The Contribution of the European Charter of Human Rights to the Right to Legal Aid

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The life of the society depends on the individual rights.
(Herbert Spencer)[1]

1 Introduction

In many countries, legal aid is an indispensable tool in order to ensure that everybody has access to the judicial system. Effective access to the judicial system is necessary in order to enliven fair trial guarantees. The rule of law requires not only that all are under, that is, bound by, the law but also that all can take refuge under the law in order to protect their rights. The high cost of legal services as compared to the average income in many countries, though, often provides a barrier that prevents those who require legal services from actually obtaining them. While insurance schemes[2] can provide a way to offset some of these costs, many potential clients decide against such forms of insurance because attorney fees are seen as a low-probability risk. From the perspective of the client, it is unlikely that one will be in need of an attorney. If this risk is then realized in the form of a legal dispute for which expert advice or even representation in the courtroom is required, the low-probability risk turns into a high-cost expense. This can lead to those who actually have a valid claim to forgo it for want of the funding that would be necessary to pursue the claim in the first place. This problem can be solved not only through voluntary *pro bono* services but more effectively through granting

[1] Quote taken from Pasca (2011), p. 1 *et seq*., at p. 1.

[2] On the importance to insurance schemes for the access to court, see also Regan (2003), p. 49 *et seq*.; van Velthoven and Klein Haarhuis (2011), p. 587 *et seq*.

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legal aid.[3] While it might at first sight seem unfair that society at large should cover the expenses of a private pursuit, in particular if insurance services are available, it has to be kept in mind that the losing party will usually be required to pay the costs incurred by the victor. If the party to a court dispute that has received legal aid wins the case, the opponent effectively will have to cover the costs that were initially borne by the state, hence turning legal aid into a kind of credit that is paid back not by the initial beneficiary but by the other party in the dispute. This course of events can be made more likely by screening cases prior to a decision as to whether or not legal aid is granted.[4] Just like a state has to provide a base investment in order to establish and maintain a functioning judicial system, for example, by paying for the maintenance of court buildings or the salaries of judges and other employees, the state will be required to spend money on the establishment and permanent maintenance of an effective judicial system in which everybody can participate without discrimination regarding their financial means. The rule of law and legal certainty are fundamental elements of an environment that is conductive not only to a harmonious co-existence within a society and the protection of individual rights. Their importance for the conduct of business transactions and as a fertile ground for economic development can hardly be overestimated. States therefore have an interest in a functioning judicial system that goes beyond their fair trial obligations. In other words, a functioning judicial system pays off—and providing legal aid can make sense from an economic perspective as well. (It has to be noted, though, that in order to be effective, a legal system does not necessarily have to allow for a nearly unlimited number of lawsuits through which individuals can permanently block important development measures—although any generalization in this regard appears dangerous as it might lead to the neglect of rights in individual cases.)

In Europe, despite the pride of place that is rightly given to the European Convention on Human Rights,[5] human rights guarantees are found also within EU law. EU human rights have long been known to be relevant in the context of fair trial guarantees in general, for example, as they pertain to European Criminal law.[6] But while legal aid makes sense from the perspective of the state and is important for many persons who are involved in legal disputes, the question needs to be asked whether, and if so, how, the European Charter of Human Rights contributes to strengthening the right to legal aid?

The European Court of Justice has been developing the idea of human rights in Community (and later Union) law since the late 1960s.[7] This approach was necessary because the human rights contained in the Convention did not bind the

[3] On the comparative degrees of effectiveness of *pro bono* services and legal aid, see Gruodytė and Kirchner (2012), p. 43 *et seq*.

[4] The allocation of costs described here mirrors the current legal situation with regard to cases in civil and administrative laws in Germany.

[5] European Treaty Series No. 5, http://conventions.coe.int/treaty/en/treaties/html/005.htm.

[6] See Kirchner (2003), p. 127 *et seq*.

[7] Klein and Scherer (2002), p. 2.

Community directly and because Community and Union laws take precedence[8] over the laws of the member states.[9] Unlike the European Convention on Human Rights, the European Charter of Human Rights does not primarily apply to states but rather to the EU itself[10] and to EU member states when they implement EU law.[11] It has entered into force only on 1 December 2009 with the Treaty of Lisbon.[12] The Charter rights were already included in the failed draft Constitution and stand in the tradition of the human rights that have been developed in the jurisprudence[13] of the European Court of Justice over the last decades. In Europe's multilevel system of governance, the European Charter of Human Rights does not stand alone but has to be seen in the context of not only the human rights that are guaranteed by national constitutions but also the European Convention on Human Rights.[14] In fact, both the Convention and the Charter are to be interpreted in identical ways:

> In early 2011, the presidents of the ECtHR and the EU's European Court of Justice signed a joint declaration to the effect that the human rights contained in the EU's Charter of Fundamental Rights[[15]] and in the ECHR are to be interpreted in parallel.[[16]] This parallel interpretation serves to prepare the eventual accession of the European Union to the ECHR.[17]

This parallel interpretation is a direct consequence of Article 6 (2) of the EU Treaty,[18] according to which

> [t]he [European] Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[19]

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[8] European Court of Justices, *Costa v E.N.E.L.*, Case 6/64, Judgment of 15 July 1964.

