

**'Human Rights and Access to Justice'**  
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This paper explores a linked set of contradictions – some of which verge on paradox – about legal aid (defined for this purpose as ‘legal assistance funded by the state for indigent suspects and defendants’). These are:

- The right to legal aid is a ‘hybrid’ right in the sense that it imposes a positive obligation of funding on the state, akin to an economic right, although it is an integral part of the civil and political right to a fair trial.
- Legal aid, now enshrined in the major comprehensive human rights treaties, actually originated as the result of a variety of causes, by no means all of which reflected any notion of human rights.
- For one particular group of countries (those post-socialist states which have achieved independence in the aftermath of the break up of the Soviet Union), human rights have been a conscious driver of change. However, for almost all of these countries, the immediate driver for reform was the prospect of future accession to joining the European Union rather than the mechanisms of the Council of Europe that oversee the structure of the European Convention on Human Rights (ECHR).
- The European Union provides an example for an organisation into which a major attempt has been made to integrate human rights into its constitution and this has both made it a powerful enforcer of rights in relation to countries on its eastern border but is now attracting the resistance a group of countries led by Ireland and the United Kingdom on its western border – both of which have actually have relatively well established legal aid schemes.

### **Legal aid and human rights**

Most of the major international human rights conventions contain some reference to legal aid or access to justice within their fair trial provisions. Most derive in whole or in part from Article 14(3)(d) of the UN’s International Covenant on Civil and Political Rights (ICCPR). This gives a right of self-defence in a criminal case together with a right of choice as to legal assistance:

*and to have legal assistance assigned ... in any case where the interests of justice so require and without payment ... in any such case if he does not have sufficient means to pay for it.*

Some regional equivalents are rather less generous. Article 7 if African Charter on Human Peoples' Rights makes no mention of payment, giving only 'the right to defence, including the right to be defended by counsel of choice'.<sup>1</sup> The American Convention on Human Rights acknowledges the issue of cost but chooses not to address it:

*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 ...<sup>2</sup>*

The most important regional human rights treaty is the European Convention on Human Rights because of its comparative age (it was adopted in 1950); the role of the jurisprudence of the European Court of Human Rights in expanding and entrenching its provisions; its link with membership of the European Union; and the breadth of its membership. The ECHR provides for fair trial rights not only in matters involving a criminal charge but also 'in the determination of ... civil rights and obligations', wider coverage than the ICCPR, but with a very similar statement of the basic right:

*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.<sup>3</sup>*

The prize for the strongest statement of a right to legal aid in any comprehensive human rights document goes to the European Union for Article 47 of the European Charter of Fundamental Rights and Freedoms:

*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.*

160 countries have signed and ratified the ICCPR, albeit with some reservations and derogations: just over a quarter (47) have also signed and ratified the ECHR – 23 having joined (including Russia) since the break up of the former Soviet Union in the early 1990s. Montenegro was the most recent in June of 2006.

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<sup>1</sup> Article 7, African Charter on Human and Peoples' Rights adopted in June 1981.

<sup>2</sup> Article 8, American Convention on Human Rights, adopted in November 1969.

<sup>3</sup> Article 6(3)(c) European Convention on Human Rights.

The purpose of this paper is to examine the effect of these human rights' requirements on the development of legal aid around the world and to begin consideration of what any interaction, or lack of it, may tell us about, on the one hand, access to justice and legal aid and, on the other, human rights. I am going to ignore, for this purpose, important debates about the most effective form of legal aid. I want to concentrate on the relationship of legal aid and human rights.

We have had legal aid for some time in many jurisdictions. The earliest statutory provision of legal aid, at least in Europe, appears to be in a Scottish statute of 1424. It allowed the remittance of court fees in civil cases and the provision of counsel to those on the 'Poor's roll'.<sup>4</sup> Similar legislation followed in 1494 for England and Wales. This was several centuries before a defendant could even give evidence on his own behalf in a criminal case, let alone obtain legal assistance. What is more, this 15<sup>th</sup> century version of legal aid was probably provided for cases which would now be excluded by most legal aid schemes, relating as they would have done to land and inheritance. Thus, some change is happening here which promises to be interesting.

With a degree of licence, we might be able to schematise the reasons for legal aid funding as at least six services in addition to a commitment to human rights. Each of these themes can be further subdivided into a number of different, sometimes apparently, opposing strands:

- (a) As charitable activity by lawyers out of a commitment, professional or political, to the poor. This is where we can identify the more modern origins of the legal aid and services movements in the US and the UK. The organisation now known as the Legal Aid Society of New York was formed as the German Immigrants Society in 1876. Such charitable organisations were so prevalent in the United States that, by 1911, they had formed their own National Alliance of Legal Aid Societies. In the UK, we had the Poor Man's Lawyer movement, linked to the university settlements that were active at around the same time. In a more contemporary version, we have the thriving 'pro bono' movement of the current day. The model rule of professional conduct proposed by the American Bar Association's Center for Professional Responsibility quantifies and specifies the ABA's expectation on US lawyers in this regard. Few other countries have gone so far but the US example is spreading the sense of the pro bono obligation around the world. All the major 'magic circle' London firms undertaking international corporate work

have pro bono co-ordinators and feature their pro bono work in their presentational material. There are plenty of sceptics who would argue that this kind of injunction is ultimately designed to protect the project of a profession's privileged market position. Similarly, however, there can be no doubting the very real contribution to services for the poor by lawyers who accept professional obligations of the kind set out by the ABA:

*Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:*

- (a) *provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:*
  - (1) *persons of limited means or*
  - (2) *charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and*
- (b) *provide any additional services through:*
  - (1) *delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;*
  - (2) *delivery of legal services at a substantially reduced fee to persons of limited means; or*
  - (3) *participation in activities for improving the law, the legal system or the legal profession.*

*In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.*

- (b) As part of a commitment to reduce or ameliorate poverty, most obviously the legal services incorporated within President Johnson's 'war on poverty'. This is a justification still visible in the language of social exclusion to justify much current

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<sup>4</sup> *Civil Appeals (Scotland) Bill Policy Memorandum*, Scottish Parliamentary Corporate Body 2006  
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expenditure on what used to be known as ‘social welfare’ law in England and Wales among other jurisdictions. But the then Ministry of Constitutional Affairs made this role explicit in England and Wales:

*Legal aid serves two, largely distinct, functions. Firstly, it provides protection and representation to those accused of a criminal act, underpinning the guarantee of a fair trial. Secondly, it actively contributes to the Government’s social welfare agenda – particularly by tackling key problems associated with social exclusion, such as housing and debt.<sup>5</sup>*

- (c) As a way of seeking to ensure the efficient operation of an adversarial justice system. This is a reason that is often forgotten or glossed over in official accounts but it is surely no coincidence that criminal defendants in England and Wales were given the right to testify on their own behalf in 1898 and the Poor Prisoners’ Defence Act was passed in 1903 to meet the pressing need for representation that this opened up. Similarly, the growth of magistrates’ court jurisdiction in the 1970s was matched by a growth of legal aid in criminal cases. In 1969/70, the cost of legal aid in civil and lower (magistrates) court criminal cases was only £8m. By 1986/87, it had risen to £265m. One factor was a rising divorce rate but another was the growth in jurisdiction of the magistrates’ courts.<sup>6</sup> Statutory regulation of police station interrogations and abolition of the Judges Rules was accompanied in the same legislation by the formation of duty solicitor police station schemes in the Police and Criminal Evidence Act 1984.<sup>7</sup> The reforms were considered as a package – more powers to the police, more protection for the defendant through representation, more funding for solicitors through extended legal aid.
- (d) As an element of the rule of law. Thus, the World Bank has an active access to justice policy and asserts that: ‘Improving, facilitating and expanding individual and collective access to law and justice supports economic and social development.’<sup>8</sup> The UK Department for International Development has a policy on

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<sup>5</sup> Para 3.1 Department for Constitutional Affairs A Fairer Deal for Legal Aid July 2005, Cm 6591

<sup>6</sup> 36<sup>th</sup> Annual Reports of the Law Society and the Lord Chancellor’s Advisory Committee (1985-6) HC 87, HMSO, 1986.

<sup>7</sup> statutes refer to England and Wales except where otherwise indicated.

<sup>8</sup> <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20745998~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>  
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safety, security and accessible justice.<sup>9</sup> The Foreign and Commonwealth Office promotes of access to justice among the rule of law goals of its Global Opportunities Fund.<sup>10</sup> The language would have been foreign to the time but this is probably the heading which best justifies the 15<sup>th</sup> century origins of legal aid: litigation was subsidised in order to promote the legitimacy of the political and legal system.

- (e) As the self-interest of lawyers. The Rushcliffe committee that reported in 1944 and advanced the idea of the national legal aid scheme ultimately passed in 1948 was dominated by the Law Society and determined to prioritise divorce law so that its private practitioners could be allocated the work then being undertaken by salaried lawyers in the services and in the department that the Law Society itself had been forced to create. Again, much matrimonial work of this kind of routine divorce work would now not attract legal aid. A note provided by the Lord Chancellor's Department explaining the Bill made clear the link between assistance to the clients and benefit for their lawyers. Its purpose was:

*To provide legal advice to those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right, and to allow counsel and solicitors to be remunerated for their services.<sup>11</sup>*

There is an undoubted and undeniable interest by the legal profession in legal aid. Like social services, it is provided to the ultimate beneficiaries through intermediaries who, themselves, benefit in the process. As a result, public funding has played a major role in funding and forging the private UK profession. Legal aid has provided, on Law Society figures, more than £1 in every £10 earned by their members – in 2000-1 legal aid provided, for example, 13 per cent of total turnover. For the Bar, the figures appear even higher. In the only year ever disclosed, 1989, legal aid provided 27 per cent of its turnover. Until very recently, legal aid was particularly important as a source of experience and income for young lawyers, both solicitors and barristers – and very widespread. In the 1980s,

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<sup>9</sup> 12/10/00

<sup>10</sup> Chapter 5, *Human Rights Report 2006*, HMSO

<sup>11</sup> Lord Chancellor *Summary of the Proposed New Service* Cmnd 7563 (HMSO, 1948)  
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80 per cent of all solicitors firms would receive a legal aid payment during a year. Most barristers will still undertake legal aid work in the course of their career.

