro bono service or not.[60] It is better for both the public and the government if such obligation is effectively implemented. This can be done either through the enactment of law which empowers the court to assign civil counsel to the indigent litigant or empowering the Ethiopian Bar Association to license and revoke or suspend advocates' licenses. If the bar association capacity is built, it can effectively implement the pro bono obligation since it is easy for the association to handle lawyers who are its members. Secondly, the Association begins to establish legal aid centers which make possible advocates to discharge their obligation. By doing this, the government can assist in making the justice system more accessible to the poor.

### 3.4.2. Legal Aid by Civic Organizations

Most of the recent studies on legal and judicial reform consider non-governmental organizations as an integral part of the justice sector in a democratic country.[61] NGOs can be extremely useful in advancing human rights both in general and with in the justice sector. Examples of their involvement include legal aid service, monitoring treatment of prisons and detainees, awareness campaigns etc.

Like most countries in Sub-Saharan Africa, Ethiopia has a low level of literacy and a large percentage of its citizens living below poverty line. As a result, our well written Constitution and all of the rights and benefits contained therein remain hidden in the document, largely unheard of and untapped by those whom it was intended to benefit. Furthermore, the reformed judicial, legal institutions can best be accessed with the assistance of lawyers who are few in number compared

to Ethiopia's population, expensive to retain and are reluctant to practice or extend their professional service for its citizens.[62]

The government tries to provide legal aid service in criminal cases through Public Defenders Office. Although miscarriage of justice which the Constitution provides[63] is to be applied by courts on case by case basis, such provision is being interpreted by courts to mean applicable only on criminal charge directly brought to the high courts, particularly on homicide and genocide matters.[64] The legal service provided by public Defenders office is ineffective since it is not able to sufficiently address the right to a fair hearing of the accused as it is not well budgeted and staffed by fully qualified lawyers and there is also shortage of staffs as compared to the number and seriousness of cases the office is responsible to handle.[65]

In addition to the ineffectiveness of the Public Defenders Office scheme, the legal aid provision leaves out poor people with less serious but complicated criminal cases and civil cases in the higher and other courts. It is these circumstances that have inspired the civil society organizations to the forefront of providing legal aid services to the overwhelming number of the needy that are outside the reach of the state's limited legal aid service provision.[66]

Legal aid to poor litigants in their civil claims is provided by Action Professionals Association for the People's (APAP). APAP is a non-partisan, indigenous non-governmental organization established in 1993 with the main objective of providing legal and professional services to the poor, women and children in Ethiopia and accessing human rights in bringing about an attitudinal change and as resource in the development process.[67] Accordingly, APAP has carried out numerous activities that are bent towards the realization of the right of access to justice in Ethiopia through the provision of legal aid service.

From 1993-1999, APAP has been engaged in providing counseling services, prepared legal documents and pleadings, and represented in court those unable to afford the service of a lawyer by its staffs and volunteer legal professionals.[68] It has been also engaged in activities related to promoting legal aid by conducting national seminars on legal aid etc. It had also implemented programs in the Amhara, Oromiya, South Nations Nationalities and peoples, and Harari Regional States as well as in Dire Dawa with the objective of advancing the engagement of paralegals for providing low cost legal services in human rights and legal fields; and to provide qualified legal services to the target social groups.[69] In 2000, it introduced voluntary institution support program which was aimed at in initiating the formation of legal professionals' associations in areas it operates so as to increase professional legal aid coverage far and wide.[70] Except for Oromiya, APAP has managed to have these lawyers' association legally constituted. In addition, as part of the support program, it initiated both the Ethiopian Bar Association and the Alumni Association of the faculty of law engage in legal aid activity through joint project scheme. As per the terms of the joint project, APAP would extend technical and financial support provided that they demonstrate commitments to engage in legal aid activities.

APAP has opened two legal aid centers in Addis Ababa, at the premises of the Federal High Court and Arada Division of Federal First Instance Court in collaboration with Ethiopian Bar Association, Alumni Association and the Federal First instance Court. It has also established legal aid center in Dessie town which is staffed by paralegals that provide legal aid service to the poor. The efforts of APAP make it the largest provider of service to the poor from the other organizations. The shift from service giving in to general co-ordination is very encouraging because it gives local bar associations all around the country the necessary funds as well as technical assistance to organize.

The Ethiopian Bar Association, professional NGO, is another provider of the legal service to the poor without the payment to its individual members by operating legal aid clinic. The service rendered by the bar includes legal advice, providing written arguments and representation in both civil and criminal cases.[71] Its service which began on 2001 has the modusoperandi of giving its 400 members, who are attorneys, one case each year and there are also two coordinators, law students and one secretary.[72] The service of the bar is indeed commendable. Its recognition of the demand of the poor in civil cases is a good signal to government address the problem somehow.

Another indigenous NGO, Ethiopian Women Lawyers Association (EWLA), is also working for the advancement of women in the area of legal empowerment including legal aid to the poor women litigants. The services EWLA gives: legal advice, writing letters and there by petitioning courts and it follows court cases.[73] Among the cases EWLA follow labor and family comprise the majority of cases. Given the very backward position of women of Ethiopia economically, socially and politically, compared with men, the specialized service of EWLA will definitely address the problem of representation of the poor by targeting the poorest of the poor.

Recently, the organization for Social Justice in Ethiopia and African Child Policy Forum has started to provide legal aid service to the needy litigants.

As it is discussed, civic organizations are playing vital contribution to the government's efforts to build a united and democratic nation where human rights of Ethiopians are respected. However, there is no clear perception by the government of the role of human rights NGOs as watchdogs of human rights.[74] There should be tolerance to NGO activities. It is better if the government

encourages the contribution of human right NGOs and professional association to the provision of legal aid service which is stressed by the Dakar Declaration and Recommendation on the Right to a Fair Trial in Africa.[75] The government can do this job by promoting the raising of funds for the service and giving houses to those who have problems of housing especially to those which want to establish branches in the regions. There is also government's failures in recognizing the organizations power of attorney. In this regard, legal officer of EWLA, W/o Mahdere Paulos, suggested that government should amend the law to allow the organization's power of attorney to be accepted in court.[76]

By so doing, the government can assist and facilitate the wonderful jobs done by civic organizations. At the end the beneficiaries would be its poor citizens who are unable to vindicate their rights which are written down both in domestic and international instruments.

### 3.4.3. Para-Legal Training

A Para-legal is a member of particular community with basic legal services and basic legal information.[77] By basic legal services; it is the identification of a legal problem when it occurs, the provision of immediate advice on what course of action to follow when a legal problem occurs, the provision of advice and assistance in presenting the problem to judicial and administrative bodies, and where appropriate, initiating and mobilizing efforts to make the law respond to the particular problems of the community.[78]

Training Para-legal is necessitated because in Ethiopia the level of general and legal illiteracy is very high and hence the mass are not in general aware of the basic legal rights they are entitled to, and procedures that have to be followed to enforce these rights. Also the gap between professionals and the communities'

particularly poor communities is one of the main reasons for inability of the poor to utilize modern institutions like the law. Thirdly, the legal service which is rendered by Para-legal is very poor which causes the users to incur additional cost and losing their rights.[79] The law is usually conceived as something that comes in to operation when two individuals conflict. However, most individuals are unaware of the legal and judicial remedies that are available to them. Thus, the training of persons who can feel comfortable with the legal system, and who are familiar with the judicial remedies availed comes to be essential.

Equipping Para-Legal with a basic understanding of human rights and the legal system, enabling them to identify legal problems and to provide legal service to their communities has a paramount importance in addressing the needs of the poor to the provision of civil legal aid. Para-legal will serve in legal aid centers established by NGOs and if the government establishes such centers, they can reduce the human resource problem in the area. Moreover, they can also mobilize the public to claim their rights to food, education, housing and health.

Para-legal training is now conducted by NGOs. For instance, APAP does such activities since it conceives the training as integral part of their legal assistance and public interest litigation activities.[80] The government should also conduct Para-legal training as part of its responsibility to provide legal aid to the poor either by its own or in collaboration with NGOs. In addition, the government should establish the legal framework which enables Para-legal to provide basic legal assistance. This is emphasized in the Draft Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by heads of state at the second summit of the African Union held in Maputo in July 2003. It states that given the fact in many states the number of qualified lawyers is low, states should in conjunction with the legal profession and NGOs, establish training, the qualification procedures and rules governing the activities and conduct of Para-

legal.[81] The government should also encourage NGOs to train Para-legal.[82] States that recognize the role of Para-legal should ensure that they are granted similar right and facilities afforded by lawyers, to the extent necessary to enable them to carry out their functions with independence.[83]

If all such works would have been done, Para-legal could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession. Hence our poor litigants would get some relief as to their needs of civil legal aid which helps them to vindicate their rights and to penetrate in to the closed justice machinery system.

### 3.4.4. Legal Aid Services by Law Schools

Law schools can play vital roles in promoting a rights culture by providing access to the civil and criminal courts and educating the public about their legal rights. Since meeting legal needs only through government's efforts is difficult, requiring pro bono contribution is a cost-effective way of addressing unmet needs of the poor.