[9] Klein and Scherer, p. 2.

[10] Klein and Scherer, p. 6.

[11] Klein and Scherer, p. 6; see also Frenz (2009), p. 138.

[12] Official Journal 2007 C 306, p. 1 *et seq*.

[13] For example, European Court of Justice, *Nold v Commission*, Case 4/73, Judgment of 14 May 1974; European Court of Justice, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, Judgment of 17 December 1970.

[14] On the relationship between human rights under EU law and human rights under the ECHR, see Peters (2003), p. 27 *et seq*.; Grabenwarter (2008), p. 26 *et seq*.

[15] EU Charter of Fundamental Rights, Official Journal of the European Union 2000 C 364, p. 1 *et seq*.

[16] *Joint communication from Presidents Costa and Skouris*, Strasbourg and Luxembourg, 24 January 2011, available online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

[17] Kirchner (2012), p. 147, footnotes renumbered and reformatted.

[18] A consolidated version is published in Official Journal 2012 C 326, p. 13 et seq.

[19] Art. 6 (2) EU Treaty.

That the jurisprudence of the European Court of Human Rights has to be taken into account in the interpretation of Article 47 of the Charter has already been decided by the European Court of Justice in *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany*.[20]

In this text, we will attempt to answer this question by looking at the topic from the perspective of both practicing attorneys and academicians. Based on our practical experience, we will begin with the need of poor clients for legal aid, as well as the regulation of legal aid in different states. Afterwards, we will look at the right to a fair trial as it pertains to legal aid, paying attention to legal aid in different cases before answering the question of the EU Charter's impact on legal aid.

2 Legal Aid

2.1 The Need for Legal Aid

Historically, the beginning of legal aid in Europe is related to the Age of Enlightenment[21] in which equality before the law and equal rights were established with the basic aim of creating equal opportunities for individuals to obtain justice.[22] Legal aid was initially known as the law for the underprivileged,[23] which was actively introduced in European countries, together with ideas regarding the reduction of costs.[24] Some sources indicate that already in the fifteenth century first legislation regarding the provision of legal aid has been enacted.[25] For example, in Scotland the right to defense counsel had become common by the 1520s at the latest; in the Holy Roman Empire, the *Codex Carolinus* of 1532 recognized the right to a defense counsel,[26] while in such EU countries as France and England legal acts prohibited the usage of defense counsel (with certain exceptions[27]) for persons

[20] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 37.

[21] Usually, the concept of public support for those who are facing legal proceedings is associated with the seventeenth and eighteenth centuries, Age of Enlightenment, in: New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Age_of_Enlightenment; Hackett (1992).

[22] Kiraly (2010), pp. 57–74 *et seq*., at p. 59.

[23] Which aim to ensure possibility of participation in a legal procedure notwithstanding the financial abilities of an individual in order not to be just privilege of the wealthy, Kiraly (2010), pp. 57–74 *et seq*., at p. 57.

[24] Cited in Kiraly (2010), pp. 57–74 *et seq*., at p. 57.

[25] The Act was drafted in England, Regan (1999–2000), pp. 383–404 et seq., at p. 386.

[26] Wasser (2005), p. 186 *et seq*., at p. 189.

[27] In both countries, the judge was empowered to make exceptions and assign counsel to the accused, Wasser (2005), p. 186 *et seq*., at p. 189.

accused of crimes.[28] However, before the emergence of the state legal aid, such an assistance usually consisted of various forms of "charity" or *pro bono* work by legal professionals, i.e., providing services to the poor at little or no cost.[29] This in turn is a reminder of the fact that in ancient Greece, the provision of legal advice by those who had knowledge of the law was supposed to be free of charge.[30]

Only in the eighteenth and nineteenth centuries the rules of underprivileged law became a social duty of the state as the previous rules were unable to help the poor effectively. For example, in Hungary legal aid developed from underprivileged law to a social responsibility of a State only in the later nineteenth century.[31] In Finland, legal aid was provided by attorneys as late as 1896.[32] The most significant developments of state legal aid happened after World War II as many governments established state legal aid schemes, thereby allowing equal justice becoming more attainable for people.[33]

Nowadays, States should guarantee access to justice as a human right that requires the state to take a positive action, a *status positivus* obligation. In order to have a functioning judicial system, it has to be accessible *de facto*,[34] as

