

A HUMAN RIGHT TO LEGAL AID

Simon Rice¹

Introduction

Legal aid programs are widespread, and spreading wider. They are part and parcel of the rule of law, and where the rule of law is, or is being developed, so legal aid programs are, or are being developed. Nowhere, however, is legal aid a right, except within closely defined circumstances. Speaking to an international conference on legal aid and human rights,² was an opportune time to set out an argument for recognition of legal aid as a human right, a fundamental right for all people.

Before going further with a discussion of ‘legal aid’, I must be clear about what I mean by the term. If legal aid means nothing more than ‘legal representation in court’, then to that extent there is limited recognition of a right to legal aid. It is a right that has been found to be implicit, at least for some criminal trials, in various legal systems and in human rights instruments. To have established that right is a significant achievement. In a criminal trial the state is at its most powerful, and the liberty of a person is most at risk. Because of a right to legal representation in criminal trials, countless thousands of people are represented and defended where they would not have been otherwise.

But legal aid could mean much more than legal representation, and a right to legal aid could mean much more than a limited right to representation in court. We can, instead, think of legal aid as providing public access to law, to law that is preventive and protective, that brings change and hope, that relieves poverty and promotes prosperity. We can think of legal aid as providing public access to legal information, to legal advice and to legal education and knowledge. None of this broad and bold conception of legal aid – legal aid beyond legal representation – is recognised as anyone’s by right.

When there is legal aid beyond legal representation, it is provided for a range of reasons – Smith has suggested six: charity, poverty reduction, efficiency in the legal system, rule of

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² *Conference on the Protection and Promotion of Human Rights through Provision of Legal Services: Best Practices from Africa, Asia and Eastern Europe* Kyiv, Ukraine 27-30 March 2007.

law, lawyers' self-interest and human rights.³ Such legal aid is discretionary, provided by the state or by non-state actors as and when they can or wish. Indeed, some aspects of the full scope of what legal aid could be would never be provided willingly by the state; it is quite simply not in the state's interest to encourage the aggressive use of law as a force for change.⁴

The key to establishing a right to this broader idea of legal aid lies in a different understanding of the role of the state, and that different understanding is offered by the theory of human rights.

I look first at the cases and the human rights treaties that describe that part of legal aid – legal representation in court – that has received some recognition as a right, and I conclude that even that right is available only in limited circumstances. In light of this not-very-encouraging analysis, I outline an argument for a fundamental human right not only to legal representation, but to 'legal aid' – access to law – in its fullest sense.⁵

The right to legal representation

A right to legal representation is rarely stated explicitly. Rather, it is established by inference from the systems and institutions of the state. Superior courts and learned writers around the world have recognised a right to legal representation, in some circumstances, through two ways of thinking: by implication in constitutional guarantees of equality, and by implication in a guarantee of a fair trial.

Criminal matters

In the United States of America an explicit Constitutional right to legal representation is limited by the Sixth Amendment to Federal criminal matters. By reading this right with the separate Constitutional right to due process in the Fourteenth Amendment, the United States Supreme Court in *Gideon v Wainwright*⁶ was able to infer a right to legal

³ Roger Smith, 'Legal Aid as a Policy', discussion paper to London School of Economic seminar *Legal aid: a human right or a mere luxury*, 28 January 2007, unpublished.

⁴ see eg Richard Abel, 'Law Without Politics: Legal Aid under Advanced Capitalism' (1985) 32 UCLA L. Rev. 474 at 528-9.

⁵ Contributions to the important volume Francesco Franconi (ed) *Access to Justice as a Human Right* OUP 2007, identify existing rights to procedures and remedies, but do not go further and speculate on a possible universal right of access to law at its broadest.

⁶ 372 U.S. 335 (1963).

representation in *all* criminal matters. But what a court gives a court can take away, and the United States Supreme Court subsequently limited the right to legal representation to cases when a gaol sentence is possible, saying that it is ‘the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel’.⁷ As a result, the availability in the USA of a right to legal representation, already limited to criminal matters, is subject to the state’s discretion in prescribing gaol as a possible sentence.