On the manner how such programs are conducted, the 1973 Durban Legal Aid Conference made a number of suggestions. These include the following:

> *Legal aid should be a compulsory course in the law curriculum or at least an elective course; academic credit should be given for legal aid work; universities should encourage research in to the administration of justice and effectiveness of legal aid; law students should be used to reduce the manpower shortage in respect of legal aid work; the feasibility of student practice rules should be investigated; properly supervised legal aid clinics should be set up at all universities...*[84]

There is a debate whether such programs should be mandatory or not. Some say if it is mandatory, it may produce incompetent service by unmotivated students.[85] However, if it is elective, it only attracts relatively small number of students; there would be inadequate institutional resource, and few efforts at quality control.[86]

In south Africa, student practice rules were drafted for students attached to law clinics and the rules provided that in order to be eligible to appear in the district courts on behalf of indigent persons a student must have completed three of an undergraduate law degree or one year of post-graduate law degree, be certified by the dean of the Faculty of Law to be of good character and adequately trained to perform as a student practitioner, be a student practitioner in the legal aid clinic of the university.[87]

In Ethiopia the current government offers no hope of meeting the legal needs of the poor and for the low-income communities, some access to legal assistance is preferable to no access at all. For many impoverished clients, some assistance, however inexperienced, is preferable to what they have now, which is none. Hence creating such programs and legislating laws which allow practice of law by students will make beneficiary not only the poor section of our society but also the students themselves because, such work offers a range of practical benefits, such as training, trial experience, and professional contacts. For many students, this work will provide their only direct exposure to what passes for justice among the poor and to the need for legal reforms. Involvement in public service is a way for individuals to expand their reputations, and build problem solving skills.[88] It can also increase students' willingness to provide pro bono contributions after graduation as a study conducted in US reveals.[89]

The adoption of such program is also suggested as a solution to reduce the unmet needs of the poor in a workshop held to discuss on the justice reform program of Ethiopia.[90] Creating a culture of commitment to public service will require more sustained efforts. But there is much to gain and little to lose from the effort. Enlarging student' sense of professional responsibility reinforces their instincts and aspirations which is good at best both for the poor and the students.

Different law schools of Ethiopia have now started clinical legal education but the problem is that it is not given as part of the curriculum. It is conducted in partnership agreements with NGOs and in a voluntary basis. Currently, the national legal education reform program aims at institutionalizing clinical programs in law school curriculum[91] which is a good start if it is implemented.

# CONCLUSION AND RECOMMENDATION

There can not be any real equality in the right to sue and be sued unless legal aid is available to poor persons in civil proceedings since without it there is a virtual denial of civil justice. Poor litigants who have no sufficient means to retain an advocate face tougher problems to litigate with the party retaining a competent lawyer. Because the intricacies of the law and the technicalities it involves for its operation in the court requires the guiding hand of lawyer at every stage of the proceeding. Poverty together with the multitude of court costs and expenses incurred for advocate fee blocks a litigant's path to the justice machinery. This state of affair creates difficulties for economically weaker party to litigate on equal footing with the party in a better financial condition such as the state and bodies corporate.

However, many countries, to grant access to the justice machinery, provide legal aid services to their respective civil litigants. Even if initially legal aid was seen as a charitable service provided to a few individuals through the goodwill of the legal profession, this emphasis on charitable basis was replaced by gradual realization that legal aid is a necessary public service and a governmental responsibility parallel in some ways to society shift toward states funded medical care. And hence different states are by now, providing the service and some are even made a constitutional right.

Currently, in Ethiopia, there is an increasing use of self representation primarily because of inability to afford the fee charged by advocates. Since our laws are too complex and voluminous, it requires a person knowledgeable in law to operate the system. Even though Ethiopian Civil Procedure Code incorporates both the adversarial and inquisitorial modes of litigation and gives broad powers and roles

to the judge, our system of litigation expects each litigant to discover the facts, research the law, convincingly present the case, stand ready to rebut the presentation of the adversaries, and protect his constitutional and other legal rights. For a layman litigant in person, this is a difficult task since he is faced with a complex system of pretrial practice and procedure through which his case must go. Pre-trial procedure certainly requires an expert to take the case through all its stages, and to some extent cases may be won or lost by procedural rules.

The struggle to translate disputes in to a legal form or pleading is perhaps the most difficult aspect of pre-trial system since the illiterate poor litigant does not know anything as to how pleadings are written. If not properly done, pleading limit the ambit of the trial by defining the issues in dispute and restricting the admissibility of evidence to matters relevant to the issues and a party may encounter difficulties in raising it during the trial issues not raised in his pleadings. If the defendant, for instance, fails to deny an allegation in the statement of defense, he is deemed to have admitted it. Likewise if he fails to deny an allegation in the statement of defense, he may not raise subsequently and the result was that substantive rights were often adversely affected because of pleading errors.

Ignorance of trial procedure and tactics is another further obstacle. Ethiopian law has many highly technical rules governing the conduct of a trial and the manner in which matters in dispute may be proved. These rules provide an obstacle for unrepresented litigants and deny them their right to penetrate in to the justice machinery system.

The errors, mistakes and difficulties the litigant encountered during all stages of the proceeding certainly have impacts on the probability of winning his case.

Where legal merits are about evenly balanced, a represented litigant has a better chance of winning his case. If it were not so, there would be no point in going to the expense of employing a lawyer. Moreover, it can not be denied that experts in procedure can exploit the system so as to prejudice their opponents and take advantage of the complexities of the system, and of their unrepresented adversaries' ignorance.

Self representation also present judges with many tough challenges. The fair working of the justice system depends on the correct use of pre-trial procedures, and the availability of comparative skills on both sides. The judge must therefore find himself in difficulties whenever these conditions are not fulfilled. He loses the benefit of legal argument on one side and may have to supply deficiencies out of his knowledge. If the judge leans too far to help one party, it is difficult for him to maintain his impartiality. He also faces other challenges like getting self-represented litigants to understand: court room practices and rules, their burden of proof asserting or defending causes of action, the judge's role of impartiality etc.

Self representation can be a cause of delay. This is mainly due to lack of proper pleading. More often than not, litigants in person do not fulfill the requirements of proper pleading. The court adjourns so as to give time to either one of the litigants who fails to plead properly. And hence it limits the expediency of the litigation process. This can create an additional cause of expense and inconvenience to the represented party and the court. All such problems surrounding self representation can erode the public's trust and confidence in our civil justice system.

Even though suits by pauper or access to court are guaranteed to the poor, the rights which makes access effective is almost denied. The right to bring or defend

a lawsuit with out an accompanying right of counsel is, in most cases, hollow. With out access to legal aid, effective access to courts which enables one to vindicate his constitutional and other legal rights is unthinkable.

It is the proclamation which re-defines the powers and duties of the federal executive organs provides for civil legal aid service to the poor for claims of damages for human rights violations and bodily harms. Even if this recognition of civil legal aid as a right of litigants is by itself a good start, its scope is very limited and not address the needs of large majority of poor grievances. Other than this proclamation, there is no express law which provides for legal aid. However, the FDRE Constitution and international human rights law by interpretation gives the poor wider protection in regard to the provision of civil legal aid as of a right which can be exercised by the needy indigent litigants.

The equality before the law principle of the FDRE Constitution and international instruments is one of the grounds for requiring legal aid. The principle states that all persons are equal before the law and are entitled without discrimination to the equal protection of the law on grounds of property or other status. People should be equal with out compromise in relation to access to law and legal remedies. There should be equality in the application of the law and the result and benefits of applying the law. Nevertheless, equality before the law is meaningless if people are prevented from enforcing their rights. True equality requires that barriers, for instance financial, be removed for the poor section of the society. For a citizen who has not the financial means required to afford the expense of a lawyer, there is no concrete meaning or benefit to be derived from the principle of equality in the eyes of the law as between himself and his rich, powerful opponent, as he has no one to represent or advise him concerning his legal rights, and he can not afford the expense of litigation.

The right to a fair hearing is a fundamental human right 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. Fairness is the heart of our justice system. Ours system of litigation mainly depends up on a contest between two roughly equal parties. If there is a serious disparity in the power balance between the parties, the fairness of the procedure and the outcome would be uncertain. In civil cases, this is especially evident where unrepresented litigant has a case against the state or a financially powerful private litigant. In such situations if a person is not provided with legal aid, this would amount to denial of fundamental fairness requirement of due process of law incorporated and guaranteed in the FDRE Constitution and international human rights law.

The rule of law and access to justice principles of the Constitution are also good grounds for claiming the provision of civil legal aid service to the needy poor litigants. Rule of law implies that a government in all its actions is bound by the rules fixed and announced beforehand. Protection under this rule would be an empty promise if individuals could not avail of themselves of the law. This means individuals require not only knowledge of the law but also effective access to it. For effective access, the litigant needs legal advice and representation in court. The rule of law is undermined if that assistance is not forthcoming and the citizen can not afford to pay for legal representation. The idea behind access to justice is also to try to remove impediments of access to justice at all levels. As we can see, the major obstacle is the fee charged by the advocates. To remove such obstacles, there arises a need to make legal aid service available to the public since it is impossible to access the justice machinery system with out the assistance of skilled person in law.

All such principles of law suggest that civil legal aid should be provided to the indigent. With out legal aid, the full meaning of these principles could not be enforced. And hence our laws are enough to claim legal aid as a right. But the government is not active in discharging its responsibility. So long as it is a right, the government has the duty to protect and enforce it since it has the obligation to enforce the rights enshrined in both domestic and international laws. The government is there to ensure that the rights and interests of its citizens are fulfilled in accordance with the law. And thus it is responsible for providing legal service to the needy litigants. However, such responsibility can not be imposed on the state to render the service to litigants of all civil cases. As it is in criminal cases, this can be done where the interest of justice requires. In civil cases, the interest of justice could be determined by considering the complexity of the case and the ability of the party to adequately represent himself, the rights that are affected, the financial position of the adverse party, the likely impact of the outcome of the case on wider community etc. If the government provides legal aid in such circumstances, one can say that it discharges its obligations.