> the equality principle underpinning the rule of law places the state under an obligation to formalize the theoretical right of access to justice into a substantive citizen right to both civil and criminal legal aid.[35]

In a democratic society, everybody is entitled to the right to justice and to choose the various available kinds of legal services. The efforts of citizens themselves while trying to implement their rights and to protect them are insufficient; therefore, the state is obliged to help them to exercise their rights and, in a case of an infringement, to defend them.[36] *The availability of legal defense principle both in national and international level is treated as one of the most fundamental legal principles, requiring each state to create such a mechanism of legal defense which could ensure real and effective protection of violated rights and interests of the individual concerned*,[37] which indicates that in cases when this right is depending on the financial status of the individual, the state has a positive obligation to provide state-supported legal aid. However, this State obligation could not so easily be

[28] In France, article 162 of the 1539 Criminal Code forbade the use of defense counsel to any person accused of a crime; the same regulation was reinforced by the next major code in 1670, while in England defense counsel was normally denied to people accused of felonies, Wasser (2005), p. 186 *et seq*., at p. 187.

[29] Regan (1999–2000), pp. 383–404 et seq., at p. 386.

[30] Bers and Lanni (2003), p. 3.

[31] Kiraly (2010), pp. 57–74 *et seq*., at p. 60.

[32] Vendidinen (2008), pp. 135–146 et seq., at p. 137.

[33] Regan (1999–2000), pp. 383–404 et seq., at p. 387.

[34] Gruodytė and Kirchner (2012), p. 43 *et seq*.

[35] Sommerlad (2004), pp. 345–368 *et seq*., at p. 351.

[36] Vaišvila (2000), p. 383.

[37] Krolienė (2010), pp. 116–135 *et seq*., at pp. 116–117.

implemented in practice if an individual is indigent because he/she cannot afford lawyers (especially the best ones) or to bear the costs of the legal procedure.

If the State is not able to ensure the right to legal aid, human rights, including the right to a fair trial, become worthless and people will distrust in democracy and its values. But legal aid that is provided by the state must be balanced because "*tax payers in the end have to finance state aid [. . .] but State resources are limited*"[38] and it is necessary for states to make choices.

2.2 Legal Aid in Selected EU Member States

The EU Commission indicated that "despite the fact that the law and criminal procedures of all Member States are subject to ECHR standards and must comply with the EU Charter when applying EU Law, there are still doubts about the way in which standards are upheld across the EU".[39]

In the course of European integration, the matters related to criminal issues (which are closely related to the principle of fair trial and the right to defense counsel) developed gradually,[40] and now the principle of mutual trust[41] dominates in the area of freedom, security, and justice, which is treated as a cornerstone of judicial cooperation in civil and criminal matters because only in such cases that the necessary approximation of legislation, cooperation between competent authorities, and protection of individual rights may be guaranteed.[42] The principle of mutual trust is seen as an important instrument for protection of individual rights, and this issue is stressed in various EU documents,[43] and the importance afforded to this principle appears to be only natural as the trust in the legal systems of other EU

[38] Commission of the European Communities, State Aid Action Plan "Less and better targeted state aid: a roadmap for state aid reform 2005–2009" (Consultation document), Brussels, 7.6.2005, COM (2005) 107 final, section 8.

[39] EU Commission Green Paper "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention". Brussels, 14.6.2011, COM (2011) 327 final, p. 3.

[40] Gruodytė and Kairienė (2009), p. 32 *et seq*.

[41] Because of the introduction of the mutual trust principle as a leading one, criminal law cooperation has been systematically biased towards law enforcement, Wolfgang (2011), art. 3.

[42] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, Official Journal 2010 L 280, section (1), 26.10.2010.

[43] For example, the Programme of measures to implement the principle of mutual recognition of decisions in criminal Matters (2001/C 12/02), Official Journal 2001 C 12, 15.1.2001, p. 10; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, Official Journal 2010 L 280, section (1), 26.10.2010.

countries is based on the shared respect for human rights and freedoms and on the principles of freedom and democracy. Notwithstanding recent progress in the EU[44]

> many Member States still do not offer sufficient fundamental rights protections for suspects and defendants, and without an enforceable right to access a lawyer, the basis for mutual trust is lacking.[45]

In European countries, access to justice and legal aid (especially in criminal cases) is usually guaranteed by the Constitution and statutory laws,[46] but evaluating if the state legal aid is ensured just in criminal cases or if provisions are more general, the states show that the cases at hand may be divided in two big groups. For example, Article 24 of the Constitution of the Italian Republic[47] declares that "Defense is an inviolable right at every stage and instance of legal proceedings" and that "the poor are entitled by law to proper means for action or defense in all Courts"; in Finland, the right to legal help regardless of one's economic situation is guaranteed by section 21 of the Finnish Constitution,[48] which means that the legal aid for indigent people is guaranteed without difference between civil or criminal matters. The Belgian Constitution contains a rather general norm that states that "Everyone has the right to lead a life in keeping with human dignity",[49] and the right to legal aid is identified in the Belgian Constitution together with other rights as a one constituent of human dignity.[50] In other states, for example, Cyprus, Spain, or Lithuania, the right to legal aid is declared expressly in the Constitution—but only as far as criminal cases are concerned.[51]

In scientific literature,[52] State legal aid services are divided into two groups: "inside" litigation, i.e., helping people to defend their rights in courts (including legal representation, legal advice, and duty solicitor services), and "outside" litigation (such as legal advice and information; minor assistance with documents,

[44] For example, the proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326 final.

