

## **PART III**

### **ACCESS TO JUSTICE AND COSTS OF LITIGATION**

#### **CHAPTER 6**

##### **PUBLIC FUNDING (LEGAL AID)**

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## 1 OVERVIEW AND DEFINITION

- 1 While the provision of legal services is most associated with criminal proceedings, ensuring access to legal services for civil matters is critical for empowering poor and vulnerable parts of society. Indeed, it has been estimated by the World Justice Project that 1.4 billion people have unmet civil or administrative justice needs.<sup>1</sup> Access to legal services for civil matters contributes to enhancing people's trust in the justice system. Importantly, it enhances the legitimacy of the state. Legal services assistance ensures that people have access to information about their rights, entitlements, and obligations. In summary, access to assisted legal services is fundamental to safeguarding fair, equal, and meaningful access to justice.
- 2 This Chapter will focus on the provision of assistance for legal services in civil matters by the state or state funded schemes, in particular, it will focus on legal aid. Legal aid is broadly defined for the purposes of this Chapter as 'assistance in relation to the costs associated with a civil justice need'.<sup>2</sup>
- 3 This chapter will place legal aid in its broader context: first, by charting the long history of public funding for legal services in various forms and, second, by outlining the roots of public funding within human rights frameworks and specifically in relation to the right of equal access to justice. Third, this chapter will endeavour to examine how legal aid frameworks are designed and operate in a range of jurisdictions. Other forms of public funding in particular states will then be examined as a form of partial legal aid, before finally considering whether legal aid is available in particular situations (such as for alternative dispute resolution) or for particular stakeholders (such as micro and small enterprises).

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<sup>1</sup> World Justice Project, 'Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World' (Washington DC 2019) 13.

<sup>2</sup> For other definitions of 'legal aid' see United Nations, 'Global Study on Legal Aid: Global Report' (New York, UN Development Programme and UN Office on Drugs and Crime, October 2016) 8, where legal aid is defined as 'legal advice, assistance and/or representation at little or no cost to the person designated as entitled to it'; and R H Smith, *Justice and the poor: a study of the present denial of justice to the poor and to the agencies making more equal their position before the law, with particular reference to legal aid work in the United States* (3rd ed, New York, Carnegie Foundation for the Advancement of Teaching 1924) 134 where legal aid work was considered to consist of 'giving legal advice and legal assistance in negotiation and litigation to poor persons, without cost to them or at a minimum cost which they can afford, in matters where no other assistance is available.'

## 2 HISTORICAL ORIGINS OF PUBLIC FUNDING FOR DISPUTE RESOLUTION

### 2.1 Early Origins

- 4 Legal aid, as it is broadly defined in this chapter, has a long history.<sup>3</sup> As Moore and Newbury articulate, ‘subsidised, charitable and free support for legal dispute resolution has existed for centuries’.<sup>4</sup> In medieval and early modern Europe the entitlement of *personae miserabilis* to legal services was not a matter of mercy or charity but was considered their ‘good right’.<sup>5</sup> As the premodern juridical infrastructure emerged in the twelfth century, churchmen held that *personae miserabilis* should be able to protect their claims in the same way as more affluent members of the community and clerics were assigned to defend the poor for free in church courts.<sup>6</sup> This category of recipients was said to include widows, orphans, the chronically ill and ‘the poor’. Yet, as Griet Vermeesch observes, in practice free legal aid was only provided to a limited subset of ‘deserving poor’ and regularly excluded vagrant and itinerant poor people.<sup>7</sup>
- 5 Churches were not the only authorities to have granted legal entitlements to the poor. Since the thirteenth century, the Spanish royal chanceries had employed *abogados de pobres*, or lawyers for the poor.<sup>8</sup> Cities elsewhere began to provide similar legal assistance, such as in fifteenth-century Northern Italy and in the Savoy.<sup>9</sup> The first statutory provision for legal aid in the common law world, known as *in forma pauperis* was enacted in 1495 (11 Hen.VII, c.12).<sup>10</sup> It entitled a poor person to court-appointed counsel, attorneys and others to pursue civil litigation in the common law courts free of charge.

### 2.2 Formalization of Legal Aid

- 6 Increased formalization of legal aid emerged from the eighteenth century onwards. The remnants of the *personae miserabilis* tradition in Europe required litigants at that time to first submit a request to the law court where they wished their case to be heard, where their

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<sup>3</sup> The Chapter, in its discussion of the history of public funding, is restricted to the Western world, with an emphasis on Europe.

<sup>4</sup> S Moore and A Newbury, *Legal aid in crisis: Assessing the impact of reform* (Bristol University Press 2017) 15.

<sup>5</sup> G Vermeesch, ‘Access to Justice: Legal Aid to the Poor at Civil Law Courts in the Eighteenth-Century Low Countries’ (2014) 32(3) *Law and History Review* 683, 683.

<sup>6</sup> *Ibid* 692.

<sup>7</sup> *Ibid* 683, 686 and 697–703.

<sup>8</sup> *Ibid* 693.

<sup>9</sup> *Ibid*.

<sup>10</sup> Dame Margaret Bazley ‘Transforming the Legal Aid System: Final Report and Recommendations’ (Ministry of Justice, Wellington, Legal Aid Review, November 2009) 6; and R Cranston, *How Law Works* (Oxford University Press 2006) 45, 46.

petition was reviewed against several criteria by a judge.<sup>11</sup> In order to be granted free legal aid, the case had to be justified, the litigant had to be ‘genuinely destitute’ and the other party involved in the case had to be heard to verify these conditions and as an attempt to reconcile the parties.<sup>12</sup> The introduction of a means test saw a person’s poverty judged by their current assets and financial means, with assets that did not yield ready cash (such as land) being disregarded.<sup>13</sup>

- 7 The formal requirements for suing *in forma pauperis* in the common law courts became similarly stricter – only plaintiffs were covered and poor litigants had to demonstrate the merits of their case in advance by paying for a counsel’s opinion.<sup>14</sup> Modifications were made in the late nineteenth century and the poor persons’ procedure was formalized in 1914. However, it remained very limited in its scope: it did not apply to the county courts, did not cover out-of-court work, relied on lawyers conducting pro bono work, worked with a strict means test and still required the poor to find necessary out of pocket expenses.<sup>15</sup>
- 8 The German Code of Civil Procedure of 1877 codified ‘the right of the poor’ to legal assistance (*Armenhilfe* – pauper relief).<sup>16</sup> However, such assistance was also limited, as litigants were prevented from obtaining relief if the case seemed hopeless.
- 9 Across the Atlantic, during the late eighteenth and early nineteenth centuries, litigation rapidly increased as a result of significant immigration, the rise of the wage-earning class and the growth of urban populations.<sup>17</sup> While courts in the United States were initially able to be accessed by anyone, that quickly changed with the increasing complexity of court proceedings. So too did the need for lawyers. Before 1900 mentions in the legal records of aid to the poor were scattered, with most references being to judges who appointed counsel to poor clients, or to lawyers who voluntarily took their cases.<sup>18</sup> Subsidized advice in the United States to help poor people deal with social and legal problems more formerly began

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<sup>11</sup> Vermeesch (n 5) 699,700.