The major defense presented by the government for its failure to provide civil legal aid is budgetary constraint and shortage of human man power. However, the government can operate the scheme, with little fund, by participating advocates and law students in public legal service, giving training to Para-legal and facilitating civic organizations which are involved in rendering legal assistance service.

In order to make the civil legal aid service effective, the writer of this paper recommends the following:

- The government by recognizing its duty, it shall give the service by making the scope of the civil legal aid service wider. It should exert effort in fund raising activities.

- To enforce the pro bono obligations of advocates, Ministry of Justice should devise enforcement mechanisms either by enacting a law which empowers the court to assign civil counsel or giving the Ethiopian Bar Association the power to license, revoke or suspend advocates' licenses.
- NGOs which are rendering legal aid service should be encouraged. The government, by engaging in partnership agreement with them, should facilitate their task of providing the service, for instance by making houses available for legal aid centers.
- There are government's failures in recognizing the civic organizations', which provide legal aid service, power of attorney. Thus, it is better if the law is amended to allow the organizations' power of attorney to be accepted in court
- Our laws prevent Para-legal from rendering legal service. But the law should be amended to be inclusive of them since they would have vital role in making legal aid service available to the public.
- Legal aid service by law students should be institutionalized in law schools. There should be also special law which make possible for graduating law students to take a case in court of law with supervision by the Coordinator of clinical program.

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PUBLIC INTEREST LAW INITIATIVE

OPEN SOCIETY JUSTICE INITIATIVE

# INTERNATIONAL STANDARDS ON LEGAL AID: RELEVANT TEXTS AND SUMMARIES OF DOCUMENTS[1]

This document is a compilation of excerpts from the texts of international treaties and other instruments as well as summaries of the case law of the United Nations Human Rights Committee, the European Court on Human Rights and the Inter-American Court and Commission of Human Rights.

## I. THE UNITED NATIONS

### 1. HUMAN RIGHTS CONVENTIONS AND DOCUMENTS ADOPTED BY THE UN HUMAN RIGHTS BODIES

**International Covenant on Civil and Political Rights (ICCPR)**

**Relevant text**

**Article 14, para. 3 (d):**

3. 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 his 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 such case if he does not have sufficient means to pay for it.

**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)**

[1]This compilation was prepared in February, 2005 by the staff of the Public Interest Law Initiative and the Open Society Justice Initiative. The contribution of Anna Ogorodova, Legal Intern, Open Society Justice Initiative, in particular is gratefully acknowledged. It is published here without additional editing, for information purposes only.



**Relevant text**

11. Not all reports have dealt with all aspects of the right of defense as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary.

**General Comment No. 28 (Equality of rights between men and women) (Article 3)**

**Relevant text**

18. States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, 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 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters.

**CASE LAW OF THE HUMAN RIGHTS COMMITTEE (SUMMARIES)**

***Quality of legal aid and the extent of the obligation of the State to ascertain the quality of defense***

**Graham and Morrison v. Jamaica, CCPR/C/52/D/461/1991 (1994)**

In a capital case, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given the opportunity to engage other counsel. The upper court's failure to do so violates Article 14, para. 3 (d). (See also **Kelly v. Jamaica, CCPR/C/57/D/537/1993 (1996), Jones v. Jamaica, CCPR/C/62/D/585/1994 (1998), Silbert Daley v. Jamaica, CCPR/C/63/D/750/1997 (1998), Anthony McLeod v. Jamaica, CCPR/C/59/D/734/1997 (1998), Sooklal v. Trinidad and Tobago, CCPR/C/73/D/928/2000 (2001)**).

**Everton Bailey v. Jamaica, CCPR/C/66/D/709/1996 (1999)**

The author claimed that his right to be effectively represented on appeal was violated because the appeal lawyer decided not to pursue some of the grounds for appeal. The Committee held that this case should be distinguished from the ones cited above, where lawyers did not argue on appeal at all and the accuseds were not duly informed; because in the present case the legal aid lawyer in fact argued some of the grounds. Nothing in the file could suggest that the counsel was not exercising his professional judgment when choosing not to argue other grounds. Thus, there was no violation of articles 14 (3) (d) and (5) ICCPR.

**Smith and Stewart v. Jamaica, CCPR/C/65/D/668/1995 (1999)**

The applicants claimed to be victims of a violation of article 14 (3) (d) because their legal assistance was inadequate. In particular, the legal aid lawyers failed to call any witnesses. The Committee stated that the State Party can not be held accountable for lack of preparation or alleged errors made by defense lawyers unless it has denied the author and his counsel time to prepare the defense, or it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. Because neither of the applicants, nor their counsel requested an adjournment, and there was nothing in the file that would suggest that the lawyers' conduct was incompatible with the interests of justice, no violation of the Convention was found (see also Everton Barley v. Jamaica, above).
However, the Committee found a violation of article 14 (3) (d) and 5 on the grounds that the legal aid lawyer failed to inform the author that he was not going to argue his case on appeal (see Graham and Morrison case, above).

**Beresford Whyte v. Jamaica, CCPR/C/63/D/732/1997 (1998)**

The author claimed that his right to effective legal representation was violated because he was represented by an inexperienced junior lawyer, who did not call alibi witnesses and did not call for sworn evidence from an author. However, recalling its prior jurisprudence, the Committee held that the state party can not be held accountable for alleged errors made by a defense lawyer, unless it was or should have been manifest to the judge that the lawyer's behavior was incompatible with the interests of justice (see, *inter alia*, Lloyd Reece v. Jamaica, CCPR/C/78/D/796/1998 (2003), Henry v. Jamaica, below, Glenn Ausby v.Trinidad and Tobago, below). No indication that the decisions not to call alibi witnesses, or not to take sworn testimony from an author were not taken in the exercise of the counsel's professional judgment was present in the file.

**Henry v. Jamaica, CCPR/C/43/D/230/1987 (1991)**

In the present case the Committee found no violation of article 14 (3) (d) attributable to the State in the failure of the legal aid lawyer to call for witnesses on the applicant's behalf.



**Hensley Ricketts v. Jamaica, CCPR/C/74/D/667/1995 (2002)**

The failure of the legal aid lawyer, who represented the author for his appeal, to contact the author or the privately retained lawyer who represented the author at the first instance court was not found to be a violation of the obligation of the State to provide effective legal aid representation.

**Glenn Ashby v. Trinidad and Tobago, CCPR/C/74/D/580/1994 (2002)**

The Committee did not agree with the author's claim of inadequacy of legal representation during the trial and the appeal, because the defense counsel in fact has undertaken some actions at trial and in the appeal proceedings, namely he has cross-examined witnesses and argued the grounds of appeal.

**Glenford Campbell v. Jamaica, CCPR/C/44/D/248/1987 (1992)**

The state was found in violation of its obligation to provide for effective legal representation of the author in the appeal proceedings because of the combination of three factors: first, it was a capital case, second, the defense counsel failed to challenge the confessional evidence, although the author claimed that it was obtained through maltreatment and third, the court did not provide for an opportunity for the author to instruct his lawyer on appeal or to represent himself at the appeal proceedings.

***Legal aid and lawyer on one's own choosing***

**Trevor Bennett v. Jamaica, CCPR/C/65/D/590/1994 (1999)**

The author claimed a violation of Article 14 (3) (d) because he was not represented by a counsel of his choice. The Committee stated that Article 14 (3) (d) did not entitle the accused to choose a counsel provided to him free of charge. Thus, the respective part of communication was found inadmissible.

***Right to adequate time and facilities for the preparation of the defense (Article 14 (3) (b) ICCPR)***

**George Winston Reid v. Jamaica, CCPR/C/51/D/355/1989 (1994)**

The legal aid lawyer was not present at all preliminary hearings and met the author only ten minutes before the start of the trial. The trial judge and the investigating magistrate must have been aware of that fact. Thus, the Committee found a violation of Article 14 (3) (b) ICCPR.

**Michael and Brian Hill v. Spain, CCPR/C/59/D/526/1993 (1997)**

The authors claimed a violation of their right to adequate time and facilities for the preparation of the defense, because the lawyer only visited them for twenty minutes two

days before the trial. However, the Committee did not agree with the authors' claim because, firstly, they had a counsel of their own choosing, though appointed under a legal aid scheme, and secondly, because the hearing was adjourned in order to allow the legal aid lawyer to prepare the case.

**Leroy Simmonds v. Jamaica, CCPR/C/46/D/338/1988 (1992)**

The Committee found a violation of Article 14 (3) (b) of the Covenant, because the appellate court failed to inform the author with sufficient advance notice of the date of the hearing of his appeal. This delay deprived him of the opportunity to prepare his appeal and to consult with the court-appointed lawyer.

**Glenford Campbell v. Jamaica (see above)**

The author claimed violation of the right to adequate time and facilities for the preparation of the defense, because he was not given a chance to communicate with his counsel before the preliminary hearing, and the legal aid lawyer visited him in prison only three days before the start of the trial. The Committee noted that in capital cases it was axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defense. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of the case. In the present case, the material did not reveal that either author or his counsel complained to the trial judge that the time or facilities for the preparation of the defense were inadequate. Thus, no violation of Article 14 (3) (b) was found.