[45] Fair Trials International (2012), p. 2.

[46] Bolocan (2002), p. 64.

[47] Constitution of the Italian Republic, Article 24, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[48] Kosonen and Tolvanen (2010), pp. 233–256 *et seq.*, at p. 244.

[49] The Belgian Constitution, Article 23, http://legislationline.org/documents/section/constitutions.

[50] The Belgian Constitution, Article 23, http://legislationline.org/documents/section/constitutions.

[51] The Constitution of Cyprus states that in case of the arrest of a person, he or she shall be allowed to have the services of a lawyer of his or her own choosing, Constitution of the Republic of Cyprus, Article 11, http://www.kypros.org/Constitution/English/appendix_d_part_ii.html; the Constitution of Lithuania guarantees the right to the defense only in criminal matters from the moment of the detention or first interrogation, Constitution of the Republic of Lithuania, Adopted by citizens of the Republic of Lithuania in the Referendum of 25 October 1992, Valstybės žinios [Official Gazette], 1992-11-30, Nr. 33-1014, article 34. An analogous right is guaranteed in Spain, Bolocan (2002), p. 64.

[52] Regan (1999–2000), pp. 383–404 et seq., at pp. 385–386.

letters, telephone calls; public education and training), i.e., assistance not related to litigation.[53] In our opinion, the provision of both types of services is necessary in order to ensure equal justice. Therefore, both types of legal aid should be provided. This is the case, for example, in Lithuania and Germany. In both states, two kinds of legal aid are provided: primary legal aid (legal advice and drafting of some small documents) and secondary legal aid (representation in courts and preparation of court documents). The organization of how legal aid is provided differs somewhat between those two jurisdictions: in a majority of Germany's 16 federal states legal aid is provided by attorneys, while in remaining states by court employees.[54] In Lithuania, it is an institution that makes a decision if a person is unable to pay and needs legal aid; in Germany, it is the local court of the applicant's place of residence in Germany. While in Lithuania the primary legal aid is organized and provided by municipal institutions, every person is entitled to it regardless of his/her income or property. The secondary legal aid is given by attorneys selected by the State[55] through State legal aid services established in five biggest cities in Lithuania. In Germany, every attorney is obliged to provide legal aid (with some exceptions) if a person gets a special document from the court (*Beratungshilfeschein*). In Lithuania, the State legal aid service is provided by the institution, which evaluates if a person is entitled to secondary legal aid and provides him/her with an attorney, i.e., if the person is not able to get any attorney he/she wishes, he/she may just choose from the ones who are on the list. In Germany,[56] as in many EU countries (example Sweden, Netherlands, Austria), but not Lithuania, legal aid insurance (Legal Expenses Insurance, LEI) is widely developed, but it has limitations particularly with regard to advice (instead of representation) and in the fields of criminal and family laws, while legal aid is usually "*available for all areas of litigation and for representation in criminal cases, subject to a means and merits test*".[57]

In Sweden, up till 1997, the state legal aid model, introduced in 1970, was comprehensive and generous, as legal aid was provided for most legal problems. It also was universal because it was available to most of the population.[58] As Bernard Michael Ortwein indicated, "*Through a combination of public legal aid and private legal insurance, it seems that no citizen in Sweden is denied access to legal assistance due to an inability to pay*".[59] In 1980–1990 because of difficult economic situation in Sweden, as in other Nordic societies, less finances were foreseen for welfare programs, including legal aid; thus, there was an increase in charges for legal aid, increase in contributions from the clients for litigation, and tightening of eligibility. criteria.[60] While after reform in 1997 the scheme of State legal aid in

[53] Regan (1999–2000), pp. 383–404 et seq., at pp. 385–386.

[54] Gruodytė and Kirchner (2012), p. 43 *et seq*., at p. 54.

[55] The details may be found in the article Gruodytė and Kirchner (2012), p. 43 *et seq*., at p. 50.

[56] On Legal Expenses Insurance in Germany, see Buschbell (2007), p. 63 *et seq*.

[57] Kilian and Regan (2004), pp. 233–255 *et seq*., at p. 237.