<sup>12</sup> Ibid.

<sup>13</sup> Vermeesch (n 5) 702.

<sup>14</sup> Cranston (n 10) 45, 46.

<sup>15</sup> Ibid 46.

<sup>16</sup> B Hess and R Hubner, ‘Germany’ in C Hodges, M Tulibacka and S Vogenauer (ed), *The costs and funding of civil litigation: a comparative perspective* (Bloomsbury Publishing Plc 2010) 349, 349 and B Breig, ‘Legal Aid in Germany’ (2019) 3 Law Enforcement Review 105, 106, 109.

<sup>17</sup> Smith (n 2) 6, 7.

<sup>18</sup> R Gordon, ‘Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History’ (2019) 103(3) *Judicature* 34, 35.

with the Working Women's Protective Union in 1863 in New York, and quickly spread to other cities with similar organizations.<sup>19</sup>

### 2.3 Emergence of Modern Public Funding

- 10 While various forms of public funding for civil litigation had thus existed for centuries, it was largely ad hoc, directed at particular classes of poor people, of inconsistent quality, variable across regions, and often dependent on judges to intervene as well as lawyers being able to shoulder the cost of advocacy.<sup>20</sup> Modern legal aid systems, in a more familiar form to us today, emerged in the post-World War II period, in line with Article 10 of the Universal Declaration of Human Rights,<sup>21</sup> in an attempt to remedy the very issues described.<sup>22</sup>
- 11 Most liberal democracies introduced a system of publicly funded legal aid from the mid-twentieth century onwards.<sup>23</sup> In part, this was connected to the rise of the global access to justice movement which was founded on the idea that all members of society should have access to legal advice and advocacy irrespective of their background or personal characteristics.<sup>24</sup> But unlike earlier 'charitable' provision of legal services, this movement centered on the role of the state in directly providing such assistance and advancing the well-being of its citizens.<sup>25</sup> The roots of the movement emerged in post-fascist regimes and the new welfare states of Europe in the aftermath of World War II, spreading to Australia and North America in the mid-1960s with renewed interest in the civil rights movement.<sup>26</sup>
- 12 Like other welfare initiatives of the period, the aspiration in England and Wales was to offer nationwide services to help meet the costs of civil legal disputes for all but the most affluent.<sup>27</sup> When the scheme was introduced in 1950, 80 percent of the population was

<sup>19</sup> Ibid 36 and F Batlan, 'The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in the New York City 1863–1910' (2010) 28(4) Law and History Review 931.

<sup>20</sup> Moore and Newbury (n 4) 15.

<sup>21</sup> See P Berman and M Woo, *Global Issues in Civil Procedure* (2nd ed, West Academic 2012) 87.

<sup>22</sup> Moore and Newbury (n 4) 15 and Vermeesch (n 5) 686; some trace the modern advent of legal aid provision back to the end of the World War I and the International Committee on Legal Aid and its Report to the League of Nations in 1927 (J Singh Mann, *Comparative Legal Aid Systems and India* (Taylor & Francis, 2022) Ch 2.1.

<sup>23</sup> Moore and Newbury (n 4) 10.

<sup>24</sup> Ibid.

<sup>25</sup> For a perspective from the time see, for example, E J Cohn, 'Legal Aid for the Poor: A Study in Comparative Law and Legal Reform' (1943) 59 L Q Rev 250.

<sup>26</sup> Moore and Newbury (n 4) 10.

<sup>27</sup> Ibid 17.

eligible for free or subsidized legal representation,<sup>28</sup> and by the 1960s barristers in England and Wales were receiving over half of their collective income from legal aid cases.<sup>29</sup>

- 13 In the United States, funding for the Office of Equal Opportunity Legal Services Program in 1965 (since reorganized as the Legal Services Corporation) became a key component of President Lyndon B Johnson's 'war on poverty'.<sup>30</sup> In the mid-1970s President Ford's administration funded clinical legal education in schools, which supplemented the longstanding work of not-for-profit organizations that were providing legal aid services such as the NAACP Legal Defense Fund and the American Civil Liberties Union.<sup>31</sup> In 1980 – 1981 the total national legal aid budget was further expanded by federal services from under USD 5 million per year to USD 321 million.<sup>32</sup>
- 14 Civil legal aid expanded and was legislated for in various countries from the mid-twentieth century: in New Zealand in 1969,<sup>33</sup> in France in 1972,<sup>34</sup> the last major reforms forming the basis of civil legal aid in Germany today occurred in 1979 and 1980,<sup>35</sup> and the modern regime of governmental responsibility for civil legal aid was enacted in Japan in 2000.<sup>36</sup>
- 15 The Convention on International Access to Justice came into force in 1988 and ensured in its Article 1 that '[n]ationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State'.<sup>37</sup>
- 16 Yet, from the outset, the modern legal aid scheme has been plagued by financial stringency.<sup>38</sup> As the twentieth century drew to a close, several governments became concerned by the cost of legal aid under the banner of austerity politics.<sup>39</sup> Hence, what we

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<sup>28</sup> Ibid.

<sup>29</sup> Gordon (n 18) 40.

<sup>30</sup> Ibid 37. For a more detail discussion on the history of civil legal aid in the United States see E Johnson, *To Establish Justice for All: The Past and Future of Civil Legal Aid in the United States* (Praeger 2014).

<sup>31</sup> Ibid 37–39.

<sup>32</sup> Ibid 37.

<sup>33</sup> Bazley (n 10) 6.

<sup>34</sup> Y Desdevises, 'France: A Theoretical Perspectives' in C Hodges, M Tulibacka and S Vogenauer (ed), *The costs and funding of civil litigation: a comparative perspective* (Bloomsbury Publishing Plc 2010) 327, 330.

<sup>35</sup> Breig (n 16) 106.

<sup>36</sup> I Sugawara and E Osaka, 'Japan' in C Hodges, M Tulibacka and S Vogenauer (ed) *The costs and funding of civil litigation: a comparative perspective* (Bloomsbury Publishing Plc 2010) 373, 383.

<sup>37</sup> HCCH, 'Convention on International Access to Justice' 25 October 1980 <https://assets.hcch.net/docs/a311a685-d6e7-41d4-8210-7c2b8c30429e.pdf> accessed 10 October 2024.

<sup>38</sup> Cranston (n 10) 46.

<sup>39</sup> Moore and Newbury (n 4) 20–22, 28.

are left with in the twenty-first century has become a tension between the ideal of state-funded access to justice, the reality of funding such an endeavour for all manner of civil claims as well as the broader issue of the problems and costs associated with formal dispute resolution processes.<sup>40</sup> The history of legal services assistance thus allows us to situate today's challenges and discussions within their broader social and historical context.