***Legal aid in different categories of cases***

*a) LEGAL AID IN CONSTITUTIONAL MOTIONS*

Though the role of the Constitutional Court is not determine the criminal charge itself, its task is to ensure that applicants receive a fair trial, both in criminal and civil cases. Hence, when the author wished to approach the Constitutional Court in order to determine whether his or her criminal conviction was a result of a fair trial, and was unable to do so because of unavailability of legal aid, the Committee found a violation of Article 14 (1) ICCPR (right to a fair hearing) and Article 2 (3) (obligation of the State to provide for effective remedies). It held that free legal aid must be provided if a convicted person who wishes to challenge irregularities in a criminal trial in a constitutional motion has insufficient means to pay for legal assistance, and where the interests of justice so require. See, for example, **Anthony Currie v. Jamaica**, above; **Rawle Kennedy v. Trinidad and Tobago, CCPR/C/67/D/845/1999 (1999); Kelly v. Jamaica, CCPR/C/57/D/537/1993 (1996); Shaw v. Jamaica, CCPR/C/62/D/704/1996 (1998)**.

However, the Committee found that the constitutional challenge of the length of the sentence imposed upon commutation was not related to the determination of criminal charge. Thus, the state was not under an obligation to provide legal aid for such kind of



constitutional motion (**Xavier Evans v. Trinidad and Tobago, CCPR/C/77/D/908/2000 (2003)**).

In another case, **Douglas, Gentles and Kerr v. Jamaica, CCPR/C/49/D/352/1989 (1993)**, the Committee found no violation of the right of the convicted persons to have their conviction reviewed by a higher court (Article 14 (5) ICCPR) in the author's claim that his appeal to one particular court, the Supreme (Constitutional) Court of Jamaica, was unavailable to him because of absence of legal aid. The Committee reasoned its view with the fact that the author had effective access to other instances, such as the Court of Appeal, the Privy Council and the Constitutional Court to challenge his conviction.

b) *LEGAL AID IN CAPITAL CASES*

**Frank Robinson v. Jamaica, CCPR/C/35/D/223/1987 (1989)**

The "interests of justice" test is met in every case concerning a capital offence, thus it is axiomatic that legal assistance be available in capital cases. This is so even if unavailability of a private lawyer is to certain extent attributable to the accused herself, and even if the provision of legal assistance would entail an adjournment of proceedings.

**Conroy Levy v. Jamaica, CCPR/C/64/D/719/1996 (1998)**

Legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case (see also **Robinson LaVende v. Trinidad and Tobago, CCPR/C/61/D/554/1993 (1997), Wright and Harvey v. Jamaica, CCPR/C/55/D/459/1991 (1995)**). Article 14 (3) (d) ICCPR is violated even if the author could apply for legal aid but did not do so.

***Legal aid in different stages of proceedings***

**Clive Johnson v. Jamaica, CCPR/C/64/D/592/1994 (1998)**

In a capital case legal assistance must be also available at the preliminary hearings of the case (also see cases cited in *LEGAL AID IN CAPITAL CASES*, above). When an author appears at ht preliminary hearing without a legal representative, it would have been incumbent upon the investigating magistrate to inform the author of his right to legal representation and to ensure legal representation for him.

**Maurice Thomas v. Jamaica, CCPR/C/61/D/532/1993 (1997)**

Failure to provide the author with legal aid has denied him an opportunity to pursue further investigation and to have his case reviewed on appeal was found to be a violation of Article 14(3) (d) and Article 2 (3) (right to an effective remedy) of the ICCPR.

**International Covenant on Economic Social and Cultural Rights (ICESPR)**

**General Comment No. 7 The right to adequate housing (art. 11 (1) of the Covenant): forced evictions**

**Relevant text**

...

15. 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: ... (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

**International Convention On The Elimination Of All Forms Of Racial Discrimination (ICERD)**

**Relevant text**

**Article 5 (1) (a):**

1. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, color, or natural or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(a): The right to equal treatment before the tribunals and all other organs administrating justice

**General Recommendation 29 Discrimination against descent-based communities**

**Relevant text**

CERD recommends that the States parties to the Convention,...adopt some or all of the following measures:

5. Administration of justice

(u) 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 group claims and encouraging non-governmental organizations to defend community rights...

**Convention On The Rights Of The Child (CRC)**

**Relevant text**



**Article 37 (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 right to challenge the legality of deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

**Article 40, para. 2 (b):**

Every child, alleged as or accused of having infringed the penal law has at least the following guarantees:

...

(ii) to be informed promptly and directly of the charges against him or her, and if appropriate through his or her own parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation if his or her defense;

## 2. OTHER UN INSTRUMENTS

**UN Basic Principles on the Role of Lawyers, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27/08-7/09/1990**

**Relevant text**

Principle 3

3. 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.

**Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977**

PART II

RULES APPLICABLE TO SPECIAL CATEGORIES

...

C. PRISONERS UNDER ARREST OR AWAITING TRIAL

...

93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between

the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

**United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990**

III. Juveniles under Arrest or Awaiting Trail

...

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications...

## II. THE COUNCIL OF EUROPE

### 1. TREATY STANDARDS

**The European Convention on Human Rights**

**Relevant text**

6 – Right to a fair trial

1. 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...
2. Everyone charged with a criminal offence has the following minimum rights:
   ...
   c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

**European Agreement on the Transmission of Applications for Legal Aid (ETS 92), signed 27/01/1977, entered into force 23/04/1983**

**Summary**

According to the Agreement, every person living in the territory of one state and wishing to apply for legal aid in civil, commercial of administrative matters in the territory of another state may submit his application in the state where he 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.



**Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid (ETS 179), signed 4/10/2001, entered into force 1/09/2002**

**Summary**

The Protocol is aimed at improving efficiency of the operation of the Agreement as regards mutual assistance between the authorities responsible for transmission of legal aid applications and communication between the applicants and their lawyers. In particular, it requires that applications for legal aid be dealt with within reasonable time, and the costs of translation that might occur in communication between the applicant and her lawyer be covered by the state.

### 2. OTHER COUNCIL OF EUROPE STANDARDS

**Resolution 76(5) of the Committee of Ministers on legal aid in civil, commercial administrative matters, adopted on 18/02/1976**

**Summary**

The Resolution recommends the member states to provide legal aid on the same conditions as to the natural persons being nationals of any other member state and to all other natural persons who have their habitual place of residence on the territory of other state where the procedures take place.

**Resolution 78 (8) of the Committee of Ministers on legal aid and advice, adopted on 2/03/1978**

**Summary**

The Resolution declares the right of all persons to legal aid and legal advice, so that no one is prevented by economic obstacles from pursuing or defending his right in the court in civil, commercial, administrative, social or fiscal matters. It sets out the principles of granting legal aid, for instance that legal aid should embrace all the costs necessarily incurred by the assisted person, including witnesses, experts and translations; that it can be partial when a person is able to pay part of the costs proceedings; that the refusal for legal aid should be subject to appeal, etc. The Resolution states that legal aid should be provided by a person qualified to practice law, and requires that such person is adequately remunerated for her work on behalf of the assisted person.

Full text of the Resolution is available at http://www.coe.int/t/e/general/search.asp

**Recommendation No R (81) 7 of the Committee of Ministers on measures facilitating access to justice, adopted on 14/05/1981, Appendix**

**Relevant text**

4. 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 court, then representation by a lawyer should not be compulsory.

**Recommendation No R (93) 1 of the Committee of Ministers on effective access to the law and justice for the very poor, adopted on 8/01/1993**

**Summary**

The Recommendation aims at facilitating access to legal advice and legal aid, courts and quasi-judicial methods of conflict resolution for the very poor, defined as "persons who are particularly deprived, marginalized or excluded from society both in economic and in social and cultural terms". In the sphere of legal aid it recommends that legal aid is extended to all types of judicial proceedings and to all very poor persons, including stateless and aliens, in any event when they are habitually resident in the state where proceedings are conducted; that the persons eligible for legal aid should be given appropriate counsel, as far as possible of their own choice; the procedure of application for legal aid should be simplified and the only grounds for refusal legal aid should be inadmissibility, manifestly insufficient prospect of success and where granting legal aid is not in the interests of justice.

Full text of the Recommendation is available at http://www.coe.int/t/e/general/search.asp

**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 Applications for Legal Aid, adopted on 23/02/1999**

**Summary**

The Recommendation contains the application form for legal aid abroad to be used when making application under the European Agreement of the Transmission of Application for Legal Aid, and the form for acknowledgment of the receipt of such application. It also sets out numerous practical recommendations to improve efficiency of dealing with applications for legal aid abroad by the transmitting authorities. The Recommendation replaces the Recommendation No R (97) 6 aiming at improving the practical application of the European Agreement on the Transmission of Applications for Legal Aid, adopted by the Committee of Ministers on 13/02/97.

**Recommendation Rec (2000) 21 of the Committee of Ministers on the Freedom of Exercise of the Profession of Lawyer, adopted on 25/10/2000**

**Relevant text**



*Principle IV - Access for all persons to lawyers*

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 public funds.

*Principle V - Associations*

...
4. Bas associations or other professional lawyers' associations should be encourages to ensure the independence of lawyers and, *inter alia*, to:
...
c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice...

**Action Plan on Legal Assistance Systems of the European Committee on Legal Co-Operation (CDCJ), adopted on 31/05/2002, CDCJ (2002) 21, Add. III**

**Summary**

The Action Plan has been prepared as a follow-up of the Conference of the European Ministers of Justice held in June 2000 in London, in order to assist the Member States in setting up or reforming their systems of legal aid and advice. For this purpose the Committee plans to collect information about the legal aid schemes existing in the member states and about their functioning, and to disseminate such information on websites.

**Legal Aid Best Practices, Preliminary Draft Guide, adopted by the European Committee on Legal Co-Operation on 5/02/2002, [CJ-EJ/Doc2002/e2002 2]**

**Summary**

The Guide contains examples of the best practices in the organization of the legal aid system in general, and of the means to improve financial management of legal aid funds such as: developing means testing, supporting the practice of contingency fee agreements with private practice lawyers, introducing the system of legal expenses insurance, contracting with private legal aid providers and recovery of costs from legal aid recipients, where the financial situation of the person so allows.