[58] Regan (2003), No. 1, pp. 49–65 *et seq*., at p. 52.

[59] Ortwein (2003), pp. 405–446 *et seq*., at p. 425.

[60] Regan (2003), pp. 49–65 *et seq*., at p. 53.

Sweden in civil cases was reformed and shifted from public to private as in certain specified cases (such as most civil and family court cases), Sweden must rely on their Legal Expense Insurance policy that restricts state legal aid.[61] As a consequence of the reform, many public law offices were closed,[62] but the criminal legal aid was not touched and remains the most generous in Europe.[63] An accused individual in criminal cases is entitled to a public defense counsel (advocate) appointed by the court and, additionally, to compensation for the costs of preparing a defense (usually such as production of evidence, traveling expenses, and subsistence).[64]

In the Netherlands, state legal aid was introduced by law in 1958, followed by the establishment of Legal Aid Bureaus 1974, after various reforms (in 1994 and 2005/2006) replaced by the Legal Services Counters.[65] The model partially resembles earlier analyzed approaches because legal aid consists of primary and secondary legal aid. Every individual is entitled to free primary legal aid, which is provided by the Legal Services counters and is basically related to provision of general information about rules, regulations, legal procedures; clarification of the nature of the problem; giving of advice in simple legal matters; and reference of clients to private lawyers and mediators. On the other hand, the secondary legal aid consists of extended consultation (more than one hour) and actual legal aid and is provided by private lawyers only. The main difference of this from the Lithuanian model is that the client may contact a lawyer by himself or may be referred by the legal aid services counter. But a lawyer willing to provide such services must be registered with the legal aid board.[66] However, during the aforementioned reforms, the previously more generous state legal aid scheme gradually became more limited as they are being provided only to poorer people[67] and is subject to a private contribution depending on the level of income and wealth.[68] Another difference from the Lithuanian model is that, like in Sweden, the State legal aid model is combined with the legal expenses insurance, which is steadily growing while the

[61] After the legal reform under LEI policies, legal advice (which previously was 2 h) is not offered and usually Swedes should pay at least some costs of legal services for court cases and are discouraged from seeking advice, Regan (2003), pp. 49–65 *et seq*., at p. 62.

[62] Regan (2003), pp. 49–65 *et seq*., at p. 50.

[63] The defense counsel is offered to all criminals free of charge for serious crimes, not taking into account income or property issues of a criminal, Regan (2003), pp. 49–65 *et seq*., at pp. 62–63.

[64] Ortwein (2003), pp. 405–446 *et seq*., at p. 425.

[65] Poor citizens depending on their property and income were entitled to receive free of charge or by paying a small price the assistance of lawyer reimbursed by the State, van Velthoven and Klein Haarhuis (2011), pp. 587–612 *et seq*., at p. 589.

[66] Legal Aid Board (2013), p. 3 *et seq*.

[67] The person is eligible if the maximum income per family per year is 34,400 euros, and 24,000 euros for single, van Velthoven and Klein Haarhuis (2011), pp. 587–612 *et seq*., at p. 589.

[68] The private contribution is divided into five classes, ranging from 100 euros up to 750 euros per one assignment; court fees for less-well-endowed individuals are reduced by 50 or 75 %, but a losing party, even poor, must compensate the legal expenses of the winning party, van Velthoven and Klein Haarhuis (2011), pp. 587–612 *et seq*., at p. 590.

importance of legal aid is receding as a result of budget cuts.[69] The LEI usually covers legal disputes related to housing, medical errors, fiscal affairs, work and income, asset management, and motor vehicle accident policies. But it is controversial as it has some clear disadvantages for low-income citizens, though the disadvantages are compensated by some advantages (improvement of the process of problem resolution; as more disputes are solved by settlement, the procedure is cheaper as at first the problem is dealt by the staff of the insurer and only if not solved is the client able to choose the lawyer).[70]

In Finland, the Law on General Legal Aid and the Law on Free Trials were passed in 1973, vesting legal aid in the hands of municipalities. From 1998, legal aid was transferred from municipalities to the state.[71] Usually a private counsel is paid his fees and expenses from public funds when acting by virtue of the Criminal Procedure Code as a public defense counsel or counsel of the complainant because the defendant has a right to choose his own counsel or when acting by virtue of the Legal Aid Law as a trial counsel.[72] The Finnish model is really generous in its provision of legal assistance in litigation, while less opportunities are given for dealing with legal problems of everyday life.[73]

It may be concluded "*that legal aid and access to the courts are fully available in many countries although in some they are accessible only to the poorest*",[74] the newest tendencies being diversification of legal aid and constant search for better and cheaper solutions.