### 3 PUBLIC FUNDING'S BASIS IN HUMAN RIGHTS

- 17 At its core, legal aid is about safeguarding fair, equal and meaningful access to justice for all persons (for more detail see pt III ch 7). Equality before the law, arguably, cannot exist without publicly funded legal services.<sup>41</sup> Without such services, many people would not be able to assert their rights. Not only is access to justice thus a fundamental human right in itself, but it is also a pre-requisite to the exercise of other fundamental rights.<sup>42</sup> This is just as true for civil matters as it is for criminal. Indeed, studies have revealed that a majority of people's everyday justice problems are civil rather than criminal in nature and that the inability to resolve everyday civil and administrative problems diminishes people's participation in the economy, undermines their social and physical wellbeing and reinforces the poverty trap.<sup>43</sup>
- 18 In order to understand why publicly funded assistance for legal services is so important, it is therefore crucial to understand its basis in human rights.
- 19 The right to equal access to justice has long been upheld within human rights frameworks. As discussed in Chapter One of this report, several international instruments proclaim the importance of equality before the law and in ensuring equal access to justice for all.<sup>44</sup> Many states have similarly explicitly protected this right in their constitutional law.<sup>45</sup> More

<sup>40</sup> See summary for the United Kingdom: A Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37(3) Oxford Journal of Legal Studies 687, 689–691.

<sup>41</sup> United Nations (n 2) 8; Cranston (n 10) 36 and T Cornford, 'The Meaning of Access to Justice' in E Palmer, T Cornford, A Guinchard and Y Marique (ed), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford, Hart Publishing 2016) 27, 30.

<sup>42</sup> United Nations (n 2) 8 and Cranston (n 10) 37.

<sup>43</sup> World Justice Project (n 1) 13 and P Pleasence, N J Balmer and R L Sandefur, *Paths to Justice: A Past, Present and Future Roadmap* (London, UCL Centre for Empirical Legal Studies 2013).

<sup>44</sup> See, for example, Universal Declaration of Human Rights 1948 (GA Res 217 A (III), 10 December 1948); The International Covenant on Civil and Political Rights 1966; and the Convention on the Elimination of All Forms of Discrimination Against Women 1979.

<sup>45</sup> See, for example, s 3 of the Italian Constitution of 1948: 'All citizens [...] are equal before the law, without distinction of sex, race, language, religion, political opinion, or social and personal conditions'; German Basic Law Article 3(1): 'All persons shall be equal before the law'; Constitution of the Fifth French Republic Article 2: 'France [...] shall ensure the equality of all citizens before the law'; Constitution of the Republic of South Africa Article 9(1): 'Everyone is equal before the law and has the right to equal protection and benefit of



recently, the United Nations Sustainable Development Goals 2030 (adopted by the General Assembly in September 2015) resolved to 'promote the rule of law at the national and international levels and ensure equal access to justice for all'.<sup>46</sup> In order to meet the Sustainable Development Goals, and the aspirations espoused in other international instruments, many commentators have observed that public funding for legal assistance in civil disputes is essential.<sup>47</sup>

- 20 The express right to legal aid for civil matters has developed in a more piecemeal fashion.<sup>48</sup> Until the adoption of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* in 2012, there was no standalone international normative instrument dedicated exclusively to the right to legal aid.<sup>49</sup> Yet, these Principles only refer to the importance of legal aid in the criminal context.
- 21 That same year the UN Special Rapporteur on Extreme Poverty clearly outlined the importance of access to legal aid services for civil matters in addition to criminal matters.<sup>50</sup>

International human rights law explicitly establishes the right to free legal assistance in criminal proceedings (International Covenant on Civil and Political Rights, art. 14). This is particularly important for those living in poverty, who face a range of obstacles in negotiating bail procedures, pretrial detention, trials and sentencing, and appeals. Nonetheless, free legal aid should not only be provided in criminal matters, but also in civil matters when individuals do not have sufficient resources to pay for legal assistance and, without such assistance, they are prevented from asserting their rights. For example, when domestic law requires that individuals be represented by counsel to access judicial protection, the failure to provide free legal aid to persons without financial means would constitute a violation of the right to a fair trial and to effective judicial protection.

- 22 The right to legal aid was enshrined by the European Union in the European Convention on Human Rights (ECHR). Article 6(3) of the Convention guarantees the right to free legal assistance where a defendant has insufficient means to pay for such assistance and when

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the law' and Constitution of India Article 14: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

<sup>46</sup> UN Sustainable Development Goals 16.3.

<sup>47</sup> United Nations (n 2) 8; World Justice Project (n 1) 4; Cranston (n 10) 36 and Cornford (n 41) 30.

<sup>48</sup> United Nations (n 2) 14.

<sup>49</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (8/67/458) (GA Res 67/187) 20 December 2012.

<sup>50</sup> United Nations General Assembly, Report by the Special Rapporteur on Extreme Poverty and Human Rights (A/67/278, 67th session) 9 August 2012, para 61.

the interests of justice require it.<sup>51</sup> Although the Convention only refers to this right in relation to persons charged with a criminal offence, subsequent case law from the European Court on Human Rights (ECtHR) has established that states should also provide all citizens with legal assistance in civil proceedings when it is indispensable for effective access to court, or when a lack of legal assistance would deprive that person of a fair hearing.

- 23 In *Airey v Ireland* the ECtHR held that ‘despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court’.<sup>52</sup> The Court considered various relevant factors in favour of granting legal aid, including the complexity of the procedure and of the issues of law, the need to establish facts through expert evidence as well as the examination of witnesses.<sup>53</sup>
- 24 However, the right of access to a court is not absolute and may be subject to limitations. These are permitted by implication since the right of access to justice, by its very nature, calls for regulation by the state.<sup>54</sup> In this respect, the EU contracting states enjoy a certain margin of appreciation. Subsequent case law from the ECtHR has made clear that the limitations applied must not restrict or reduce the access of the individual in such a way or to such an extent that the very essence of the right is impaired.<sup>55</sup> Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>56</sup>
- 25 The EU Charter on Fundamental Rights, which has the same ‘legal value’ as other EU treaties,<sup>57</sup> also enshrines a general right to legal aid in all proceedings. Article 47(3) provides that ‘legal aid shall be made available to those who lack sufficient resources in so far as such

<sup>51</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953).

<sup>52</sup> *Airey v Ireland*, Case 6289/73 (ECtHR), Judgment 9 October 1979 [ECLI:CE:ECHR:1979:1009JUD000628973] para 26.

<sup>53</sup> *Airey v Ireland* (n 52) para 24, 26.

<sup>54</sup> S A Kramar, ‘Are Financial Burdens Preventing Access to Justice in Southeast European Judicial Systems?’ in A Uzelac and C J H Van Rhee (ed), *Revisiting Procedural Human Rights: Fundamentals of Civil Procedure and the Changing Face of Civil Justice* (Intersentia 2017) 317, 323 and S Peers, ‘Europe to the Rescue? EU Law, the ECHR and Legal Aid’ in E Palmer et al (n 41) 53, 54.

<sup>55</sup> See, for example, *Tolstoy Miloslavsky v United Kingdom*, Case 18139/91 (ECtHR) Judgment 13 July 1995 [ECLI:CE:ECHR:1995:0713JUD001813991] para 59.

<sup>56</sup> See, for example *Waite and Kennedy v Germany*, Case 26083/94 (ECtHR) Judgment 18 February 1999 [ECLI:CE:ECHR:1999:0218JUD002608394] para 43 and *Steel and Morris v United Kingdom*, Case 68416/01 (ECtHR) Judgment 15 February 2005 [ECLI:CE:ECHR:2005:0215JUD006841601] para 62.