The Australian High Court in *Dietrich*⁸ gave Australians access to an even more narrowly conceived right. Recognising a right to a fair trial in Anglo-Australian common law, the High Court decided that ‘depending on all the circumstances of the particular case, lack of [legal] representation may mean that an accused is unable to receive ... a fair trial’.⁹ The High Court cautioned that whether a trial will be unfair for want of legal representation is ‘inextricably linked to the facts of the case and the background of the accused’.¹⁰ The effect of *Dietrich* is that the state may, depending on the circumstances, be obliged to provide legal representation in criminal matters that are serious. Again this limited right to representation is further subject to the state’s discretion, this time as to whether a criminal matter is classified as ‘serious’.¹¹

Non-criminal matters

Because *Gideon v Wainwright* and *Dietrich* found the right to representation in criminal matters to be implied in the availability of other rights – due process and fair trial – they have been the basis for persistent, and persistently unsuccessful, calls for recognition of a similar right to representation in non-criminal matters.¹² A significant obstacle has been the refusal by courts and policy makers to treat the needs of a party in a non-criminal case as deserving the same right to representation that an accused has.¹³

⁷ *Lassiter v. Department of Social Services* 452 U.S. 18 (1981) at 25.

⁸ *Dietrich v. The Queen* (1992) 177 CLR 292, [1992] HCA 57.

⁹ *Ibid*, at 309.

¹⁰ *Ibid*.

¹¹ generally understood to be a charge that proceeds on indictment before a superior court rather than summarily before a magistrate.

¹² See eg Frances Gibson, ‘Legal Aid: A decade after *Dietrich*’ (2003) 41 *NSW Law Society Journal* 52.

¹³ see eg *Lassiter* note 5 above, where only potential loss of liberty is serious enough to warrant a right to counsel.

There is certainly an inequality of arms when an accused faces the state in a criminal trial, but the same inequality of arms occurs in many non-criminal matters that involve well-resourced parties on one side of a case. Sometimes (as in *Lassiter*) that well-resourced party is the state. I agree with Luban when he says that there is a ‘lop-sided emphasis on physical liberty over all other interests’.¹⁴ It is a crude exercise, unsustainable on any rational basis, to measure the relative seriousness of one person’s being gaoled for a year with another person’s losing their home or family or means to earn a living.

On the few occasions when a right to representation in non-criminal matters has been recognised, the courts have always heavily circumscribed the right.

In Canada, in *New Brunswick v G*,¹⁵ the state was a party in a non-criminal matter where the provincial Community Services Minister wanted to take a woman’s children into care. The Canadian Supreme Court decided that when the rights of life, liberty and security of the person, guaranteed by s.7 of the *Canadian Charter of Rights and Freedoms*, are at risk (as they were in that case), the state ‘is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the [party], the government may be required to provide an indigent [party] with state-funded counsel’.¹⁶ As in *Dietrich*, a limited right to counsel, depending on the circumstances, is derived from the right to a fair hearing.

Similarly in South Africa, the Land Claims Court said in *Nkuzi*¹⁷ that an effective right to a fair hearing obliged the state to provide legal representation, but only when it was required by the complexity and seriousness of the matter, and the limited capacity of the applicant, and the risk of ‘substantial injustice’.

¹⁴ David Luban, ‘The Right to Legal Services’ in Alan Paterson and Tamara Goriely (eds) *Resourcing Civil Justice*, OUP 1996 at 59

¹⁵ *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46; 1999 CanLII 653 (SCC).

¹⁶ *Ibid* at 7-8.

¹⁷ *Nkuzi Development Association v South Africa* (unreported) ; see generally J Perelman ‘The Way Ahead? Access to Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The *Nkuzi* Case’ (2005) 41 *Stanford Journal of International Law* 357.