3 The Right to a Fair Trial as the Legal Basis for Legal Aid

3.1 Legal Aid as an Essential Element of a Fair Trial

> *It is better that ten guilty persons escape than that one innocent suffer*
>
> -Sir William Blackstone (1765)[75]

In 2011, over 11 % of the clients of the non-governmental organization Fair Trials International reported being denied access to a lawyer during their police interview in the EU.[76] The concept of fair trial is rather complex, incorporating many

[69] van Velthoven and Klein Haarhuis (2011), pp. 587–612 *et seq*., at pp. 591, 604.

[70] van Velthoven and Klein Haarhuis (2011), pp. 587–612 *et seq*., at pp. 591, 606.

[71] Vendidinen (2008), pp. 135–146 et seq., at p. 137.

[72] Vendidinen (2008), pp. 135–146 et seq., at p. 137.

[73] Vendidinen (2008), pp. 135–146 et seq., at p. 137.

[74] Kiraly (2010), pp. 57–74 *et seq*., at p. 64.

[75] William Blackstone. *Commentaries on the Laws of England*, 1765, http://www.lonang.com/exlibris/blackstone/index.html.

[76] Fair Trials International (2012), p. 1.

components, such as free access to justice; examination of the case in a fair, public trial and within a reasonable time; examination of the case by an independent, impartial court; and publicity of the sentencing.[77] But for the purposes of this article, we are examining only legal aid (the defense right) as an essential element of a fair trial, i.e., the right of the parties to be assisted by a lawyer chosen by them or an appointed lawyer. In a fair trial, nobody "*should be deprived of freedom at the hands of the state without first having the opportunity to test the allegations and supporting evidence in a court of law, and then only after being found guilty*".[78]

The defense right may be treated as a positive procedural (opposite to substantial) obligation of the State because a State must take necessary actions in order to ensure that the usage of this right would be effective.[79] The principle of effectiveness could be used to measure identification of positive right and in establishing its limits—effective protection of human rights and freedoms requires the state to take actions in order for the usage of respective right or freedom to be effective.[80]

If an individual is not guaranteed the right to legal advice and representation, it may be the case that a person does not understand his or her legal rights and therefore will not be able to exercise them properly. *Not only are individuals suffering serious injustices, as our cases demonstrate, but time and costs are also being wasted due to subsequent appeals and delayed proceedings, when suspects are not provided with legal advice and representation sufficiently early in the case*.[81]

3.2 The Right to a Fair Trial Under the European Convention on Human Rights and the EU Charter

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) enshrine the right to a fair trial. The issue of legal aid under Art. 6 ECHR was already decided in the 1979 case of *Airey v. Ireland*,[82] in which

> it was held that, although the right of access to court does not imply an automatic right to free legal aid in civil proceedings, it may imply the obligation on the part of the State to provide for the assistance of a lawyer to persons in financial need. This is the case when legal aid proves indispensable for an effective access to court, either because legal

[77] Pasca (2011), p. 1 *et seq*., at p. 1.

[78] Ardrill (2000), pp. 3–8 *et seq*., at p. 3.

[79] Urbaitė (2009), pp. 123–144 *et seq*., at p. 126.

[80] Urbaitė (2009), pp. 123–144 *et seq*.

[81] Fair Trials International (2012), p. 5.

[82] European Court of Human Rights, *Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, para. 24 *et seq*.

representation is rendered compulsory of by reason of the procedural complexity of the case. The State may also, if appropriate and possible, opt for abolition of compulsory representation and simplification of procedure to the effect that effective access to the court no longer requires a lawyer's assistance.[83] Moreover, an certain financial threshold for the legal costs to be incurred may be acceptable.[84] In the *Aerts* Case the Court adopted the opinion that legal aid may not be refused by the competent authority on the sole basis of the latter's assessment of the prospects of success of the review, unless the assessment is made by a court.[85] In the *Gnahore* Case the Court specified this by stating that the fact that representation by a lawyer was obligatory, had been decisive. It accepted the refusal of legal aid for reason of lack of any serious cassation ground in a case where legal representation was not required and the procedure of selection offered several guarantees.[86] The same position was adopted in the *Essaadi* and *Del Sol* Cases.[87] If an *ex gratia* offer has been made, but is refused by the applicant, the latter cannot complain about lack of effective access.[88,89]

This jurisprudence of the European Court will have to be taken into account when interpreting the Charter. But when we compare Article 47 of the Charter and Art. 6 of the Convention,[90] we will see that the Charter actually goes one step further than the Convention and includes a right to legal aid *expressis verbis*. Article 6 of the European Convention on Human Rights reads as follows:

Article 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

[83] European Court of Human Rights, *Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, para. 24 *et seq*.

[84] European Court of Human Rights, *Glaser v. the United Kingdom*, Application no. 32346/96, Judgment of 19 September 2000, para. 99.

[85] European Court of Human Rights, *Aerts v. Belgium*, Application no. 25357/94, Judgment of 30 July 1998, para. 60.