<sup>57</sup> S Peers (n 54) 53, 56.

aid is necessary to ensure effective access to justice'. The official explanation to the Charter makes explicit reference to *Airey v Ireland* in affirming this right.<sup>58</sup>

- 26 More recently, on 31 March 2021, the Committee of Ministers of the Council of Europe adopted guidelines on the efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law. The Committee stressed the importance of establishing an accessible, effective, sustainable and reliable legal aid scheme that allows individuals to effectively exercise their right of access to justice in civil proceedings.<sup>59</sup> In substance, the guidelines provide concrete guidance and solutions for states to increase the efficiency and effectiveness of their national legal aid schemes for civil proceedings. Further, the Committee noted the importance of legal aid schemes in enabling access to justice to every individual, regardless of their background, and recommended specific protection and assistance for vulnerable people.<sup>60</sup>
- 27 Increasing recognition is being given to the importance of public funding for legal services assistance in civil cases. State funding is essential to ensure all persons have equal access to justice and to protect their rights more broadly. Without such funding, whether it is through a formalized civil legal aid system or other funded organizations who can provide free advice to individuals, the rights of millions of people around the world are in jeopardy.

#### 4 LEGAL AID: COMPARATIVE OVERVIEW

- 28 Most states have some form of public funding for legal assistance in civil cases. However, 'legal aid' can mean quite different things in different jurisdictions and the approaches vary significantly.<sup>61</sup> This section will endeavour to assess how legal aid frameworks are designed in a range of jurisdictions. The key questions that are examined and compared are:

- a) Which costs are covered? For which legal services is legal aid available? In particular, does it cover court costs?
- b) For which civil matters is legal aid available?

<sup>58</sup> European Union Agency for Fundamental Rights, 'EU Charter of Fundamental Rights and Official Explanations' <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial> accessed 10 October 2024.

<sup>59</sup> European Committee on Legal Co-Operation, 'Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and effectiveness of legal aid schemes in the areas of civil law and administrative law' (1400th meeting, 31 March 2021, CM(2021)36-add2final) para 3.

<sup>60</sup> European Committee on Legal Co-Operation (n 59) para 4.

<sup>61</sup> C Hodges, S Vogenauer and M Tulibacka, 'Part I: The Oxford Study on Costs and Funding of Civil Litigation' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (ed), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Bloomsbury Publishing Plc 2010) 1, 22.

- c) What are the eligibility criteria? (for example, a monetary or a merits threshold?)
  - d) What is the administrative burden to access legal aid?
- 29 While the approaches discussed in this section are not necessarily representative of legal aid in all states, they assist in identifying key trends in modern funding of legal aid and common obstacles in ensuring equal access to justice for all.
- 30 At the outset, it is worth identifying several influential comparative studies in the field:
- a) The work of Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, in particular the Oxford Study on Costs and Funding of Civil Litigation;<sup>62</sup>
  - b) The Global Study on Legal Aid completed in 2016 by the United Nations Development Programme and United Nations Office on Drugs and Crime;<sup>63</sup>
  - c) The Report on Costs of Legal Aid conducted by John Flood and Avis Whyte;<sup>64</sup>
  - d) Comparative Legal Aid Systems and India by Jeet Singh Mann;<sup>65</sup> and
  - e) Mathias Reimann's synthesis of Cost and Fee Allocation in Civil Procedure that examines legal aid as one component of costs and funding for civil litigation worldwide.<sup>66</sup>
- 31 This chapter does not seek to replicate these studies and the important contributions they have made. Rather, this section brings together some of the key findings from these works and others in order to understand the key features and scope of legal aid models worldwide.

#### 4.1 Overview

- 32 The provision of state-funded legal aid in civil matters is relatively limited, especially when compared with legal aid for criminal proceedings.<sup>67</sup> During the 2000s, and especially following the 2008 financial crisis, many legal aid schemes have also been subject to funding

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<sup>62</sup> Ibid.

<sup>63</sup> United Nations (n 2).

<sup>64</sup> J Flood and A Whyte, *Report on Costs of Legal Aid in Other Countries* (University of Westminster, December 2004).

<sup>65</sup> J Singh Mann (n 22).

<sup>66</sup> M Reimann, 'Cost and Fee Allocation in Civil Procedure: A Synthesis' in M Reimann (ed), *Cost and Fee Allocation in Civil Procedure* (Springer 2012) 3.

<sup>67</sup> United Nations (n 2) 24.

cuts.<sup>68</sup> This has resulted in countries introducing tighter eligibility criteria and, in some cases, making litigants pay higher contributions towards their legal fees.<sup>69</sup> As Hodges, Vogenauer and Tulibacka observe, 'legal aid, therefore, generally remains available only at a very limited level for the very poor that have cases with reasonable merits'.<sup>70</sup>

## 4.2 Availability and Public Funding of Legal Aid

33 Most states offer some form of civil legal aid. However, there are some exceptions. While most countries in Latin America and the Caribbean provide legal aid for indigent populations in criminal cases, only a few states offer legal services for the poor in civil and administrative cases (including Mexico, Argentina, Colombia and Costa Rica).<sup>71</sup> In the United States, there is no generally available public legal aid for private litigation, although there are very limited federal funds to support legal representation for indigent people through various independent legal aid organisations.<sup>72</sup> In Russia, public legal aid is only available to a very limited extent in certain classes of civil litigation, although it is more generally provided in criminal cases.<sup>73</sup>

34 Where legal aid is available, it can be funded in various ways:<sup>74</sup>

- a) The lawyer is paid by the state, although sometimes at a fixed hourly rate or flat rate per case or hearing;
- b) Assisted parties may be required to make a contribution towards the cost of legal services, either making a payment to their lawyer or to the state, as in England and Wales and the Netherlands;
- c) Assisted parties are granted legal services as a loan to be repaid within a fixed period, as in Germany and in most civil cases in Japan;
- d) Assistance might only cover the provision of the services of a lawyer, and not cover opponents' costs because the latter are not shifted, as in Japan or Taiwan;

<sup>68</sup> Reimann (n 66) 38 and Hodges et al (n 61) 24.

<sup>69</sup> M Barendrecht, L Kistemaker, H J Scholten and others, 'Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?' (February 2014) The Hague Institute for Innovation of Law 6.

<sup>70</sup> Hodges et al (n 61) 24.

<sup>71</sup> United Nations (n 2) 28.

<sup>72</sup> Reimann (n 66) 37 and Legal Services Corporation (LSC) website: <https://www.lsc.gov/about-lsc/who-we-are> accessed 10 October 2024.

<sup>73</sup> Reimann (n 66) 37 and D Maleshin, 'Russia' in C Hodges, M Tulibacka and S Vogenauer (ed), *The costs and funding of civil litigation: a comparative perspective* (Bloomsbury Publishing Plc 2010) 483, 484.

<sup>74</sup> Hodges et al (n 61) 22; Hess and Hubner (n 16) 357, 358; Flood and Whyte (n 64) 8; Sugawara and Osaka (n 36) 387; United Nations (n 2) 44, 45.