Perhaps the best known consideration of a right to representation in non-criminal matters is the decision of the European Court of Human Rights in *Airey*.¹⁸ The Court observed that the state has a duty to secure for a person an effective right of access to the courts, and decided that, in some circumstances, the possibility of appearing in person before a court does not provide an effective right of access, saying that Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ‘may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory ... or by reason of the complexity of the procedure or of the case’.¹⁹ But the Court was at pains to reassure the state that its conclusion ‘does not hold good for all cases concerning “civil rights and obligations” or for everyone involved therein’. In terms very similar to those used in the decisions discussed above, the Court observed that ‘much must depend on the particular circumstances’.²⁰

In *Steel and Morris*²¹ the European Court of Human Rights reiterated the conditional nature of any entitlement to legal representation in non-criminal matters, saying that ‘[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively’.²²

In summary, courts have been prepared to imply a right to legal representation in court in a particular context, most usually a constitutional or common law or human right to fair trial. The right is most usually identified in criminal matters, and occasionally in non-criminal matters, and is limited by the subjective circumstances of the person and the case.

¹⁸ *Airey v Ireland* (1979-80) 2 EHRR 305, [1979] ECHR 3.

¹⁹ *Ibid*, at [24]-[26].

²⁰ *Ibid*, at [26].

²¹ *Steel and Morris v. the United Kingdom* (2005) 41 EHRR 22, [2005] ECHR 103.

²² *Ibid*, at [61].

Reflecting on the ‘right’ to representation

Academic arguments for a right to legal representation adopt the courts’ approach of finding a right by implication in a particular context. They have made the case for the right in non-criminal as well as criminal matters, and have looked beyond ‘fair trial’ as a source for the right, to contexts as local as the terms of a provincial constitution,²³ or as broad as a democratic political system generally.²⁴ When Luban argues for a right to representation based on the USA’s constitutional guarantee of equality before the law, he recognises that his argument is context-specific, and disavows any claim to be articulating a right to representation beyond the scope of the USA’s system of law and politics²⁵. Indeed, Luban doubts whether *any* transnational claim can be made, precisely because of the differing politico-legal contexts from one state to another.

Luban is correct for as long the source for a right to representation is inferred from the processes and institutions of a state, and the right to representation that I have described above is always one that arises in a particular context, as part of a particular system.

Since Luban wrote, the type of processes and institutions in which he and others were finding a right to representation is now widespread, and is rapidly spreading more widely. The western ‘rule of law’, with its associated democratic process, right to fair trial and guarantee of equality before law, is being exported and transplanted around the world, in particular through conditions attached to developmental aid funds and membership of economic and political communities.²⁶ The wide establishment of this particular legal system carries with it an associated implied right to legal representation. But it is a right that is available only in very defined circumstances. Most importantly, it is not a right that stands on its own; it is derived from processes and institutions of the state. Because the existence and nature of the implied right to representation is tied to the state’s trial procedures, the state has the lawful power to define the right, to modify it, to interpret it, and even to deny it, by defining what is fair in a trial, and redefining the circumstances in which the courts say the right arises.

²³ D Perluss, ‘Washington’s Constitutional Right to Counsel in Civil Cases: Access to Justice v Fundamental Interest’ (2003-4) 2 *Seattle Journal of Social Justice* 571.

²⁴ F Zemans, ‘Recent Trends in the Organization of Legal Services’ (1986) 11 *Queen’s Law Journal* 26.

²⁵ David Luban, ‘The Right to Legal Services’ in Alan Paterson and Tamara Goriely (eds) *Resourcing Civil Justice*, OUP 1996 at 47-48.

²⁶ see eg Roger Smith, ‘Old Wine in new Bottles: Legal Aid and the New Europe’ (2005) 2 *Justice Journal*.

The one constitutional statement of an explicit ‘right to legal aid’ is not all it seems. When the European Union’s *Charter of Fundamental Rights* says that “legal aid shall be made available to those who lack sufficient resources” (Article 47), it does so in the context of a right to a fair trial and the right to be advised, defended and represented. The term ‘legal aid’ is used there not in any broad sense, but only to mean state-sponsored legal representation. That is only the same right to legal representation that the courts have already said is implicit in a right to a fair hearing.

By spelling out the circumstantial nature of the right to representation I do not mean to undermine its importance. But the exercise does highlight that even this most prominent aspect of legal aid is contingent, and has failed to establish itself as a secure and broadly available right within the structures of the state.