The massive expansion of legal aid in the 1970s and early 1980s had a profound effect on the legal profession in England and Wales. It helped to fund the expansion of the legal profession that allowed entry to women. Legal aid rose from amounting to 7 per cent of all solicitors' income in 1977 to 11 per cent a decade later. During the decade of the 1970s, barristers almost doubled (2,714 barristers to 4,685) and solicitors grew by 50 per cent (from 25,366 to 39,795). This has not stopped the current large degree of unrest among the legal aid lawyers at the present time. It results from the determination of government to reduce the cost, ironically with particular effect in the areas of criminal law guaranteed by human rights. Thus, the Carter review on expenditure foresaw decreases in the following costs over a three-year period from expenditure in 2005-6: from, overall, £1158m to £1038.<sup>12</sup> The beneficiaries of the current expansion of higher education face a very different legal market from that of thirty years ago. Legal aid, at least in crime, is contracting. The consequence will be seen in the structural organisation of the legal profession - in the altered economics of mixed 'High Street' practice and the greater fragility of Bar's organisation based on the individual barrister.

- (f) Finally, as a force for citizen empowerment or 'constitutional inclusion'. In one version, this developed out of the civil rights struggle in the US; was highly political and oriented towards law reform and strategic litigation, as we have seen above; promoted the idea of 'neighbourhood legal services' based around salaried lawyers working in local, shop front, accessible offices and was picked up as part of President Johnson's 'war on poverty' and leadership provided within the federal Office for Economic Opportunity.<sup>13</sup> This caught imaginations around the world and soon networks of community law centres (the UK), community legal centres (Australia), community legal clinics (Ontario) and law shops (the Netherlands) proved that the ideas could successfully be transplanted – often somewhat to the concern of existing private practitioners. In retrospect, some of the language used at this time is interesting for its emphasis on its linking of

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<sup>12</sup> Police station and magistrates court £523m to £503m; Crown court litigation £273m to £245m; Crown court advocacy £362m to £290m, Carter Report on the future of legal aid, 2006

empowerment as a way of combating poverty; its somewhat naïve assumption about the power of the law and the way in which it prefigures – but has a dynamic, more confrontational and very different from – ideas of law in the service of social inclusion:

*Our responsibility is to martial the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.<sup>14</sup>*

The World Bank might wince at the messianic language but its own articulation of the purpose of its access to justice programme deploys a rather similar idea:<sup>15</sup>

*Village communities suffer from chronically low levels of legal awareness. However, they are well aware that the formal legal system is costly, distant and biased in favour<sup>16</sup> of wealthy and powerful interests. This is one factor leading to a strong preference for informal dispute resolution mechanisms. But our research also demonstrates that ordinary villagers have a strong desire to increase their bargaining position through enhanced legal awareness, particularly in fields relevant to their immediate needs - land ownership, access to natural resources, corruption and public service delivery. Yet building awareness of legal rights will achieve nothing in the absence of access to resources to enforce those rights. Villagers are prepared to use the legal system as a last resort if suitably facilitated by trained local paralegals or external assistance in the form of pro bono legal aid lawyers or facilitators from civil society organizations.*

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<sup>13</sup> See *Securing Equal Justice for All*, as above, pp3-9.

<sup>14</sup> Quoted in Handler, Hollingsworth and White *Lawyers and the Pursuit of Legal Rights*, Academic Press, 1978, p5.

<sup>15</sup> World Bank, 'Justice for the poor' programme:

[http://www.justiceforthepoor.or.id/?lang=en&act=about\\_go](http://www.justiceforthepoor.or.id/?lang=en&act=about_go)

<sup>16</sup>

## The forgetfulness of the old

Legal aid in England and Wales currently faces a major crisis. Yet, there is no serious dispute that its provision, particularly in criminal cases, is a necessary part of a government's duty to provide adequate access to justice. Indeed, one very real danger is that legal aid is so entrenched that its ultimate purpose is taken for granted. Thus, a post-election statement of priorities by the Department of Constitutional Affairs stated, indistinctly if rather menacingly: 'Legal aid will be reformed so that it responds to what the public wants and justice requires'<sup>17</sup>. This turned out largely to herald unprecedented cuts. For the countries of central and eastern Europe, however, the position is different. In the early 1990s, as the power of the Soviet Union crumbled, they signed up to the European Convention on Human Rights. Then, little more than a decade later, eight of them joined the European Union (together with Malta and Cyprus) followed in short order by a further two – Romania and Bulgaria.

## Legal aid and human rights

The European Convention distinguishes criminal legal aid – where the obligation is specific – from legal aid in civil proceedings. In the latter, the state must provide a 'fair and public hearing', an obligation which might – in the words of one commentator – 'sparingly' be construed as requiring legal aid.<sup>18</sup> In the celebrated 'McLibel case', the European Court of Human Rights re-stated the principles on which legal aid might, exceptionally, be available in civil proceedings:

*The question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was 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.<sup>19</sup>*

Thus, countries which have signed and ratified the European Convention (now 47) should provide legal aid in criminal proceedings as required by Article 6.2 of the convention and

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<sup>17</sup> [www.dca.gov.uk/dept/dcaprioritiesmay2005.pdf](http://www.dca.gov.uk/dept/dcaprioritiesmay2005.pdf).

<sup>18</sup> C Harlow, 'Access to Justice as a Human Right', in P Alston et al (ed) *The EU and Human Rights*, OUP, 1999; *Steel and Morris v UK*, chamber judgment, 15 February 2005, application number 68416/01.