- e) Where costs are shiftable, the legal aid assistance might cover opponents' costs if the case is lost, or it might not. In Spain, England and Wales winning defendants cannot recover their costs against legally added claimants. Whereas in Finland, Germany, Italy, the Netherlands, Sweden and Switzerland individuals remain liable to pay the costs of their successful opponent.

35 The majority of Western European states have adopted an assigned counsel model, where private practitioners supply legal services, for which the state pays on behalf of the parties.<sup>75</sup> Indeed, this model is the most common way of delivering legal aid services worldwide.<sup>76</sup>

36 In terms of the legal services that are included in a grant of legal aid, this also varies widely between jurisdictions. Examples of common services that are funded include the following:<sup>77</sup>

- a) Primary legal advice is readily available for civil disputes, including legal information, referral to territorial offices, assistance with negotiation and out of court resolution, as well as public education. Some countries provide consultations for primary legal advice to all citizens regardless of their financial status (including Georgia, Moldova, Lithuania and the Netherlands), although such consultations are limited to one hour only.<sup>78</sup> The availability of legal aid for negotiation, mediation and other forms of alternative dispute resolution is discussed in more detail in Section 6 of this chapter.
- b) Commonly, legal aid includes legal representation and assistance in preparing cases at local and national levels, court fees, and in some instances submitting cases to international tribunals.<sup>79</sup> These types of costs are almost always covered for civil disputes in states in Western Europe, Eastern Europe and Central Asia as well as Sub-Saharan Africa.

<sup>75</sup> United Nations (n 2) 27. Pro bono representation by lawyers is an unknown but often occurs for high profile cases, in particular in common law jurisdictions with a strong tradition of pro bono work. It also should be noted that in some jurisdictions, such as China, every lawyer and law firm is obligated to take legal aid cases and will suffer repercussions if the obligations are not met. (J Singh Mann (n 22) Ch 2.2.2.1.E).

<sup>76</sup> United Nations (n 2) 44.

<sup>77</sup> United Nations (n 2) 24, 45, 74; Barendrecht et al (n 69) 5, 42; Reimann (n 66) 36.

<sup>78</sup> A Ogorodova, 'International Study of Primary Legal Aid Systems with the Focus on the Countries of Central and Eastern Europe and CIS' (2012) United Nations Development Programme and Ministry of Justice of Ukraine 35.

<sup>79</sup> In Germany legal aid is available for proceedings in both the EU Court of Justice and national Courts: see Burkhard Breig (n 16) 112.

- c) Provision of additional services, such as involving investigators or experts, is available in some states. For example, in Spain, the state pays for the costs of expert witnesses when it is directly associated with litigation.<sup>80</sup>
- d) Psychosocial support and a range of other support services are available in some jurisdictions, although this is rare in civil cases. For example, in Japan in recent years the Japan Legal Support Center (*Houterasu*) and bar associations have collaborated to provide 'legal social work' to elderly persons in cooperation with local governments and welfare agencies.<sup>81</sup> In New Zealand, a new initiative combines free legal clinics alongside mental health support in a *tikanga* Māori (indigenous) setting.<sup>82</sup>

37 The range and quality of services available, however, is dependent on resources and capacities available in the particular country.<sup>83</sup>

### 4.3 Scope of Civil Legal Aid

38 According to the United Nations' Global Study on Legal Aid, people seek out legal assistance in civil matters for a wide variety of cases, most frequently for marital disputes, child custody issues, property issues and labour or employment disputes.<sup>84</sup> What is clear, however, is that access to civil legal aid is not without its limitations.

39 Many countries have excluded certain categories of disputes from the scope of civil legal aid. Some examples include:

- a) In Hungary, legal aid cannot be obtained for cases related to entrepreneurial activities, taking of a loan, customs matters or establishment of a social organization.<sup>85</sup>

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<sup>80</sup> M Aránzazu Calzadilla Medina, C Trujillo Cabrera and A Ferreres Comella, 'Spain' in C Hodges, M Tulibacka and S Vogenauer (ed) *The costs and funding of civil litigation: a comparative perspective* (Bloomsbury Publishing Plc 2010) 489, 489.

<sup>81</sup> See T Ikenaga, M Wagatsuma, K Abe, W Hara, G Ichiki, T Oishi and T Sagawa, 'Japan' (Global Access to Justice Project) <https://globalaccesstojustice.com/global-overview-japan/?tab=9.-technological-innovation-and-access-to-justice> accessed 10 October 2024.

<sup>82</sup> P de Graaf, 'New Northland legal clinics to address an "access-to-justice crisis"' (12 June 2024) Radio New Zealand <https://www.rnz.co.nz/news/national/519305/new-northland-legal-clinic-to-address-an-access-to-justice-crisis> accessed 10 October 2024.

<sup>83</sup> United Nations (n 2) 24.

<sup>84</sup> Ibid 120

<sup>85</sup> Ogorodova (n 78) 32.



- b) In Russia, the scope of legal aid for civil disputes depends on who the legal services provider is.<sup>86</sup> State legal aid bureaus are only entitled to provide free legal assistance for 'poverty law' related issues, including housing, employment, family matters, social benefits, etc. Whereas private providers are not limited in the choice of the areas of law in which they wish to provide legal aid assistance.
- c) In England and Wales cuts to civil legal aid have resulted in most civil disputes being excluded from public funding. The areas of law excluded include divorce, personal injury, clinical negligence, employment, housing and debt cases (unless there is an immediate risk to the home), although tribunal procedures are offered for some of these areas that make them easier to navigate without a lawyer.<sup>87</sup>
- d) Several of the Western European countries allow people to bring cases before specialised tribunals (such as employment and social security) without being represented by a lawyer and so legal aid is limited in such circumstances.<sup>88</sup>
- e) In the Netherlands, legal aid is excluded for small claims with a small financial interest (under EUR 500).<sup>89</sup> Legal aid is also similarly excluded for small claims in New Zealand that come within the jurisdiction of the Disputes Tribunal (up to NZD 30,000 or EUR 18,000) and where self-representation is the norm.<sup>90</sup>

40 Some states have legal aid available for cross-border civil disputes. This is primarily within the European Union because the European Council established minimum common rules in 2003 relating to the availability of legal aid in such cases.<sup>91</sup> In such cases, the Council directed that legal aid should cover the following legal services: pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing

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<sup>86</sup> Ogorodova (n 78) 33.

<sup>87</sup> Barendrecht et al (n 69) 5, 30 and N Byrom, 'Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales' in A Flynn and J Hodgson (ed), *Access to Justice and Legal Aid* (Oxford, Hart Publishing 2017) 221, 222 and 223.

<sup>88</sup> Barendrecht et al (n 69) 26, 30.

<sup>89</sup> Barendrecht et al (n 69) 30.

<sup>90</sup> Legal Services Act 2011 (New Zealand) ss 7, 10 and 11; Ministry of Justice <https://www.justice.govt.nz/courts/going-to-court/legal-aid/get-legal-aid/can-i-get-family-or-civil-legal-aid/#civil> accessed 10 October 2024; and Disputes Tribunal Act 1988 (NZ) ss 10 and 38(2).