**Recommendation Rec(2003)18 of the Committee of Ministers containing a transmission form for legal aid abroad for use under the European Agreement on the Transmission of Applications for Legal Aid (ETS No. 092) and its Additional Protocol (ETS No. 179), adopted on 9/09/2003**

**Summary**

The Recommendation introduces the form for the transmission of request for legal aid under the European Agreement of the Transmission of Applications for Legal Aid, and replaces the form for acknowledgement of receipt of the application for legal aid, contained in the Recommendation No R (99) 6 (see above) with a new form.

**Recommendation 1639 (2003) 1 of the Parliamentary Assembly "Family mediation and gender equality", adopted on 25/11/2003**

**Relevant text**

8. The Parliamentary Assembly … calls on Council of Europe member and Observer states to implement the principles for the promotion and use of family mediation as laid out in Recommendation No. R (98) 1 of the Committee of Ministers and to introduce or strengthen the following measures with a view to ensuring:

…

iv. the inclusion of family mediation in the legal aid system…

**Draft Council of Europe Convention on Action against Trafficking in Human Beings, approved during the 7th meeting of the Committee on Action against Trafficking in Human Beings, 7-10 December 2004**

**Relevant text**

Article 12 – Assistance to victims

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

…

(d) counselling and information, in particular as regards their legal rights, in a language that the victims can understand;

(e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders…

…



Article 15 – Compensation and legal redress

1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant court and administrative proceedings.

2. Each Party shall provide, in its internal law, for the right to legal assistance for victims and for the conditions under which the victim may benefit from free legal aid.

## THE EUROPEAN COURT OF HUMAN RIGHTS

## CASE LAW ON THE RIGHT TO FREE LEGAL ASSISTANCE (case summaries)[2]

### *1. OVERALL SCOPE OF THE RIGHT TO FREE LEGAL ASSISTANCE*

**Despite the restriction in scope of Article 6(1)(c) to criminal matters, a right to free legal assistance can apply in both civil and criminal matters because of the broad interpretation given by the ECHR to Article 6(1). In cases in which free legal assistance is necessary, Article 6(1)(c) requires that the assistance of the lawyer be effective; formal appointment alone is not sufficient. Finding a violation of Article 6(3)(c) does not require showing that the ineffectiveness of counsel did in fact prejudice the applicant.**

**Golder v. UK (1975)**
Applying the Vienna Convention on the Law of Treaties and general principles of international law, the ECHR found that the Article 6 (1) guarantee of the right to a fair trial in criminal matters must be considered to include the right to "access to the courts" in general, in civil as well as in criminal matters. 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.

**Airey v. Ireland (1979)**
Applying the *Golder* decision, the ECHR found that the Article (6)(1) right of access to the courts also implies the right to free legal assistance in certain civil cases. The court found that the right applies in civil cases when such assistance proves indispensable for effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of the procedure or the type of case. In the present case, the applicant had requested free legal assistance to bring an action for judicial separation because of the unwillingness of her abusive spouse to sign a voluntary separation agreement. Relevant factors included 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

[2] For the full text of decisions summarized here, see HUDOC (http://www.echr.coe.int/Hudoc.htm).

entailing emotional involvement incompatible with the level of objectivity required for effective advocacy. The Court noted, however, that the right to access to a court is not absolute and may be subject to legitimate restrictions, including the imposing of financial contributions or requiring a case to be well-founded and not vexatious or frivolous.

**Artico v. Italy (1980)**
Formal appointment of a lawyer alone does not satisfy the Article 6(3)(c) requirement of free legal assistance if that assistance is not effective; the state must take "positive action" to ensure that the applicant effectively enjoys his or her right to legal assistance. Further, finding a violation of Article 6(3)(c) does not require showing that the ineffectiveness of counsel did in fact prejudice the applicant. Upon receiving the applicant's petition for quashing a criminal conviction for fraud and related offenses, the Court of Cassation granted the applicant's request for free legal assistance, appointing a lawyer who then failed to represent him. The lawyer submitted a formal request to the court to be relieved of his duties due to ill health and the "very demanding and onerous" nature of the assistance that would be required. The court did not respond to that request, and the applicant's numerous subsequent requests to the court for substitute counsel were denied on the grounds that the applicant already had a lawyer appointed to represent him. See also *Magalhães Pereira v. Portugal* (2002) (finding a violation of Article 5(4) on unlawful deprivation of liberty in a case in which the court appointed a junior lawyer who played no active role in the mandatory review of a commitment decision.)

## *2. FREE LEGAL ASSISTANCE IN CRIMINAL CASES*

**According to the text of Article 6(3)(c), a person charged with a criminal offence must be provided with free legal assistance if: (1) he or she does not have sufficient means to pay for legal assistance; and (2) the interests of justice so require. In applying this article, the ECHR makes its own independent determination of what constitutes a criminal offence.**

**Engel and others v Netherlands (1976)**
A matter is considered to be criminal in nature if the relevant domestic law classifies it as such or if the ECHR considers it to be criminal according to its own independent analysis of the nature of the offence and the nature, duration or manner of execution of the punishment that may be imposed. In this particular case, involving military discipline, the ECHR found that Article 6(3)(c) applied with respect to several applicants who faced deprivation of liberty, but that the interests of justice did not require that they receive free legal assistance because they were capable of providing explanations concerning the simple facts involved.

**Ezeh and Connors v. UK (2003)**
After applying the *Engel* test, the ECHR found that prison disciplinary proceedings for threatening to kill a probation officer and assaulting a prison officer were criminal offences triggering Article 6(3)(c) and that the interests of justice required that they



receive free legal assistance. The maximum penalty was 42 additional days in prison, and the applicants were awarded punishments of 40 and 7 additional days, respectively.

### *2.1 Applying the Financial Criterion*

**The ECHR is not in a position to determine the financial means of the applicant at the time he or she requested free legal assistance in the domestic proceeding. The ECHR, therefore, finds the financial criterion to be met if there are some indications that the applicant is indigent and no clear indications to the contrary.**

**Pakelli v. Germany (1985)**
For the ECHR to find a violation of Article(6)(3)(c), the ECHR find that the lack of sufficient means is "beyond all doubt". The financial prong of the test is satisfied if there are "some indications" that an applicant is indigent, and there are no "clear indications to the contrary."

**Twalib v. Greece (1998)**
The fact that applicant was represented by court-appointed counsel at trial and by counsel provided by a humanitarian organization on appeal, together with the fact that he had been in prison for the prior three years, was a sufficient indication that he lacked the financial means to pay for legal assistance at cassation.

### *2.2 Applying the "Interests of Justice" Criterion*

**The "interests of justice" test includes the following elements: (1) the seriousness of the offence; (2) the complexity of the case; and (3) the ability of the defendant to provide his or her own representation.**

**Quaranta v. Switzerland (1991)**
The interests of justice require consideration of the seriousness of the offence, the complexity of the case, and the ability of the defendant to provide his or her own representation. Free legal assistance should be granted even if there is little likelihood that the three-year maximum potential sentence will be imposed. The case was especially complex because of the wide range of measures available to the court, including activating a suspended sentence or imposing a new one. The applicant was a "young adult of foreign origin from an underprivileged background" without any occupational training.

**Benham v. UK (1996)**
The applicant was issued a civil warrant of detention for failure to pay a local tax. Where deprivation of liberty is at stake, the interests of justice require legal representation. A potential sentence of three months' imprisonment, along with the relative legal complexity of the case due to the application of the legal standard of "culpable negligence," triggered the right to free legal assistance. The applicant had in fact been sentenced to 30 days in detention.

**Perks and others v. UK (1999)**
Facts were similar to *Benham*. Applicants had been issued detention warrants for periods as short as 7 days. No applicants was in fact detained for longer than 9 days. Three had been released after serving several hours, and one received a suspended sentence but was never placed in custody.

### *2.3 Post-Conviction Reimbursement*

**Croissant v. Germany (1992)**
Seeking reimbursement from a defendant of the fees for court-appointed lawyers after a conviction has taken place does not in itself constitute a violation of the Article 6(1) right to a fair trial. In the present case, involving criminal charges concerning the applicant's activities as a lawyer on behalf of various members of the Red Army Faction, lawyers were appointed to represent the defendant pursuant to the requirements of German law and in the interests of justice. The applicant's lack of sufficient means had not been a basis for the appointment, and the ECHR did not reach the issue of whether Article 6(3)(c) permitted the seeking of full or partial reimbursement of legal fees if the applicant were to show that he lacked sufficient means. See also *Lagerblom v. Sweden* (2003) (finding that mandatory legal defense does not violate Article 6 notwithstanding the applicant's post-conviction obligation to pay a minor part of the litigation costs).

## *3. FREE LEGAL ASSISTANCE IN CIVIL CASES*

**As decided in the *Airey* case (summarized above), the Article 6(1) right to access to a court encompasses the right to free legal assistance in civil matters when such assistance proves indispensable for effective access to the courts, either because: (1) legal representation is mandatory under domestic law; or (2) because of the complexity of the procedure, or the type of case. The right to access to a court is not absolute, however, and it may be subject to legitimate restrictions, based, for instance, on the financial situation of the litigant or his or her prospects of success in the proceedings. The fundamental Article 6 principle of fairness may also require free legal assistance to ensure that a civil litigant has the opportunity to present his or her case effectively before the court and enjoys equality of arms with the opposing side.**

**P, C and S v. UK (2002)**
Free legal assistance may be necessary in civil matters in order to ensure that access to a court is both effective and fair. The seriousness of what is at stake for the applicant will be relevant to assessing the adequacy and fairness of proceedings. In the present case, applicants were contesting the severing of parental rights in the face of child abuse allegations. The ECHR found a violation of Article 6(1) because of the complexity of the case, the importance of what was at stake and the highly emotive nature of the subject matter. Assistance afforded to P. by the counsel for other parties, as well as the latitude



the judge granted P. in presenting her case, were considered no substitute for competent representation by a lawyer.