<sup>19</sup> As above.

also, exceptionally, in civil proceedings. The European Court has been clear that this right should be ‘practical and effective’ and not ‘theoretical or illusory’.<sup>20</sup> The story of the ex-communist countries reveals that these rights were precisely theoretical and illusory for the decade in which enforcement was left to the institutions of the Council of Europe. The European Court of Human Rights plays a major role in determining the duties of those states that accept the convention. However, on this occasion, it was the political power of the European Commission and the European Union that was more important in giving ‘practical and effective’ force to obligations about access to justice.

### **The EU and human rights**

As would be expected from an organisation that progressed slowly from the economic to the political sphere, the European Community was slow to identify a concern with human rights. The Single European Act, signed in 1986, started the process by a reference in its preamble to member states that are:

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

By 1997, the reference to the European Convention and its principles had migrated into the body of the text agreed in the Amsterdam Treaty that came into force two years later:

*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.<sup>21</sup>*

It specifically tied the Union to the standards of the European Convention:

*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.<sup>22</sup>*

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<sup>20</sup> *Airy v Ireland* ECHR (1979) 2 EHRR 305, para 24.

<sup>21</sup> Art 6.1.

<sup>22</sup> Art 6.2.

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'A serious and persistent breach' of the principles by any member state could lead to suspension of rights under the treaty.<sup>23</sup>

The proposed new constitution for the EU, currently stalled by the lost referenda in the Netherlands and France, would have given the Union a separate legal identity (hitherto seen as a barrier to signing the convention); required it to accede to the European Convention directly; and set out in its second part the European Charter of Fundamental Rights and Freedoms that incorporates, but goes beyond, the European Convention.<sup>24</sup> The constitution stated:

1. *The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.*
2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ...*
3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

By this means, the circle was intended to be complete. The Union's member states have all accepted the provisions of the European Convention – despite the restiveness by such as Mr Blair in relation to some of its detail. The Union would join them and, in time, the jurisprudence of the two European Courts in Strasbourg (Council of Europe) and Luxembourg (European Union) would happily converge. In addition, members of the EU would take on board the additional, if legally limited, obligations of the European Charter of Fundamental Rights and Freedoms. Ah, that it could have been so easy. The UK has taken advantage of resistance to the constitution in other countries to seek to unravel the commitment to the charter and to human rights of the EU.

### **The accession process**

Countries wishing to accede to the European Union are required to undertake a process that requires meeting a set of conditions published in some length in an *acquis communitaire*.

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<sup>23</sup> Art 7.

<sup>24</sup> Art 1-9.

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The general principles for accession of the post-communist countries wishing to join the Union after the fall of the Soviet Union were agreed at a 1993 European Council meeting in Copenhagen and included, as one of three 'Copenhagen criteria':<sup>25</sup>

- *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.*

The *acquis* sets no specific conditions in relation to legal aid and access to justice but candidate countries were subject to monitoring on their performance as against the criteria for membership. The reports covered legal aid and access to justice in the context of reporting on performance against the third criteria. For the new entrants in 2004, annual reports culminated in a 'Comprehensive Monitoring Report' published in the previous year. These are important because they represent a 'signing off' of the state's performance at the moment that they joined the EU. Once members, the reports ceased. Members of the EU are not subject to such intrusive monitoring. Some of the comprehensive monitoring reports were highly critical – raising the question of whether governments have made any further response or whether the position remains poor. For example, the comprehensive report on Poland stated that:

*The system of legal aid is still under-developed and organised in a non-transparent way, with the result that citizens are not informed as to their rights.<sup>26</sup>*

One of the legacies of the countries which were formerly part of the Soviet Union has been the ex officio system of legal aid which most incorporated into their new post-Soviet constitutions.<sup>27</sup> Legal aid was seen as a professional duty of lawyers, largely unpaid. There is a deeply ingrained culture of seeing legal aid as a procedural requirement concerned with formality rather than anything more substantial.

Countries under the sway of the Soviet Union tended to have no general statement of principle that was equivalent to the general requirement of 'equality of arms' that underlies Article 6 of the European Convention on Human Rights or the principle that free legal aid should be supplied by the state where 'the interests of justice' require and the defendant has insufficient means to pay. The relevant provisions tended to be specific and without

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<sup>25</sup> <http://europa.eu.int/comm/enlargement/intro/criteria.htm>.

<sup>26</sup> Public Interest Law Initiative 'EU Access Reports Highlight Legal Aid Deficiencies', <http://pili.org/features/PublicationLaunch/>.

<sup>27</sup> The following description is largely taken from E Rekosh, K Buchko, D Manning and V Terzieva 'Access to Justice: legal aid for the unrepresented' in *Access to Justice in central and eastern Europe: source book*, 2003, Public Interest Law Initiative, Bulgarian Helsinki Committee, Polish Helsinki Foundation for Human Rights and Interights.

reference to the underlying reason why legal aid might be desirable. Some cases required the mandatory appointment of a defence lawyer, albeit generally free to the client – primarily where the minimum sentence was above a certain level. No account, however, was taken of maximum or likely lengths of sentence so a degree of arbitrariness was unavoidable. ‘Other criteria for determining if legal representation is mandatory,’ reported one study, ‘include the defendant’s mental or physical condition, age and ability to speak the official language used in court, whether the defendant was subject to pre-trial detention and whether the trial was *in absentia*.’<sup>28</sup>

The method of appointment of lawyers varied, as did provisions as to payment. One study reported.