<sup>91</sup> European Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2002/8/EC of 27 January 2003 (EU) 'to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes' and Barendrecht et al (n 69) 40.



a case before a court, as well as representation in court and assistance with or exemption from the cost of proceedings.<sup>92</sup>

#### 4.4 Eligibility Assessments

- 41 The concept of applicant eligibility is fundamental to civil legal aid models.<sup>93</sup> Almost all legal aid schemes include tests for ‘means’, ‘merits’, or both, in determining the eligibility of applicants for civil legal aid.<sup>94</sup> There are, however, wide variations across countries on the eligibility of applicants for legal aid and advice and in the complexity of the tests applied.<sup>95</sup>
- 42 Financial means is the most common factor across jurisdictions that determines eligibility for such assistance.<sup>96</sup> Parties who fall below a (sometimes statutorily defined) income or wealth threshold will be excluded from obtaining assistance.<sup>97</sup> How financial means is assessed varies greatly. Some jurisdictions only apply income tests, thereby excluding assets held by an applicant (as in France, Greece and Italy), while other states take both income and capital into account when determining eligibility (as in Canada, Ireland, Sweden and New Zealand).<sup>98</sup>
- 43 In most jurisdictions it is evident that civil legal aid is targeted towards the poorer sections of a population, keeping the proportion of potential legal aid users low and normally making it unavailable to the middle class.<sup>99</sup> Indeed, stringent means criteria for legal aid have led commentators in the United Kingdom, Canada and New Zealand to observe that most people, not just those with the lowest incomes, cannot access legal services for civil disputes.<sup>100</sup>
- 44 An applicant’s financial means may also determine whether or not they have to make a contribution to their legal aid costs. For example, in Germany, legal aid is available to individuals who are unable to pay for part or all of their procedural costs, at all or at the

<sup>92</sup> European Council Directive (n 91) Article 3(2).

<sup>93</sup> Flood and Whyte (n 64) 2.

<sup>94</sup> Hodges et al (n 61) 23 and Flood and Whyte (n 64) 2.

<sup>95</sup> Flood and Whyte (n 64) 2.

<sup>96</sup> United Nations (n 2) 119.

<sup>97</sup> Reimann (n 66) 38.

<sup>98</sup> Flood and Whyte (n 64) 10 and K Stewart and B Toy-Cronin, *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services* (University of Otago 2018) 10.

<sup>99</sup> Flood and Whyte (n 64) 10; Reimann (n 66) 38.

<sup>100</sup> Stewart and Toy-Cronin (n 98) 10, 11; Civil Justice Council, ‘Access to Justice for Litigants in Person (or self-represented litigants). A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice’ (November 2011) Judiciary of England and Wales 14 and Chief Justice B McLachlin, ‘Foreword’ in M Trebilcock, A Duggan and L Sossin (ed), *Middle Income Access to Justice* (University of Toronto Press 2012) ix, ix.

outset of proceedings. If legal aid is granted to German applicants, it can be granted either as an interest-free loan (to be repaid in monthly instalments) or as a full grant without any repayment obligation. This is determined based on the ability of an applicant to contribute financially to the litigation.<sup>101</sup>

- 45 Merits tests are similarly expressed in a variety of ways. In Germany, the merits test is expressed as the applicant's case having 'adequate prospects of success'.<sup>102</sup> In Japan, legal aid is available 'when it cannot be said that such person is unlikely to win the case'.<sup>103</sup> In Australia, multiple types of merits tests may be applied – prospects of success, whether a prudent self-funding litigant would risk the proceedings, and whether the applicant or community would benefit from the expenditure.<sup>104</sup> While restrictions on accessing civil legal aid based on 'merits' tests are common, many models of public funding for criminal legal aid do not require such a test to be met.<sup>105</sup>
- 46 Some states also impose various other kinds of restrictions before legal aid can be obtained, such as excluding certain kinds of disputes (as discussed) or mandating that an applicant exhaust other forms of assistance first (as in Sweden, France, Germany, Scotland and Finland with legal expenses insurance).<sup>106</sup> Nonetheless, merits and means tests remain the primary gatekeepers to accessing funded legal services in civil cases.

#### 4.5 Accessing Legal Aid

- 47 Applications for legal aid can be made and determined in various ways. In some states, applications are determined by courts (as in Austria, Germany, Greece, Norway, Poland and Romania) while others are determined by the bar (as in Czech Republic and Spain), or by a public authority (as in England and Wales, France, Hong Kong, Ireland, the Netherlands, New Zealand, Scotland, Singapore and Taiwan).<sup>107</sup>
- 48 Where a party has to apply to a court after the start of a case, the difficulty is that an applicant may not know or be able to predict whether they will be awarded legal aid (or how much) without commencing a claim.<sup>108</sup> This is true in Germany, where applications for legal

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<sup>101</sup> Hess and Hubner (n 16) 358.

<sup>102</sup> Ibid.

<sup>103</sup> E Sugiyama, 'Simplified Civil Procedure in Japan' (2015) 8(4) Erasmus Law Review 201, 204.

<sup>104</sup> Flood and Whyte (n 64) 10.

<sup>105</sup> Flood and Whyte (n 64) 2.

<sup>106</sup> Reimann (n 66) 38; Flood and Whyte (n 64) 10; Barendrecht et al (n 69) 41.

<sup>107</sup> Hodges et al (n 61) 23 and Barendrecht et al (n 69) 5.

<sup>108</sup> Hodges et al (n 61) 23.

aid must be filed with the same court that is to decide the merits of the case.<sup>109</sup> Indeed, in Germany, legal aid is granted or denied without a hearing taking place, although the opponent is able to be heard.<sup>110</sup>

- 49 In contrast, where the decision is taken by a separate authority or decision maker, an applicant can have some certainty of being granted legal assistance before determining whether to commence proceedings.

#### 4.6 Concluding Remarks

- 50 While legal aid continues to be offered in most jurisdictions for civil disputes, it is clear that the limitations placed on its access increasingly restrict its availability. The limited availability of civil legal aid is often the result of state budget restrictions and the limited capacity of legal professionals to offer such services. In practice, these obstacles lead to strict means tests, requirements for legal aid to be paid back as a loan or for applicants to contribute to their fees, as well as restrictions on the types of disputes that qualify for civil legal aid. The reality is that civil legal aid systems are not necessarily ensuring equal access to justice for all. As Hazel Genn has posited in relation to the United Kingdom, the increasing restrictions placed on civil legal aid are representative of a wider, and more concerning, policy shift: ‘It seems as though state responsibility for providing effective and peaceful forums for resolving civil disputes is being shrugged off through a discourse that locates civil justice as a private matter rather than as a public and socially important good’.<sup>111</sup>
- 51 In light of the increasing limitations placed on civil legal aid, additional forms of public funding to access legal services have become essential. Some of these other forms of public funding are discussed in the subsequent two sections.

### 5 OTHER FORMS OF PUBLIC FUNDING

- 52 Many countries, especially where legal aid for civil matters is very limited, have established other forms of publicly funded legal assistance. These include Community Law Centres, Citizens Advice Bureaus, support for litigants-in-person at court, or Ombudsmen services that are partially or wholly funded by a state. These services provide a form of partial or ‘indirect’ legal aid. Although not legal aid in the traditional sense, these forms of indirect legal aid are becoming increasingly important as access to civil legal aid is subject to funding

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<sup>109</sup> Hess and Hubner (n 16) 358.