If the right to legal representation is of such limited availability, then it is fanciful to think that courts will, in any circumstances, imply a right to a broader conception of legal aid. What is needed is a way of freeing a rights claim of its contingent provenance, and conceiving it in universal terms. This idea of a right’s universality suggests the modern conception of human rights.

A universal right to legal aid

Identifying human rights

The source of a human right is neither the state nor any particular system, it is the person. This is the key to its universality. A human right is a right that every person has; it inheres in the person, it is with each of us from birth, it is ours because we are human, and it is necessary to our living with dignity, to our exercise of reason and conscience.²⁷

Those who do not enjoy their rights are not without rights – they are deprived of their enjoyment of them. Impoverished people surviving under a cruel and oppressive state have human rights, but are deprived of their enjoyment. It is necessary to recall this because my argument is for the recognition in principle of a human right to legal aid; whether and how that right can in fact be enjoyed is a necessary but further issue.

The first answer to the question ‘what are the rights that inhere in our being human?’ is the positive statement of human rights in the *Universal Declaration of Human Rights* and

²⁷ Article 1, *Universal Declaration of Human Rights*

the related International Covenants on Civil and Political Rights, and Economic Social and Cultural Rights. But there is little there that speaks directly to the relationship between the person and law: Article 14 of the *International Covenants on Civil and Political Rights* (ICCPR) speaks of the guarantee of legal representation in criminal cases ‘where the interests of justice so require’.

The positive list of fundamental rights is, however, neither closed nor immutable. It is always the subject of exposition, debate, refinement and the pursuit of better understanding. Rights are interpreted, particularised and augmented. Identifying a new right is not remarkable. Few would deny, for example, a human right to a clean and healthy environment, although no such right is clearly set out in the Universal Declaration or any related treaty. Such a human right is argued for from first principles, supported by interpretation of existing rights such as the right to health, and a form of it now appears in Article 37 of the *Charter of Fundamental Rights of the European Union*. It is possible, therefore, to explore the possibility of a new human right – not its creation but its realisation, a right that might exist but has so far not been identified and articulated.

Identifying a human right of ‘access to law’

The ‘person’ who is the source of human rights is not an abstraction or a specimen, but lives in society, exercising reason and conscience. Human rights are those rights and freedoms necessary for a person to function with dignity *in society*, in whatever circumstances, and whatever state, a person is. People’s social relationships give rise to practices and expectations, to rules of behaviour, which become vastly magnified in their number and complexity as society becomes larger and more complex. Human life, in society, is universally rule-based. These rules – call them ‘law’ – may be oppressive or beneficial, setting limits or permitting conduct, denying remedies or enabling claims. Law in some form is, universally, a part of a person’s environment.

I suggest that whatever polity is built on these rules, whatever system of laws develops, it is universally so that people’s opportunity to live with dignity, and to fulfil their human potential, depends on their engagement with rules that govern their relationships with each other and with whatever constitutes the social authority – what, for us, is the state.

We cannot live with dignity, exercising reason and conscience, if we do not know these rules, cannot comply with these rules, and cannot use these rules. Just as we must be able to express ourselves, to associate with others, and to have access to education, so must we know, and be able to abide by and use, the rules of our society.

This is fundamental. We cannot be human with dignity if, through ignorance of the state's rules, we face censure and sanction; if, through inability to use rules, we face loss and damage; if, through confusion about rules, we lose opportunity. The universally rule-based nature of our social existence gives rise to a fundamental right to *effectively* know the rules of society.

The established human right to take part in the conduct of public affairs is based on a very similar rationale. Article 25 of the ICCPR guarantees that right, which the Human Rights Committee describes as a right 'to an effective opportunity to enjoy the rights it protects . . . whatever form of constitution or government is in force'.²⁸ I suggest that just as it is a recognised human right for people to participate, and participate effectively, in the political system of which they are a part, so it is fundamental that people be entitled to participate, and participate effectively, in the system of rules – the legal system – of which they are a part.