*In fact, virtually any lawyer can be appointed no matter what his or her field of specialisation, practice or experience is. The prosecuting authorities may either directly appoint a lawyer from a list provided by the local bar or refer the case to the local bar, leaving bar officials to designate the attorney. In either case, once the lawyer has been chosen, no mechanisms exist for initial or ongoing supervision of the attorney.*<sup>29</sup>

A Hungarian study in 1996 revealed the consequence – a massive disparity in service between privately hired and ex officio lawyers. This was illustrated by statistics as to interview – 44 per cent of a sample of detainees had yet to meet their ex officio lawyer; only eight per cent of the sample with privately hired lawyers had yet to meet them. Few or no statistics were kept in any country on the ex officio lawyers. Representation tended to be formal rather than real. Fully overcoming this tradition probably remains to be achieved.

The scrutiny of the European Union caused the candidate states of central and eastern Europe to reconsider their legal aid arrangements – at least in form. Other forces were working in the same direction. The Public Interest Law Initiative (PILI) of Columbia University has a base in Budapest and, now, Moscow. The Open Society Justice Initiative (OSJI) is also based in Budapest. Both have been active in encouraging legal aid in central and eastern Europe. Both have collaborated on two conferences – in 2002 and 2005 – that brought together people from countries in the region. PILI joined with three other human rights groups to produce a two-volume study of access to justice in central and eastern Europe, published

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<sup>28</sup> p6 n13.

<sup>29</sup> p9 n13..

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in 2003<sup>30</sup>. OSJI has been extremely active and has funded two pilot public defender projects – one in Lithuania and the other in Bulgaria. It has facilitated the movement of officials between different European states to examine the operation of different legal aid systems – particularly, in Europe, the English and the Dutch. The Lithuanian and Bulgarian projects have allowed the OSJI an inside experience of the working of the legal system in those countries and it has striven to raise standards – a drive which was the major theme of the 2005 access to justice conference.

### **The new Europe: snapshots before accession to the EU**

The EU provided an audit trail of the state of play in relation to legal aid in the 10 states from central and eastern Europe that have recently joined the Union

#### Bulgaria

The country was criticised in its 2003 monitoring report for the state of its legal aid. Bulgaria has a new law on attorneys, published on 25 June 2004. This requires that an attorney must act for a client if selected by the local Bar Council – a provision taken from earlier Acts. The Open Society Institute has set up a pilot Public Defender Office in Veliko Turnovo with five lawyers. A joint working party of the Ministry of Justice and the Open Society Justice Initiative developed a joint concept paper on legal aid and then a draft Bill in late 2004. This proposes the establishment of an independent Legal Aid Board; would extend legal aid to civil and administrative matters in addition to crime; and requires registration and itemised billing by lawyers acting on legal aid. It is not yet in force.<sup>31</sup> A draft was still before the legislature in June 2007. Prior to accession, the EU pressed that more should be done, stating in its 2004 report on progress to accession:

*Regarding legal aid, studies show limited improvements in access to legal assistance during trial. A significant number of defendants are still being tried without a defence counsel. The situation regarding the pre-trial detention phase has not improved over the reporting period but the adoption of the law on lawyers in June 2004 should*

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<sup>30</sup> n13.

<sup>31</sup> From M Gramatikov 'Legal aid developments: country update on Bulgaria' in Public Interest Law Initiative and Open Society Justice Initiative 2<sup>nd</sup> European Forum on Access to Justice: background materials.

*guarantee some improvement in the access to justice for all citizens. A legal aid fund, separate to the budget of the judiciary, has not yet been established.<sup>32</sup>*

#### Czech Republic

A draft law on legal aid was approved by the Legislative Council of the Czech Government in 2003.<sup>33</sup> The EU final monitoring report was rather favourable:

*Access to justice is satisfactory, however not all citizens may be fully aware of their entitlement. Legal aid is available both in criminal and civil cases, either by virtue of the code of criminal procedure (free legal representation for defendants and victims) or by request to the Chamber of Advocates under the Act on Attorneys.<sup>34</sup>*

#### Estonia

A State Legal Aid Act entered into force on 1 March 2005. This considerably broadened the types of case in which legal aid can be granted – either to natural or legal persons. Only advocates can receive legal aid remuneration, a somewhat contentious limitation. Controversy has also arisen over the requirement that forms must be submitted in Estonian – the country has inherited a large Russian-speaking minority. Significantly, the rate of expenditure on legal aid is budgeted to rise: from €1.7m in 2004-5 to €2.8m in 2005-6.<sup>35</sup>

The final monitoring report's comment was:

*Concerning legal aid, the draft Legal Services Act, which was submitted to Parliament at the end of 2001, has yet to be adopted and may not enter into force before 2005. It is possible to be granted free legal aid by submitting an application to the court for the appointment of a lawyer at the expense of the state. This is provided for in the codes of criminal, civil and administrative procedure and also in connection with administrative offences. However, while free legal aid is routinely granted in criminal*

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<sup>32</sup> p22, European Commission 2004 Regular Report on Bulgaria's Progress to Accession, Com (2004) 657 final. All the monitoring reports can be accessed through the European Union's website: [http://europa.eu.int/comm/enlargement/report\\_2003/](http://europa.eu.int/comm/enlargement/report_2003/).

<sup>33</sup> B Bukovska 'Legal aid developments: country update on the Czech Republic', n18.

<sup>34</sup> p13, European Commission Comprehensive Monitoring Report on the Czech Republic's preparations for Membership, 2003.