<sup>110</sup> Ibid.

<sup>111</sup> H Genn, ‘What is Civil Justice For – Reform, ADR, and Access to Justice’ (2012) 24 *Yale Journal of Law & the Humanities* 397, 398.

cuts by several governments. In this section, we examine some of these different forms of public funding that are emerging in various jurisdictions around the world.

### 5.1 Community Law Centres

- 53 Community Law Centres, or Legal Advice Centres as they are sometimes known, exist in many jurisdictions around the world. These institutions may be partially or wholly funded by a state. These Centres often attempt to bridge the gap for those who do not qualify for legal aid but are still unable to pay for legal services themselves.<sup>112</sup>
- 54 Community Law Centres are common in many jurisdictions. Some long-standing examples are detailed below:
- a) Neighbourhood law offices, financed by public funds and staffed by full-time lawyers, were created in the United States in the 1960s as part of President Johnson's War on Poverty.<sup>113</sup> These offices have provided civil legal aid to many communities since that period.<sup>114</sup> Today, the Legal Services Corporation (LSC) helps fund these offices and other advice centres throughout the various states.<sup>115</sup> One of these is the Legal Assistance Foundation of Metropolitan Chicago, which receives over half of its budget from LSC and provides legal advice, representation in court as well as legal education. This Foundation operates through six offices in Chicago and also runs a series of special projects, such as consumer law for the elderly.<sup>116</sup>
  - b) Modelled on the neighbourhood law offices in the United States, community law centres developed in England and Wales in the 1970s.<sup>117</sup> The first, the North Kensington Neighbourhood Law Centre, opened in 1970 in a disadvantaged area of London.<sup>118</sup> The funding of this Centre initially derived from a mix of charity and local authority support and its aim was to offer holistic assistance to its clients.<sup>119</sup>

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<sup>112</sup> Cranston (n 10) 54 and Stewart and Toy-Cronin (n 98) 15.

<sup>113</sup> Cranston (n 10) 53 and Law Centres Network, 'How Law Centres started out' <https://www.lawcentres.org.uk/> accessed 10 October 2024.

<sup>114</sup> Neighbourhood Legal Services <https://nlsa.us/> accessed 10 October 2024.

<sup>115</sup> Flood and Whyte (n 64) 11, 12.

<sup>116</sup> Flood and Whyte (n 64) 12.

<sup>117</sup> Moore and Newbury (n 4) 19.

<sup>118</sup> Ibid and Cranston (n 10) 53.

<sup>119</sup> Moore and Newbury (n 4) 19.

- Today, the Law Centres Network includes 42 community centres all over the United Kingdom.<sup>120</sup>
- c) In New Zealand the first Community Law Centre opened in 1978 and there is now a network of 24 such centres across the country providing legal services to around 20 per cent of the population each year.<sup>121</sup> The centres are run as independent charities, funded by donations and the Government's Ministry of Education. While the centres provide some support for litigants, they primarily offer legal advice rather than legal representation. New Zealand also provides additional bespoke, partially government-funded, legal advice services through YouthLaw Aotearoa (for young people) and Auckland Disability Law (for individuals with disabilities). YouthLaw provides legal assistance for individuals under 25 through in-person clinics in Auckland and online services nationwide (through the free phone line, email correspondence and a mobile app).<sup>122</sup> Auckland Disability Law, affiliated with the local Community Law Centre, provide information, advice and limited legal representation.<sup>123</sup>
  - d) In Japan the Japan Federation of Bar Associations and local bar associations play a significant role in providing funded legal assistance alongside the legal aid provided by the Japan Legal Support Center.<sup>124</sup> In rural areas, the Himawari Fund Law Offices provide legal aid services on civil cases, while in urban areas Public Law Offices provide legal services for those who have difficulties in finding lawyers for financial and other reasons. Local bar associations have also established Legal Counseling Centers across Japan that provide all residents with legal consultations on a variety of issues, including multiple consumer loan problems, family matters and workplace-related issues. Municipalities nationwide also provide free legal consultation and advice services for local residents in each municipal office.
  - e) Germany has some public legal advice centres, but their availability varies amongst regions. Hamburg residents with low incomes can use the *Öffentliche Rechtsauskunft* for low-cost legal consultation, dispute settlement and mediation assistance.<sup>125</sup> The service cannot provide legal representation, but legal advice is

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<sup>120</sup> Law Centres Network (n 113).

<sup>121</sup> Stewart and Toy-Cronin (n 98) 15, 16.

<sup>122</sup> Ibid 17.

<sup>123</sup> Ibid 18.

<sup>124</sup> Ikenaga et al (n 81).

<sup>125</sup> Hamburg directory, 'Public Legal Advice (ÖRA)' <https://www.hamburg.com/residents/social/public-legal-advice-19922> accessed 10 October 2024.

given on a walk-in basis during consultation hours. In Berlin, there is also a specialist Consumer Advice Center which, since 1953, has provided a wide range of advice and information for consumers.<sup>126</sup> There is also even free legal advice for German consumers who have cross-border issues in the European Union through the European Consumer Centre Germany, which is co-funded by the European Commission and the German Federal Ministry of Justice and Consumer Protection.<sup>127</sup>

- f) Australia's mixed model of legal aid service delivery relies on its almost 200 community law centres, who provide free legal information and advice, legal representation and 'do-it-yourself' kits as well as conducting law reform work and community legal education.<sup>128</sup> Community legal education services have become particularly prominent, for example in New South Wales the Legal Information Access Centre operated by the State Library has become a prominent provider of legal information through its network of local libraries.<sup>129</sup> The law centres are also well known for their systemic advocacy role. For example, Victoria's specialist Community Law Centre, the Consumer Action Law Centre, launched its 'Do Not Knock' campaign to end exploitation by door-to-door salespeople.<sup>130</sup> Through the campaign, the Centre provided consumer information, liaised with industry and regulatory agencies, lodged door-to-door selling complaints with regulators and contributed to law reform proposals.<sup>131</sup>

- 55 Australia also provides a bespoke legal advice centre to support and empower self-represented litigants in civil cases.<sup>132</sup> Since 2007, Law Right has provided a Self Representation Service throughout Queensland, which has since been adopted in South Australia and Western Australia. Law Right provides legal advice to self-represented litigants

<sup>126</sup> Verbraucherzentrale Berlin, 'About us' [www.verbraucherzentrale-berlin.de](http://www.verbraucherzentrale-berlin.de) accessed 10 October 2024.

<sup>127</sup> European Consumer Centre Germany [www.evz.de/en/index.html](http://www.evz.de/en/index.html) accessed 10 October 2024.

<sup>128</sup> J Giddings, 'Rhyme and Reason in the Uncertain Development of Legal Aid in Australia' in A Flynn and J Hodgson (ed), *Access to Justice and Legal Aid* (Oxford, Hart Publishing 2017) 43, 51, 56–67 and L Buchanan, 'Community Lawyers, Law Reform and Systemic Change: Is the End in Sight?' in A Flynn and J Hodgson (ed), *Access to Justice and Legal Aid* (Oxford, Hart Publishing 2017) 141, 142.