[86] European Court of Human Rights, *Gnahore v. France*, Application no. 40031/98, Judgment of 19 September 2000, para. 40 *et seq*.

[87] European Court of Human Rights, *Essaadi v. France*, Application no. 49384/99, Judgment of 26 February 2000, para. 33 *et seq*., and European Court of Human Rights, *Del Sol v. France*, Application no. 46800/99, Judgment of 26 February 2000, para. 23 *et seq*.

[88] European Court of Human Rights, *Andronicou and Contantinou v. Cyprus*, Application 86/1996/705/897, Judgment of 9 October 1997, para. 200.

[89] van Dijk et al. (2006), p. 562. Footnotes edited and renumbered.

[90] On Art. 6 ECHR see in more detail Janis et al. (2008), p. 718 *et seq*.

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(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;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 47 of the Charter of Fundamental Rights of the European Union has the following text:

> Article 47 Right to an effective remedy and to a fair trial
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*[91]

One might wonder why the right to legal aid is expressively included in the Charter but not in the Convention. To begin with, the Convention does not only provide a simple rule requiring the right to a fair trial, but it is already fairly detailed. The right to a fair trial under Article 6 ECHR includes a right to access to court.[92] Why then was legal aid not expressly included in the wording of Article 6 ECHR? In the jurisprudence outlined earlier, we have seen that the right to access to court was not thought to include a right to legal aid *per se*[93] but that this particular aspect of the right to a fair trial was developed over time. The Charter of Fundamental Rights of the European Union obviously is a much later document than the European Convention on Human Rights, and one possible conclusion is that the right to legal aid was included in Article 47 of the Charter because by the time this norm was drafted the right to legal aid—and its connection to access to justice, which is reflected in the wording of Article 47 of the Charter—had become clearer. But such a conclusion would miss part of the picture because the conditions of the time when the European Convention on Human Rights was drafted have to be taken into account as well. Back then, the drafters were still under the influence not only of the impression the horrors of the Shoa and World War II had left on Europe but also of the beginning Cold War. The Convention was a Western European project,

[91] Emphasis added.

[92] European Court of Human Rights, *Golder v. the United Kingdom*, Application no. 4451/70, Judgment of 21 February 1975, para. 34 *et seq*.; see also Ovey and White (2006), p. 170; Reid (2007), p. 85 *et seq*.

[93] European Court of Human Rights, *Glaser v. the United Kingdom*, Application no. 32346/96, Judgment of 19 September 2000, para. 99.

and it does not require much in terms of imagination that virtually everything that smelled of socialism was suspect at this time. That can explain why the right to property did not make it into the Convention. Given its importance, that right was to become codified with Article 1 of the Protocol No. 1 to the Convention.[94] Likewise, the fair trial guarantees under the Convention were broadened[95] with Protocol No. 7 to the Convention.[96] Protocol No. 7 dates back to 1984,[97] well after the aforementioned 1979 decision in *Airey*, indicating an unwillingness of the states that were involved in the drafting of Protocol No. 7 to include a right to legal aid.

This comes as no surprise because the right to legal aid is not only a political but also a social right, to use the parlance of human rights lawyers. Political rights are those that have an element of freedom, such as free speech, freedom of assembly, freedom of religion, etc. Usually the obligation incumbent on states in this context is a negative one, meaning that states have to refrain from infringing upon these rights. The right to property, on the other hand, is a social right. Social (or economic, as well as cultural) rights[98] are considered second generation rights even though, for example, for John Locke the right to property was the starting point for discourses on rights.[99] The right to access to court and the right to a fair trial are classical examples of political rights. The moment one adds a financial dimension, though, things change dramatically: the right to legal aid is not only a political but also a social right—and as such might have been suspect also during these coldest times of the Cold War in the early 1980s.

If now the Charter and the Convention are to be interpreted in parallel, the fact that one of these documents recognizes the hybrid right that is the object of our investigation while the other one does not mention it at all is bound to raise questions. One question is whether the inclusion of the right to legal aid in the Charter merely provides the fundament on top of which the conclusions of the jurisprudence of both the European Court of Human Rights and the European Court of Justice are added or whether Article 47 of the Charter is the point of departure for an entirely new development. This question can be answered by looking at the specific jurisprudence of the European Union's courts with regard to the right to legal aid under Article 47 of the Charter. In other words, the question is does the Charter provide anything new to our understanding of the right to legal aid?

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[94] A consolidated version is available online at http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

[95] But some problems remain: see Kirchner (2011), p. 4 *et seq*.

[96] Available online at http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm.

[97] Protocol No. 7, http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm.

[98] On social and cultural rights as a category of legal theory, see Steiner et al. (2007), p. 263 *et seq*.; Ssenyonjo (2010), p. 49 *et seq*.

[99] Kirchner (2008), p. 35.