<sup>35</sup> T Evas 'Legal aid developments: country update on Estonia', n18.  
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*cases, its availability in civil and administrative cases seems to remain rather limited.*<sup>36</sup>

## Hungary

Hungary passed a Legal Aid Law in 2003 – coming into effect in a first phase from April 2004 and a second in January 2006. This introduces state-funded legal advice and services other than for criminal suspects and defendants; in contrast to Estonia, it welcomes in non-attorney providers such as NGOs. Hourly rates for advice remain somewhat unattractive – the equivalent of €9.93 an hour. A new Code of Criminal Procedure in 2003 at last required the state to provide the cost of legal aid if the defendant was exempted from payment by the court. No change has been made to the ex officio system for criminal proceedings.<sup>37</sup>

The final comprehensive monitoring report stated:

*Legal aid is currently rather restricted. In criminal cases, the state is obliged to provide defence counsel only in limited cases (e.g. if the offence is punishable with more than 5 years' imprisonment), and a defence counsel may be provided as a matter of discretion in other cases. In general, if the defendant is convicted, he must pay all costs. In civil cases, legal aid tends to be restricted to the very poor and to pensioners. Although there is a network of offices offering free legal information, these offices do not represent citizens in trials. The government has undertaken to submit a bill to Parliament to significantly improve the legal aid system before the end of 2003.*<sup>38</sup>

## Latvia

The budget for mandatory legal aid in 2005 was only €648,535.<sup>39</sup> A law had been drafted but was not then in force. Latvia got an admonition from its final monitoring report:

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<sup>36</sup> p13 ibid.

<sup>37</sup> M Pardavi 'Legal aid developments; country update on Hungary', n18.

<sup>38</sup> p12, European Commission *Comprehensive Monitoring report on Hungary's preparations for membership*, 2003, n18

<sup>39</sup> K Jarinovska 'Legal aid developments: country update on Latvia',n18.  
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*In the field of legal aid, planned legislative measures have been delayed. It is important to complete the legal framework to improve citizens' access to justice and to ensure adequate funding of legal aid.<sup>40</sup>*

#### Lithuania

In legal aid terms, Lithuania can claim to be the beacon of the Baltic. This is a country in which the Open Society Justice Initiative has been particularly active. As a result, Lithuania passed a new law on legal aid in January 2005 covering legal advice ('primary legal aid') and aid ('secondary legal aid'). It did not, however, escape criticism in the final monitoring report:

*The situation regarding access to legal aid, particularly in civil and administrative cases, is still unsatisfactory, due to the complexity of the procedure. The new Law on Bailiffs, which entered into force in January 2003, is expected to significantly improve the effective enforcement of judgments.<sup>41</sup>*

#### Poland

The Minister of Justice established a working group on a new draft legal aid law in October 2004 and it proposed a new draft law in February 2005.<sup>42</sup> A comment of the final comprehensive pre-accession report is given above. Overall, the report was damning:

*The access of the public to the judicial system remains limited, especially access to general information on procedures, legal aid and the state of play of an individual's own pending case. In general, the level of public trust in the efficiency and fairness of the judicial system remains low and the perception of corruption by the public is high.<sup>43</sup>*

#### Romania

The 2004 annual monitoring report called for more action on legal aid:

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<sup>40</sup> p13 ibid.

<sup>41</sup> p13, European Commission *Comprehensive monitoring report on Lithuania's preparations for membership*, 2003, n18.

<sup>42</sup> L Bojarski 'Legal aid developments: country update on Poland', n18.

<sup>43</sup> p14 European Commission *Comprehensive Monitoring Report on Poland's preparations for membership*, 2003, n18.

*There are shortcomings in the implementation of the legal aid system and effective defence for the accused is not systematically guaranteed. The lack of precise definitions of the criteria for receiving assistance may lead to arbitrary and non-uniform application of the rules. Better remuneration of lawyers providing legal aid should be ensured to encourage the lawyers to provide such assistance.<sup>44</sup>*

#### Slovakia

The government has committed itself to produce a Law on Free Legal Aid in April 2005.<sup>45</sup>

The final monitoring report was critical of the legal system though seems not to have considered legal aid specifically:

*The level of public trust in the efficiency and fairness of the judicial system remains low.<sup>46</sup>*

#### Slovenia

Slovenia introduced a new Legal Aid Act in 2001, amended in 2004. Expenditure rose from €371,006 in 2003 (itself well over budget) to a budgeted €521,000 in 2004 which was overspent 'by the end of the summer'.<sup>47</sup>

The result was a ticking off about court delays but a pass on legal aid, if somewhat perfunctory, in the final monitoring report:

*Free legal aid is available to socially vulnerable people. It covers both civil and criminal cases.<sup>48</sup>*

### **Lessons from the EU's role in the accession process**

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<sup>44</sup> p25, European Commission 2004 Regular Report on Romania's Progress to Accession, COM (2004) 657 final.

<sup>45</sup> J Hrubula 'Legal aid developments: country update on Slovakia', n18.

<sup>46</sup> p12 European Commission Comprehensive Monitoring Report on Slovakia's Preparations for membership, 2003.

<sup>47</sup> M Anclin 'Legal aid developments: country update on Slovenia', n18.

<sup>48</sup> p13, European Commission Comprehensive Monitoring Report on Slovenia's Preparations for Membership, 2003.