**McVicar v. UK (2002)**
Unavailability of legal aid in defamation cases was not considered to be a violation of article 6(1) after assessing the circumstances of the case: a) the applicant was a well-educated and experienced journalist; b) the law was not sufficiently complex to require a person in the applicant's position to have legal assistance; c) he was represented until the commencement of trial by an experienced defamation lawyer; d) his emotional involvement was not incompatible with the degree of objectivity required by advocacy in court. But see *Steel and Morris v. UK* (below).

**A. B. v. Slovakia (2003)**
When domestic law provides that a court may provide free legal assistance to a litigant in a civil proceeding, a failure to provide a formal decision to a request for such assistance constitutes a violation of the 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. The ECHR found under the circumstances that the defendant was unable to present her case in conditions of equality vis-à-vis the defendant. Such was the unfairness of the proceeding that it was unnecessary to examine whether the lack of legal representation caused the applicant any actual prejudice.

**Steel and Morris v. UK (2005)**
It is central to the concept of a fair trial, in civil as well as in criminal proceedings, that a litigant should not be denied the opportunity to present his or her case effectively before the court and that he or she should enjoy equality of arms with the opposing side. The court noted that it may be acceptable to impose conditions on the grant of free legal assistance based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings. Further, the court noted that it is not incumbent on the State to use public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary. In the present case, applicants were defendants in a defamation suit brought by McDonald's concerning leaflets they had distributed. The court distinguished the *McVicar* case in that: there were potential financial consequences of a significant nature compared to the applicants' personal situations; the legal issues were rather complex; and there were very large quantities of interlocutory actions, court hearings, documentary evidence, pages of written judgments, and witnesses, including scientific experts. The court further considered that neither sporadic help given by volunteer lawyers nor extensive judicial assistance and latitude granted by judges to the applicants, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel, especially given the disparity between the levels of legal assistance enjoyed by the applicants and McDonald's.

## *4. STAGES OF PROCEEDINGS*

**The right to free legal assistance pertains throughout criminal proceedings, from preliminary police investigation to final cassation, although it may be partially restricted, depending on the special features of the particular proceedings involved. The right to free legal assistance in cassation applies, in both criminal and civil matters is considered particularly important in jurisdictions where legal representation is required in order to access the cassation procedure, or due to the complexity of the legal issues raised in the cassation procedure.**

### *4.1. Criminal Pre-Trial Proceedings*

**Imbrioscia v. Switzerland (1993)**
Article 6 applies to pre-trial proceedings. The manner in which Articles 6(1) and 6(3)(c) are to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case. In the present case, the period during the preliminary investigation when applicant had effectively no counsel representing him was too short to conclude that the applicant did not have a fair trial in the proceedings against him, taken as a whole.

**Murray v. United Kingdom (1996)**
Applying the *Imbrioscia* decision, the ECHR found that Articles 6(1) and 6(3)(c) guarantee the right of access to a lawyer, even during preliminary investigation by the police, though it may be restricted for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. Applicant had been denied access to legal counsel for 48 hours following arrest, according to the law of Northern Ireland. The court, as permitted by relevant law, drew an inference of guilt from the failure of the suspect to reply to police questioning. See also *Magee v. UK* (2000) (finding a violation on similar facts); *Dikme v Turkey* (2000) (no violation for preventing access to lawyer where court did not attach evidentiary value to confessions obtained during questioning, and case was still pending, preventing ECHR from taking account of the proceedings as a whole); *Brennan v. UK* (2001) (finding no violation for a 24 hour denial of access to a lawyer, and no violation for police interviews of the applicant without the presence of his lawyer despite confession being admitted into evidence, but finding a violation for police supervision of the meeting between applicant and lawyer); *Ocalan v. Turkey* (2003) (finding a violation for preventing access to a lawyer during a 7 day period in which applicant made several self-incriminating statements.)

**Berlinski v. Poland (2002)**
The ECHR found that the failure of the prosecutor to either fulfill the applicants' request for free legal assistance or refer the matter to a court violated Articles 6(3)(c). As a result



of the prosecutor's inaction, the applicants had no defense counsel for more than a year of pre-trial procedural acts, including questioning of the applicants and medical examinations. After more than a year, a court decided to provide free legal assistance at the same time that it decided to obtain the opinion of forensic psychiatrists. The applicants had been accused of assaulting police officers.

### *4.2. Criminal Appeals*

**Delcourt v. Belgium (1969)**
The Convention does not compel States to set up courts of appeal or of cassation, but a State that does institute such courts is required to ensure that persons brought before these courts shall enjoy the fundamental guarantees contained in Article 6. The way in which Article 6(1) applies, however, must depend on the special features of such procedures.

**Monnell and Morris v. UK (1987)**
The interests of justice cannot be taken to require an automatic grant of free legal assistance whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6. In the present case, the applicants ignored legal advice that they did not have any chance of a successful appeal, and they anyway received free legal assistance in the submitting of written petitions requesting leave to appeal, which were ultimately denied. Applicants lacked only the possibility of an oral hearing on the petition, or the possibility of free legal counsel for the purpose of representing them at an oral hearing. The ECHR found that there had clearly been no legitimate legal grounds for appeal in this particular case, and that the limited free legal assistance applicants received was sufficient.

**Granger v. UK (1990)**
In the applicant's appeal of a 5 year sentence for perjury, the appellate court disposed easily of most of the legal issues raised on evidentiary matters, but adjourned the hearing in order to consider the trial court transcript in detail concerning one of the evidentiary grounds. In such circumstances, it would have been in the interests of justice to provide free legal assistance to the appellant, at least after the adjournment, enabling him to make an effective contribution to the proceedings. Instead, the applicant simply read out loud legal arguments prepared in advance by a solicitor, which he could not be expected to comprehend and present effectively.

**Boner v. UK (1994)**
The right to free legal assistance applies to appellate proceedings. The factors to be considered in determining whether the interests of justice require free legal assistance in a criminal appeal include the nature of the proceedings, the powers of the appellate court, and the capacity of an unrepresented appellant to present a legal argument relating to whether the trial judge properly exercised his discretion with respect to an evidentiary rule, and the importance of the issue at stake in view of the severity of the 8 year sentence. It was irrelevant that the appeals court had a practice rule requiring it to suspend the case and ensure the provision of free legal assistance if the appellant had

substantial legal grounds for the appeal and legal representation of the appellant was in the interests of justice. See also *B. v. UK* (1987); *Maxwell v. UK* (1994).

### *4.3. Cassation in Criminal and Civil Cases*

**Pham Hoang v. France (1992)**
The right to free legal assistance under Article 6(3)(c) applies to proceedings before the Court of Cassation concerning criminal matters. In this case, the complexity of the legal issues raised, namely the compatibility of the relevant domestic law with the European Convention on Human Rights, warranted free legal assistance.

**R.D. v. Poland (2001)**
The Court of Appeals refused free legal assistance in criminal cassation proceedings finding that the applicant had sufficient means to pay, despite having decided the opposite way less than three months previously during the ordinary appeal. The ECHR found strong indications that the financial criterion had in fact been met. Further, it found that free legal assistance would have been in the interests of justice because legal representation was mandatory in cassation proceedings, and the applicant could obtain access to the court for that purpose only through a lawyer. The court not only refused the request for free legal assistance, but did so with only 8 working days left within the 30 day time limit for cassation. As a result, the court deprived the applicant of having his case brought to the court for cassation in a "concrete and effective way."

**Aerts v Belgium (1998)**
Because the Court of Cassation requires representation by a lawyer, the Legal Aid Board's refusal of free legal assistance for applicant's civil cassation appeal impaired the very essence of applicant's right to a tribunal under Article 6(1). Applicant was contesting his commitment to a mental institution, and the legal aid board denied his request for free legal assistance for lack of a well-founded basis. It was not for the Legal Aid Board to assess the appeal's prospects for success; it was a matter for the Court of Cassation to decide.

**Del Sol v. France (2002)**
The refusal of the Legal Aid Board of the Court of Cassation to provide free legal assistance for the applicant's civil cassation appeal was not a violation of Article 6(3)(c) even though legal representation was required in order to bring the appeal. A critical factor is the quality of the State's legal aid system. In the present case, there were a number of safeguards against arbitrariness. The Board is composed of a diverse group of members with varying interests and its determinations are subject to appeal to the President of the Court of Cassation, which had confirmed the Legal Aid Board's decision in this case. The ECHR also distinguished the Belgian "ill-founded" test as being stricter than the French "no arguable ground" test. Following the *Aerts* decision Belgium changed its standard to "manifestly ill-founded." See also *Essadi v. France* (2002); *Gnahore v. France* (2001) (finding no violation in the refusal of the Legal Aid Board of



the Court of Cassation because the type of case concerned, educational assistance, was not subject to the legal representation requirement).