3.3 Case Law on the Issue of Legal Aid Under Article 47 of the Charter

At the time of writing,[100] there are a number of cases that involve legal aid issues, but only a few of them are truly relevant for our purposes. The European Court of First Instance has been asked to provide legal aid[101] [which does not come as a surprise: after all, it is directly bound by Article 47 (3) of the Charter], but these decisions were made on the basis of the rules of procedure rather than the Charter. The interpretation of Article 47 (3) of the Charter therefore is not as easy at it might seem to be at first sight.

Rather, Article 47 (3) of the Charter appears to provide a significant challenge: recently, the Tribunale de Tivoli has asked the European Court of Justice in two cases: "Does Article 130 of Presidential Decree No 115 of 30 May 2002 on legal aid in Italian law - insofar as it stipulates that amounts payable to the defending council, the auxiliary to the judge and the court legal assessor are to be reduced by half - comply with Article 47(3) of the Charter of Fundamental Rights of the European Union, which stipulates that legal aid is to be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice?",[102] but the ECJ decided on 22 March 2013 that it had no jurisdiction to answer this matter.[103] The question should have been phrased differently because under Article 267[104] of the Treaty on the Functioning of the European Union,[105] the ECJ can only interpret EU, not national, law. The Tribunale de Tivoli should have asked how to interpret Article 47 (3) of the Charter.

The key case in which the European Court of Justice has dealt with the issue of legal aid has been the 2010 judgment in *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany*.[106] This case came before the ECJ by way

[100] This chapter is up to date as of 22 March 2013.

[101] See, for example, European Court of First Instance, *Egan and Hackett v Parliament*, Case T-190/10, Order of 10 May 2011. In this case, legal aid was granted for one applicant and denied for the other.

[102] European Court of Justice, *Elisabetta Gentile v Ufficio Finanziario della Direzione Ufficio Territoriale di Tivoli and Others*, Case C-499/12, Reference for a preliminary ruling from the Tribunale di Tivoli (Italy) lodged on 7 November 2012; European Court of Justice, *Antonella Pedone v Maria Adele Corrao*, Case C-498/12, Reference for a preliminary ruling from the Tribunale di Tivoli (Italy) lodged on 7 November 2012.

[103] European Court of Justice, *Elisabetta Gentile v Ufficio Finanziario della Direzione Ufficio Territoriale di Tivoli and Others*, Case C-499/12, Order of 7 February 2013; European Court of Justice, *Antonella Pedone v Maria Adele Corrao*, Case C-498/12, Order of 7 February 2013.

[104] On the procedure, see already Neville Brown and Kennedy (2000), p. 204 *et seq*.; Oppermann et al. (2009), p. 269.

[105] Official Journal 2008 C 115, p. 47 *et seq*.

[106] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010.

of a reference from the Kammergericht (Court of Appeals) in Berlin.[107] It concerned the issue of legal aid for legal, rather than natural, persons.[108] It is noteworthy, though, that the Court's starting point was not Article 47 (3) of the Charter (which it dealt with at a later stage of the judgment[109]) but recitals 5 and 11 in the preamble to Council Directive 2003/8/EC,[110] which the Court quoted in the judgment.[111] It was specified that "[l]egal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings".[112] In its decision in *DEB v Germany*, the European Court of Justice relied on the precedent of the European Court of Human Rights in *Airey v. Ireland*.[113]

4 Conclusions

The right to legal aid is essential to the full realization of the right to a fair trial—not only in criminal law cases but also in the contexts of civil and public laws. Under the European Convention on Human Rights, the right to legal aid has been recognized decades ago. The contribution of the Charter, though, is less than spectacular. In particular, from the—very limited—jurisprudence of the European Court of Justice, it can be concluded that Article 47 (3) of the Charter clarifies and codifies the right to legal aid that, although not mentioned expressly in Article 6 of the Convention, is already part and parcel of the fair trial guarantees under the European Convention on Human Rights. In particular, in light of the parallel interpretation of the Convention and the Charter and the potential accession of the European Union to the Convention,[114] it can be concluded that despite the wording of Article 47 (3) of the Charter, legislative value of the norm is rather limited. In the aforementioned case of DEB v Germany, the ECJ held that "[t]he generally recognized right to access to justice is also *reaffirmed* by Article 47 of the

[107] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010.

[108] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 1.

[109] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 36 *et seq*.

[110] Official Journal 2003 L 26, p. 41 *et seq*.

[111] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 3.

[112] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 3.

[113] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 36.

[114] See Grabenwarter (2008), p. 33 *et seq*.

Charter of Fundamental Rights of the European Union".[115] This choice of words best describes the role of Article 47 of the Charter.

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[115] European Court of Justice, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Case C-279/09, Judgment of 22 December 2010, para. 3, emphasis added.

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