Overall, the EU reports provide a sobering catalogue that illustrate just how ambitious was the undertaking of bringing the accession states from central and eastern Europe up to standards that are reasonably compatible with the Convention standards that theoretically applied in the pre-existing 15 states that they joined. Legal aid is just one part of a justice system and, for a number of states, the specific observation on Slovakia has resonance: there was a wider lack of public trust in the integrity and competence of the court structure. Read these reports and you understand why. Decades of satellite status to a foreign power overwhelmingly depleted confidence in the institutions of government.

From any realistic perspective, the European Union played a remarkable role in the transformation of societies where progress to full national independence only occurred in the aftermath of the dramatic events of 1989, of which the most celebrated image was the fall of the Berlin Wall. It has to be remembered that Russian troops completed their withdrawal from countries now in the European Union only on 31 August 1994 – and not without, as in Lithuania and Latvia, a degree of bloodshed in attempted Russian counter-coups as late as 1991.<sup>49</sup> Within two years of the final Russian withdrawal, the three Baltic states, together with all the other accession states of central and eastern Europe, had signed, ratified and brought into force the European Convention on Human Rights.

There was no way in which accession to the convention such a short time after effective independence could be more than a statement of aspiration. Practically, there was bound to be a distance between the theoretical position of adherence to convention standards and the need for a reasonable transition time to bring standards up to scratch. However, this dissonance was also bound to cause a problem. It clashes with the assertion of the European Court of Human Rights that the convention is more than an aspirational statement of values, specifically in relation to access to justice:

*The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.<sup>50</sup>*

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<sup>49</sup> <http://www.balticsww.com/timeline.htm>.

<sup>50</sup> *Airey v Ireland* ECHR (1979), Series A, No 32, 2 EHRR 305, para 24.  
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It is clear, however, that for this group of countries, the convention represented only an aspirational set of values. The states did not comply with convention principles: realistically, they could not reasonably have done so in so short a space of time since they achieved true independence. It was left to the European Commission to press home the need for the necessary reforms.

The dream of accession within the countries seeking to join the European Union provided the European Commission with a method of enforcement that was lacking for the Council of Europe. This provided a framework within which legal aid, access to justice and, more widely, elements of the rule of law have been scrutinised; reported upon; and responded to, as can be seen above. It is, however, manifestly clear from the cautious observations of the monitors that questions arise as to the final state of equality of arms within the legal systems of these accession countries. Indeed, it would be quite remarkable if it were otherwise.

### **There is more**

The EU's engagement in legal aid standards has gone farther than the harmonisation of its human rights' commitment with that of the European Convention. From the Maastricht Treaty onward, the Union conceived itself as based on three pillars – the third of which was co-operation in judicial and home affairs. Reflecting the political sensitivity of decisions in this area, they were to be taken unanimously and movement has been cautious. Underpinning this movement were provisions that, as expressed in the Amsterdam Treaty (agreed in 1997 and coming into force in 1999) to the effect that:

*The council shall, acting unanimously ... issue directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly effect the establishment or functioning of the common market.<sup>51</sup>*

Two forces – one internal and one external – took the processes of approximation, mutual recognition and co-operation further and faster than might have been expected: the EU itself through decisions taken at the Tampere European Council in October 1999 and the consequences of the events of 11 September 2001. Tampere advanced the idea of a 'union of freedom, security and justice' and, in a phrase that probably sounds better in the French 'a European judicial space'. Tampere set out an ambitious programme which specifically

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<sup>51</sup> Art 94.

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included a section on access to justice. This, in turn, contained a commitment for ‘user’ guides on judicial co-operation and the legal systems of member states and called for:

*minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should be created by Member States.<sup>52</sup>*

Tampere led to a number of uncontroversial developments. For example, the Commission is co-operating with the Council of Europe to produce legal aid information sheets on the countries of Europe and appropriate websites are under construction.<sup>53</sup> A directive was agreed on cross-border legal aid in civil cases – basically giving non-nationals the same rights to legal aid as nationals in such cases.<sup>54</sup>

9/11 intruded on the future of legal aid in the European Union through a side wind. Tampere had called for the replacement of extradition proceedings with ‘simple transfer’.<sup>55</sup> By 20 September 2001, the Council of Members, keen to display solidarity with the US, had agreed a ‘Road Map on Terrorism’ in response to include a fast-track extradition procedure, the European Arrest Warrant. Such was the political drive for agreement that this was forthcoming in record time at a Justice and Home Affairs Meeting in early December. A Framework Decision was approved by the Council on 13 June 2002.<sup>56</sup> To move with such speed, full safeguards for suspects and defendants were left to a separate process. Crucial to these is, of course, legal aid. A suspect facing transfer has relatively few rights but the whole process is subject to the principles of the European Convention (and, thereby, in the UK expressly the provisions of the Human Rights Act 1998).<sup>57</sup> This allows a judge to consider whether a person subject to a request for transfer would receive a fair trial in the requesting country. The UK implemented the warrant relatively unproblematically. Other countries had more difficulty and some had to amend their constitutions, generally in relation to the removal of any distinction between nationals and non-nationals.

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<sup>52</sup> Para 30.

<sup>53</sup> See [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Operation\\_of\\_justice/Access\\_to\\_justice\\_and\\_legal\\_aid/](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/)

<sup>54</sup> Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

<sup>55</sup> Para 35.