As a fundamental human right, the right of access to law is held by everyone. It is a right that all people have at all times. Differently from the approaches taken by courts to identify a right to representation, it does not have to be searched for and inferred from a constitution or a legal system. It is not peculiar to certain types of matters. There is no room for a state to argue away the fundamental right, and there is a presumptive position that the right will be effectively available. Unlike rights created within and by the state, the state does not have the power to create, or to deny, a human right.

A common shorthand term for the 'right to take part in the conduct of public affairs' is the 'right to vote'. A shorthand term for the 'right to know, and to be able to abide by and use, the rules of society' could be the 'right of access to law'. Access to law envisages a broad and fully realised idea of 'legal aid' which includes, but is much more than, representation in court.

²⁸ United Nations Human Rights Committee *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service* CCPR/C/21/Rev.1/Add.7.

Implementing a human right of 'access to law'

The content of the right of access to law is not a right to a lawyer, any more than a right to free expression is a right to make a radio broadcast, or a right to education is a right to private tutoring. 'Access to law' means a right to be told the law, to be given the opportunity to know and understand the law, to use and comply with the law, to gain its benefit and protection.

How any human right is realised is a separate question from whether it exists, and it is an eternally vexed one. There is cost and complexity in giving effect to human rights, and there are inevitable limitations on the extent to which human rights can be realised in a state.²⁹ But the prospect of difficulties in implementing a human right cannot undermine the idea of the right itself.

The range of steps a state might take to give effect to a fundamental right of access to law is limited only by imagination: from wide publication of plain language legislation to transparent judicial appointments; from public training, education and information to simplified compliance and legal procedures. There are manageable and affordable steps any state can take.

A conference such as this brings together examples of imaginative and effective initiatives to promote access to law: the long history of Community Advice Bureaux in the UK, the extensive use in Africa of para-legals³⁰ and traditional law systems,³¹ the established networks of community law centres in Canada and Australia, the internet-led revolution in accessible legislation,³² and didactic television drama in Armenia³³ are only a very few.

These measures have often been taken apart from or in spite of the state, and have been motivated by a social justice ethos: a sense simply of what is necessary to be fair. A

²⁹ see eg the European jurisprudence on a 'margin of appreciation', which tolerates the exigencies of local conditions.

³⁰ see eg Vivek Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' (2006) 31 *Yale LJ* 427.

³¹ Penal Reform International 'Access to Justice in Africa and beyond: Making the Rule of Law a reality' PRI, 2006.

³² see eg Carol Harlow, 'Access to Justice as a Human Right: The European Convention and the European Union' in Philip Alston (ed) *The EU and Human Rights*, OUP 1999, 187 at 209.

³³ see Klaus Decker, Caroline Sage and Milena Stefanova, 'Law or Justice: Building Equitable Legal Institutions', World Bank (2005) accessible via the 'Publications' link at <http://go.worldbank.org/ID1AJ9UAX0> .

human right of access to law is a single comprehensive concept that underpins these measures.

Conclusion: implications of the right of access to law

Legal representation is one way of achieving access to law and, as cases like *Airey* and *Nkuzi* show, there will be times when legal representation is exactly the measure that is necessary. Rather than relying, as the courts did in those cases, on implications from trial processes, a right of access to law is an immutable basis for recognising a right to legal representation. Instead of being dependent on a right to fair trial, and on the court's deciding that the circumstances are appropriate, a right to legal representation will be recognised because in any court, in any place, at any time, there is a human right of effective access to law.

A human right of access to law is a universal and independent rationale for sustaining measures of access that do exist, and for advocating for measures that do not. It is a new and stronger starting point for practical debates about policy and expenditure in states' justice systems. It gives the state program of legal aid, in all its variety, a pre-eminent place in social policy as the program through which the fundamental human right of access to law is realised. It gives new meaning to a requirement, as is found, for example, in the Copenhagen criteria for EU accession,³⁴ to establish a legal aid system.

A human right of access to law both obliges and enables a state to consider a wide range of measures that will promote access to law in the particular circumstances of that state, and is a universal standard by which the adequacy of any legal aid system can be judged.

It is my hope that characterising legal aid work as not only being in pursuit of human rights, but as implementing a human right itself, will sustain legal aid workers in their noble cause to ensure access to justice for all.

³⁴ see Roger Smith, above note 25.