## *5. EFFECTIVENESS OF FREE LEGAL ASSISTANCE*

**As decided in the *Artico* case (summarized above), formal appointment of a lawyer alone does not satisfy the Article 6(3)(c) requirement of free legal assistance if that assistance is not effective; the state must take "positive action" to ensure that the applicant effectively enjoys his or her right to legal assistance. The state authorities must provide adequate time and facilities for appointed lawyers to prepare, and a violation of Article 6(3)(c) may be found if the appointed lawyer makes obvious legal errors in preparing an appeal which results in a ruling of inadmissibility.**

**Goddi v. Italy (1984)**
Failure to provide enough time and facilities for an officially appointed lawyer to prepare for the case violates the Article 6(3)(c) right to free legal assistance because fair trial considerations require the opportunity for an adequate defense.

**Daud v. Portugal (1998)**
The failure of a lawyer appointed under the legal aid scheme to indicate in a petition for appeal which legal provisions he considered to have been breached, causing the court to declare the appeal inadmissible, was a violation of Article 6(3)(c). The applicant, a foreign person, was effectively denied access to a remedy. But see *Kamasinski v Austria* (1989) (finding no violation because, due to the independence of the legal profession, state authorities are required under Article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some way).

**Czekalla v. Portugal (2002)**
The failure of a lawyer appointed under the legal aid scheme to comply with legal requirements for lodging applicant's appeal, leading to a ruling that the appeal was inadmissible, violated applicant's right to a practical and effective defense. In coming to its decision, the ECHR considered the circumstances of the case, namely that: a) the applicant was deprived of a remedy as a result of negligence of a publicly appointed counsel; b) the applicant was a foreigner who did not know the language in which the proceedings were being conducted; c) the charges the applicant faced could result in a lengthy prison sentence.

**Cuscani v. UK (2002)**
The applicant complained that his publicly-funded lawyer did not understand Italian or ask for an interpreter and did not raise the issue of interpretation at trial despite applicant's obvious inability to follow the proceedings. The ECHR did not reach the issue, however, because it found a violation of Article 6(1) in the inaction of the judge who, as "the ultimate guardian of the fairness of the proceedings," was required to treat the interests of the accused with "scrupulous care".

**Rules of the European Court of Human Rights, adopted on 7/07/2003, entered into force on 1/11/ 2003:**Chapter X (Articles 91-96) – Legal Aid

**Summary**

The Chapter sets out the rules for granting free legal aid to the applicants before the European Court of Human Rights. Free legal aid is granted by the President of the Chamber of the Court if she considers it necessary for the conduct of the proceedings and if the applicant has no sufficient means to bear the costs of the proceedings. Legal aid may include not only lawyers' fees, but also traveling and other necessary expenses incurred by the applicant and his representative.

## III. THE EUROPEAN UNION

**European Charter of Fundamental Rights**

**Relevant text**

**Article 47**
Right to an effective remedy and to fair trial
…

3. Legal aid shall be available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

### 1. LEGAL AID IN CRIMINAL CASES

**Treaty on European Union (Maastricht Treaty)**

**Relevant text**

**Article 31**

Common action on judicial cooperation in criminal matters shall include:

…

c. ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation.

**Council Framework Decision of 15 March 2003 on the standing of victims in criminal proceedings (2001/220/JHA), entered into force 22/03/2003**

**Relevant text**



**Article 4.** Right to receive information

1. Each Member State shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows:

…

(f) to what extent and on what terms they have access to:

(i) legal advice, or
(ii) legal aid, or
(iii) any other sort of advice

**Article 6.** Specific assistance to the victim

Each Member State shall ensure that victims have access to advice as referred to in Article 4(1)(f)(ii), provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid as referred to in Article 4 (1) (f) (ii), when it is possible for them to have the status of parties in criminal proceedings.

**Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), entered into force 07/08/2002**

**Relevant text**

Article 11. Rights of a requested person

…

2. A requested person who is arrested for the purpose of execution of a European Arrest Warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

**Proposal of the Commission of European Communities for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, adopted on 28/08/2004**

**Summary**

**Article 5** of the proposal states that legal advice should be provided for at no cost for the suspect in criminal proceedings if these costs would cause undue financial hardship to himself or his dependants. Member States mush ensure that they have in place the mechanism for the ascertaining whether the suspected person has the means to pay for legal advice.

**Articles 1-3** provide for a right to legal advice to all criminal suspects throughout all criminal proceedings. Legal advice should be available in any event before the start of police questioning. When the suspect is a minor or is not able to understand or follow the proceedings, or is subject of a European Arrest Warrant, extradition request or other surrender procedure, legal advice should be made available.

**Article 6** provides for a right of the suspect for an assistance of interpreter free of charge.

**Article 14** of the proposal provides for a right of a suspect to be notified in writing of existing rights, including the right to legal aid, as soon as a person is arrested or detained. **Annex A** of the proposal suggests the model of the Letter of Rights – a short written statement of basic rights that have to be given to all suspects in the language they understand as early as possible, and in any event before the questioning takes place.

Full text of the Proposal is available at http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0075en01.pdf

Progress of the Proposal for the Framework Decision:

Conclusions of the Tampere European Council, 15 and 16 October 1999 (Conclusions 30, 31,33,35 and 40)
Green Paper (2003) from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, available at http://europa.eu.int/eur-lex/en/com/gpr/2000/com2000_0051en01.pdf
The Hague Programme (Tampere 2) of the European Council, 5 November 2004 (stating that the Framework Decision should be adopted by the end of 2005).

## 2. LEGAL AID IN CIVIL CASES

**Treaty Establishing the European Community (The Amsterdam Treaty)**

**Relevant text**

**Article 61**

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:
...
c) measures in the field of judicial cooperation in civil matters as provided for in Article 65.

**Council Directive 2003/8/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, entered into force 31/01/2003**

**Summary**



The Directive applies to "cross-border" civil cases, where the person asking for legal aid does not live in a Member State where the case is to be tried or the court judgment is to be enforced **Article 3** of the Directive establishes that natural persons involved in a dispute shall be entitled to legal aid to ensure their effective access to justice, consisting of pre-litigation advice, legal assistance and legal representation in court and exemption from, or assistance with, the costs of proceedings, including the costs connected with the cross-border character of proceedings (e.g. costs of interpretation and travel costs).
**Articles 5** and **6** state that provision of legal aid in cross-border civil disputes may be made conditional upon the economic situation of the person involved in such dispute and on the merits of the dispute.
**Article 10** of the Directive expands the scope of its application to alternative dispute resolution methods, when the law or the court hearing the case requires the parties to make recourse to them.
**Articles 12-16** set out the procedure facilitating application for legal aid; namely, persons may submit such application in their country of residence, which have to be transmitted rapidly and free of charge to the authorities of the country which will be granting legal aid.

History of adoption of the Directive:

Conclusions of the Tampere European Council, 15 and 16 October 1999, point 30:
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...
Green paper (2000) from the Commission on Legal Aid in civil matters: the problems confronting the cross-border litigant, available at http://europa.eu.int/eur-lex/en/com/gpr/2000/com2000_0051en01.pdf
Initial Proposal of the European Commission of 18 January 2002 (ref. CE COM (2002) 0013)
Opinion of the European Parliament of 25 September 2002 (ref. PE T5-0441/2002)

**Decision of the Commission of European Communities 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 disputes**

## IV. THE ORGANISATION OF AMERICAN STATES

**American Convention on Human Rights**

**Relevant text**

**Article 8. Right to a Fair Trial**

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. ...During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
...

> d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
>
> e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law

**Case law of the Inter-American Court and the Inter-American Commission (summaries)**

**Cases on the right to legal assistance in constitutional motions challenging death penalty sentence**

**Summary**

In a series of cases against Bahamas, Grenada, Jamaica and Trinidad and Tobago the Inter-American Court and the Inter-American Commission have ruled that a convicted person seeking constitutional review of the death penalty sentence has to be provided legal assistance by the state when the interests of justice so require (Cf. the UN Human Rights Committee cases on the right to legal counsel in constitutional motions challenging capital sentences).

See for example:

Dave Sewell v. Jamaica,Case 12.347, Report No. 76/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 763 (2002).
Desmond McKenzie, Andrew Downer et al. V. Jamaica, Report N° 41/0012.044, April 13, 2000,
Neville Lewis v. Jamaica, Case 11.825, Report No. 97/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 327 (1998).
Michael Edwards v. Bahamas, Report N° 24/00 CASE 12.067, March 7, 2000, Inter-Am. Com.
Paul Lallion v. Grenada, Case 11.765, Report No. 55/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 551 (2002).
Rudolph Baptiste v. Grenada, CASE 11.743, April 13, 2000, Inter-Am. Com.
Sheldon Roach and Beemal Ramnarace v. Trinidad and Tobago, Cases 12.346 and 12.377, Report No. 17/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 415 (2002).



Anthony Briggs v. Trinidad and Tobago, Report N° 37/98, CASE 11.815, May 7, 1998, Inter.-Am. Com.

**Minors in Detention v. Honduras, Case 11.491, Report N° 41/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 573 (1998)**

**Summary**

A group of children was kept incarcerated in an adult prison without a court-appointed lawyer to represent them, contrary to the requirements imposed by national law. The Inter-American Commission found a violation of art. 8 (2) (e) of the Convention (right to a public defender).

**Advisory Opinion of the Inter-American Court of Human Rights OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003)**

**Summary**

The Court has construed the right of undocumented migrants for access to the court as a judicial guarantee of their labor rights. Since labor rights of migrants are often not recognized, often they must resort to state mechanisms for the protection of their rights. However, the risk an undocumented migrant runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and the fact that he is denied free legal aid, prevents him from asserting the rights in question. Thus, the State must guarantee that access to justice for migrant workers is genuine and not merely formal.