<sup>56</sup> See S Alegre and M Leaf *European Arrest Warrant: a solution ahead of its time?* JUSTICE, 2003.

<sup>57</sup> S21 Extradition Act 2003.

The existence of the warrant makes more urgent the need for the implementation of agreed minimum standards throughout the Union. The Commission has pressed on with plans for minimum standards to cover five specific areas:

- legal advice;
- interpretation and translation;
- vulnerable suspects and defendants;
- consular access;
- a letter of rights.

The process reached the stage of a Proposal for a Framework Decision.<sup>58</sup> In an early draft, the provisions relating to legal advice were that:

*A person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.<sup>59</sup>*

*Member States shall ensure that legal advice is available to any suspected person who:*

- *is remanded in custody prior to trial;*
- *is formally accused of having committed a criminal offence which involves a complex factual or legal situation, or which is subject to severe punishment, in particular where in a Member State, there is a mandatory sentence of more than one year's imprisonment ...;*
- *is the subject of a European Arrest Warrant or extradition request or other surrender procedure;*
- *is a minor; or*
- *appears not to be able to understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition.<sup>60</sup>*

*Member States shall ensure that only lawyers ... are entitled to give legal advice ...<sup>61</sup>*

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<sup>58</sup> COM (2204) 328 final (28 April 2004).

<sup>59</sup> Art 2.

<sup>60</sup> Art 3.

<sup>61</sup> Art 4.

*... the costs of legal advice shall be borne in whole or in part by the Member States if those costs would cause undue financial hardship to the suspected person or his dependents.<sup>62</sup>*

These provisions raise the issue of compatibility with the wording of the European Convention – quoted earlier. In the accompanying explanatory memorandum, the Commission made the following assertion – the truth of the first sentence surely being somewhat questionable in the light of the pre-accession monitoring noted above:

*All the Member States have criminal justice systems that meet the requirements of Articles 5 ... and 6 ... of the ECHR. The intention here is not to duplicate what is in the ECHR, but rather to promote compliance at a consistent standard. This can be done by orchestrating agreement between the Member States on a Union wide approach to a 'fair trial'.<sup>63</sup>*

The problem with the Commission's proposed wording is that, in two material ways, it did not duplicate the ECHR. It set a lower standard. The Commission's provisions all refer to 'legal advice' not 'assistance'. And the obligation to provide free legal advice occurs neither on the general grounds of 'the interests of justice' but only in specified circumstances, removing any individual discretion, nor on a test of insufficient means but 'undue financial hardship'. The issue of the definition was taken up by the UK House of Lords European Union Committee which called for clarification.<sup>64</sup> Assurances exist in written correspondence from UK ministers that 'The reference to "legal advice" would implicitly include legal representation'.<sup>65</sup> However, domestic English legal aid legislation has traditionally characterised advice, assistance and representation as three separate functions. It is not clear that a broad interpretation would, in fact, be taken either domestically in the UK or elsewhere.

The fate of this framework decision is currently unclear. Six countries led by Ireland and the UK are resisting its implementation. The Council of Europe is unhappy with redrafting that has been undertaken in a move led by the German presidency to obtain consensus and with the lack of time that it was given to comment.<sup>66</sup> It appears entirely possible that further action

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<sup>62</sup> Art 5.

<sup>63</sup> Para 9.

<sup>64</sup> House of Lords European Committee *Procedural Rights in Criminal Proceedings*, HL Paper 28, 2004-5.

<sup>65</sup> Lord Bassam of Brighton to Roger Smith, JUSTICE, 22 February 2005.

<sup>66</sup> See eg Statewatch analysis, *Rights for Criminal Suspects and EU law* S Peers, April 2007  
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in this area by the EU will be stalled. If so, this will at least temporarily provide a halt to the role of the EU as enforcer of the ECHR – immediately after a period when it has been so useful. However, it leaves us with a group of states, nearly a quarter of the Council of Europe's 47 members, that did not comply – perhaps understandably – with the requirements of the Convention; were exposed by their application to join another organisation, the EU; and required to do so, at least to a limited extent. That poses questions both for the Council of Europe and the European Union.<sup>67</sup> It also underlines the value of a commitment to human rights by political organisations like the Union or, say, the World Bank to human rights standards which, though they might lack the range of motivation behind developments around the world, do provide a relatively clear international standard.

## Conclusion

The conclusions to be drawn from this study require further work. However, at the very least, we can see that human rights can provide a strong motivational force for the growth and protection of legal aid schemes – as in central and eastern Europe. However, as currently enshrined in most human rights instruments, human rights offer at best only a partial justification for states to implement legal aid schemes – even when allied to an anti-poverty strategy. Furthermore, there is a further degree of fragility in the operation of mechanisms of enforcement imported by human rights instruments. This is so even for the structure around the European Convention on Human Rights and an attendant court that openly professes to articulate standards that are 'real and effective, not theoretical and illusory'.<sup>68</sup> Yet, actual progress in a sizeable block of countries, amounting to roughly a quarter of the current members of the Council of Europe and a tenth of that of the United Nations, has required the political impetus of the European Union rather than the legal weight of the court. This illustrates the value of a human rights commitment in bodies whose main focus is political, social or economic. However, that commitment can become highly contentious when it threatens stronger implementation of human rights standards than is comfortable for member states.

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<sup>67</sup> Articles 6 and 7

<sup>68</sup> See below.

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