**Advisory Opinion of the Inter-American Court of Human Rights OC-11/90, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), August 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990)**

**Summary**

If legal representation of an indigent person is necessary either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized, and this person is unable to obtain such services because of his indigence, then he is exempted from the requirement to exhaust domestic remedies. To determine whether legal representation is or is not necessary the circumstances of a particular case or proceeding -its significance, its legal character, and its context in a particular legal system- have to be assessed. Likewise, the exemption applies where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation. Yet, it is for a complainant to demonstrate that he could not obtain legal counsel necessary for the protection of the Convention rights either as a result of indigence or because of a generalized fear to take the case among the legal community.

**Report of the Inter-American Commission on Human Rights on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Chapter V (c) 4 "Access to Legal Representation through Legal Aid", OEA/Ser.L/V/II.106, Doc. 40 rev. February 28, 2000**

**Summary**

The Inter-American Commission has stressed the obligation of the state not only to provide for legal aid to asylum seekers as a matter of domestic law internal system, but also to make the right to judicial protection effective. The state is responsible for eliminating distinctions in the availability or coverage of legal aid provided by the provinces, which have the effect of depriving claimants requiring such services to ensure their access to judicial protection of fundamental rights.

## V. THE AFRICAN UNION

### 1. TREATY STANDARDS

**Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

**Relevant text**

Article 8
Access to Justice and Equal Protection before the Law

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:
a) effective access by women to judicial and legal services, including legal aid;
b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid…

**African Charter on the Rights and Welfare of the Child**

**Relevant text**

Article 17: Administration of Juvenile Justice
…
2. States Parties to the present Charter shall in particular:
…
(c) ensure that every child accused in infringing the penal law:
…
(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defense;



(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
…

### 2. OTHER INSTRUMENTS

**Resolution on the Right to Recourse and Fair Trial adopted by the African Commission on Human and Peoples' Rights at its 11th Ordinary session in Tunis, Tunisia, in March 1992**

**Relevant text**

The African Commission on Human and Peoples' Rights

…
1. CONSIDERS that every person whose rights or freedoms are violated is entitled to have an effective remedy…
…
2. CONSIDERS FURTHER that the right to fair trial includes, among other things, the following;
…
(e) In the determination of charges against individuals, the individuals shall be entitled in particular to:
(i) Have adequate time and facilities for the preparation of their defense and to communicate in confidence with the counsel of their choice…
…
1. RECOMMENDS to state parties to the African Charter on Human and Peoples' Rights to create awareness of the accessibility of the recourse procedures and to provide the needy with legal aid…

**Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), adopted by the Resolution of the African Commission on Human and Peoples' Rights, meeting at its 32rd Ordinary session in Banjul, Gambia, 17-23 October 2002**

Part II: Prevention of Torture
*A. Basic Procedural Safeguards to Those Deprived of Their Liberty*
20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:
…
c) The right of access to a lawyer…
*B. Safeguards during the Pre-trial process*
States should:

...

27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.

## 2. NGO INITIATIVES

**Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, attached to the Resolution of the African Commission of Human and Peoples' Rights on the Right to a Fair Trial and Legal Assistance in Africa, adopted at its 26th session held in November 1999[3]**

**Relevant text**

DECLARATION

...

8. Legal Aid

Access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective. The contribution of the judiciary, human rights NGOs and professional associations should be encouraged.

...

RECOMMENDATIONS

The African Commission should:

...

- Prioritise specific aspects of fair trial in Africa, such as access to legal aid...for discussion in the agenda of its regular sessions...

...

State parties to the African Charter should:

- Allocate adequate resources to judicial and law enforcement institutions to enable them to provide better and more effective fair trial guarantees to users of the legal process;
- Urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes;
- In collaboration with Bar Associations and NGOs enable innovative and additional legal assistance programmes to be established including allowing paralegals to provide legal assistance to indigent suspects at the pre-trial stage and pro-bono representation for accused in criminal proceedings...

Bar Associations should:

[3] Dakar Declaration and Recommendations were a result of the Seminar on the Right to a Fair Trial in Africa held in collaboration with the African Society of International and Comparative Law and Interights, in Dakar, Senegal, from 9-11 September 1999.



- In collaboration with appropriate government institutions and NGOs enable paralegals to provide legal assistance to indigent suspects at the pre-trial stage;
- Establish programmes for pro-bono representation of accused in criminal proceedings

...

Non-governmental Organisations and Community Based Organisations should:

- Consider innovative and alternative ways in providing legal assistance to indigent accused including through the establishment of paralegal programmes, legal aid clinics, legal defence funds and public interest litigation programmes...

**Draft Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by Heads of State at the second summit of the African Union held in Maputo in July 2003[4]**

**Relevant text**

G. ACCESS TO LAWYERS AND LEGAL SERVICES

(a) States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.

...

H. LEGAL AID AND LEGAL ASSISTANCE

(a) The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.

(b) The interests of justice should be determined by considering:

1. in criminal matters:

i) the seriousness of the offence;

ii) the severity of the sentence.

2. in civil cases:

i) the complexity of the case and the ability of the party to adequately represent himself or herself;

ii) the rights that are affected;

iii) the likely impact of the outcome of the case on the wider community.

(c) The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

[4] The Guidelines on the Right to a Fair Trial were coordinated by INTERIGHTS and drafted jointly by its staff and the Human Rights Institute of South Africa (HURISA). They were developed from the Declaration and Recommendations of the Dakar Seminar on Fair Trial in Africa held during 9 to 11 September 1999 (see above).

(d) An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.
(e) When legal assistance is provided by a judicial body, the lawyer appointed shall:
1. be qualified to represent and defend the accused or a party to a civil case;
2. have the necessary training and experience corresponding to the nature and seriousness of the matter;
3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;
4. advocate in favour of the accused or party to a civil case;
5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.
(f) Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:
1. when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case;
2. where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused or party in a civil case, without any payment by him or her.
(g) Given the fact that in many States the number of qualified lawyers is low, States should recognize the role that para-legals could play in the provision of legal assistance and establish the legal framework to enable them to provide basic legal assistance.
(h) States should, in conjunction with the legal profession and non-governmental organizations, establish training, the qualification procedures and rules governing the activities and conduct of para-legals. States shall adopt legislation to grant appropriate recognition to para-legals.
(i) Para-legals could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession.
(j) Non-governmental organizations should be encouraged to establish legal assistance programmes and to train para-legals.
(k) States that recognize the role of para-legals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence.

## VI. INTERNATIONAL CRIMINAL TRIBUNALS

### 1. The International Criminal Court (ICC)

**The Rome Statute of the International Criminal Court**

Relevant text

Article 55: Rights of the persons during an investigation
...



2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities..., that person shall also have the following rights of which he or she shall be informed prior to being questioned:
...
( c ) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if person does not have sufficient means to pay for it.

Article 67: Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees, in full equality:
...
(d) ...to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, id the accused does not have legal assistance, of his right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

**Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000)**

**Relevant text**

Rule 16. Responsibilities of the Registrar relating to victims and witnesses

1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:
...
(b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 and 91.

Rule 21. Assignment of legal assistance

...
2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.
3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is

refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.

...

5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

Rule 22. Appointment and qualifications of Counsel for the defense

1. A counsel for the defense shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defense shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defense may be assisted by other persons, including professors of law, with relevant expertise.

Rule 90. Legal representatives of victims

...

5. A victim or group of victims who lack the necessary means to pay for a common representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

**2. The International Criminal Tribunal for Former Yugoslavia (ICTY)**

**Relevant text**

**The Statute of the International Criminal Tribunal for Former Yugoslavia**

**Article 21**

**Rights of the accused**

4. In the determination of any charge against the accused pursuant to the present Statute, the accused 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 such case if he does not have sufficient means to pay for it.

**The Rules of Procedure and Evidence, UN Doc. IT/32/REV.19 (1994)**

**Relevant text**



**Rule 42. Rights of Suspects during Investigation**

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect speaks and understands:

(i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;

(ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning...

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

**Rule 45. Assignment of Counsel**

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel...

...

(E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel.

**Directive on Assignment of Defense Counsel No. 1/94, UN Doc. IT/73/REV. 10**

**Summary**

The Directive contained detailed procedural and substantive provisions related to the assignment of defense counsel when a suspect or an accused does not have sufficient means to meet the costs of proceedings before the Tribunal: for instance, organs responsible for the assignment of counsel, eligibility criteria and the procedure of means testing, the review procedure of refusal to assign a counsel, etc. Furthermore, it sets out the professional and other requirements for the assigned defense counsel and the remuneration scheme for the legal service and travel expenses of the assigned counsel.

Full text of the Directive as available at http://www.un.org/icty/legaldoc/

**3. The International Criminal Tribunal for Rwanda (ICTR)**

**The Statute for the International Criminal Tribunal for Rwanda**

**Relevant text**

**Article 20: Rights of the Accused –** identical to Article 21 ICTY Statute (see above)

**The Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995)**

**Relevant text**

**Rule 42. Rights of Suspects during Investigation –** text identical to Rule 42 of the ICTY Rules of Procedure and Evidence (see above)

**Rule 45: Assignment of Counsel**

...

(G) Where an alleged indigent person is subsequently found not to be indigent, the Chamber may make an order of contribution to recover the cost of providing counsel.

(H) Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

(I) It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.

**Rule 45 *quater:* Assignment of Counsel in the Interests of Justice**

The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.

**Directive on the Assignment of Defense Counsel, approved by the Tribunal 9 January 1996, last amended 15 May 2004**

**Summary**

The Directive covers essentially the same areas as the Directive on the Assignment of Defense Counsel adopted by ICTY (see above).

Full text of the Directive is available at http://www.ictr.org/ENGLISH/basicdocs/defence/