<sup>129</sup> Giddings (n 128) 57.

<sup>130</sup> Buchanan (n 128) 147 and 148.

<sup>131</sup> Ibid.

<sup>132</sup> R Dos Santos, 'Self represented litigants in the Australian civil justice system: 10 years of the Self Representation Service in Australia' (23 March 2017) National Access to Justice and Pro Bono Conference (Conference paper, Adelaide, Australia) and Law Right Access | Justice, 'About LawRight' <https://lawright.org.au/> accessed 10 October 2024.

and representation in some instances, encouraging early resolution of disputes where possible.

- 56 Several jurisdictions also have legal clinics, operated by law faculties or state bureaus, that provide legal assistance. Such services can be found in Iceland, Israel, Mexico, Norway, the United States and the Czech Republic.<sup>133</sup>
- 57 *Citizens Advice Bureaus*
- 58 Citizens Advice Bureaus tend to provide general information and advice to members of the public. They often act as a first point of contact for individuals seeking help by directing people towards the appropriate services for their problem (for example, to a community law centre or to legal aid).<sup>134</sup>
- 59 The Citizens Advice Bureau in the United Kingdom was formed during the Second World War to provide information to the public.<sup>135</sup> It expanded significantly during the late 1960s and 1970s as the legal support and advice it provided also expanded. Today, there are a considerable range of Citizens Advice Bureau and other advice centres in the United Kingdom.<sup>136</sup> As well as advice at the centres themselves, advice is also now available through outreach services and telephone helplines.<sup>137</sup> For example, National Debtline, a national publicly funded telephone helpline, provides free advice for people with debt problems over the phone and online through a webchat tool.<sup>138</sup>
- 60 One of the unique Citizens Advice Bureaus in England and Wales is the Royal Courts of Justice Advice Bureau. At this Bureau volunteer lawyers staff an in-person clinic at the Royal Courts of Justice in London and provide procedural advice to litigants in person for civil matters.<sup>139</sup> The Bureau is funded by the Ministry of Justice, Islington Council and Legal Aid Agency amongst others.<sup>140</sup> In 2020/2021 the service assisted 4,175 people with over 7,000

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<sup>133</sup> Reimann (n 66) 3.

<sup>134</sup> Stewart and Toy-Cronin (n 98) 18.

<sup>135</sup> Moore and Newbury (n 4) 19.

<sup>136</sup> Cranston (n 10) 55.

<sup>137</sup> Cranston (n 10) 55.

<sup>138</sup> Ibid and National Debtline, 'About Us' <https://nationaldebtline.org/> accessed 10 October 2024.

<sup>139</sup> P Yates, 'CourtNav and Pro Bono in an Age of Austerity' in E Palmer, T Cornford, A Guinchard and Y Marique (ed), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford, Hart Publishing 2016) 249, 254.

<sup>140</sup> RCJ Advice – Citizens Advice & Law Center, 'About us' <https://www.rcjadvise.org.uk/> accessed 10 October 2024.

enquiries, which was a notable increase from previous years.<sup>141</sup> More recently, the service has expanded its reach by providing litigants in person with an online tool that assists with matters of civil procedure (CourtNav).<sup>142</sup> This tool has increased the reach of its services from beyond those present at the London Court and has ensured its face-to-face resources are concentrated on those who most need them.<sup>143</sup>

61 Citizens Advice Bureaus are also available in other jurisdictions, including:

- a) In New Zealand, Citizens Advice Bureau have drop-in free 10–15-minute legal consultation services for general legal advice (but not representation services) that are staffed by volunteer lawyers who donate their time and expertise.<sup>144</sup>
- b) In Israel, SHIL, the Israeli Citizens Advice Bureau, was established in 1957 and continues to operate offices in 55 municipalities throughout the country and through a telephone hotline.<sup>145</sup> SHIL operates through the Israeli Ministry of Social Affairs and Social Services in collaboration with the various municipalities.
- c) In Ireland, the Citizens Information Services provide free, impartial information, advice and advocacy at more than 215 locations around the country as well as through a nationwide telephone service.<sup>146</sup> Advice can be sought on a range of civil matters, including consumer matters, money and tax, housing and social welfare.
- d) France has free legal advice centres that are comparable to the British Citizens Advice Bureaus called *Maisons de la justice et du droit*. These centres provide general legal information and advice and can arrange mediation between parties in minor civil disputes.<sup>147</sup>

<sup>141</sup> RCJ Advice – Citizens Advice & Law Center, ‘Impact Report 2020/21’ <https://www.rcjadvice.org.uk/> accessed 10 October 2024.

<sup>142</sup> Yates (n 139) 254–255.

<sup>143</sup> Ibid 254.

<sup>144</sup> Stewart and Toy-Cronin (n 98) 18.

<sup>145</sup> G Ravid, J Bar-Ilan, S Baruchson-Arbib and others, ‘I just wanted to ask: A comparison of user studies of the Citizens Advice Bureau (SHIL) in Israel’ (2014) 46(1) *Journal of Librarianship and Information Science* 21.

<sup>146</sup> Citizens information <https://www.citizensinformation.ie/en/> accessed 10 October 2024.

<sup>147</sup> Ministère de la Justice, ‘Les maisons de la justice et du droit’ <https://www.justice.gouv.fr/> accessed 10 October 2024.



## 5.2 Ombudsmen Services

- 62 Ombudsmen services tend to have two broad functions:<sup>148</sup>
- a) First, to handle individual grievances and complaints as an alternative to courts. Generally speaking, people must exhaust an organisation's internal complaint procedures first. But, having done so, a matter can be taken up with a relevant ombudsman to proceed inquisitorially and determine a matter.
  - b) Second, to establish benchmarks of good practice within a sector to raise industry standards. Ombudsmen services can give guidance to industries and liaise with regulators where there appear to be systemic issues.
- 63 Ombudsmen services are prolific in the United Kingdom. There are now several relevant such services available for civil matters. While some, like the Legal Services Ombudsmen, the Housing Ombudsmen Service and the Pensions Ombudsmen may have a statutory basis, others have been constituted by the relevant industry itself, including the Estate Agents and the Telecommunications Ombudsmen.<sup>149</sup> The Financial Ombudsman Service, constituted under the Financial Services and Markets Act 2000, absorbed some eight private ombudsmen schemes including the Banking Ombudsmen, the Building Societies Ombudsmen, and the Investment Ombudsmen.<sup>150</sup> Today the Financial Ombudsman Service assists over 1 million people every year with a range of issues and complaints, including insurance, loans and credit, debt collection, mortgages and financial advice.<sup>151</sup> The Service even has a dedicated service for small businesses<sup>152</sup>. The various English ombudsmen services have long been successful and the high volume of complaints made to them has been said to reflect the fact that there is no fee or other condition to access such services.<sup>153</sup>

## 5.3 Value of Alternative Services

- 64 Community-based organisations in all of these jurisdictions appear to be in high demand. Indeed, these community-based services play an important role in providing additional legal assistance outside of formal legal aid regimes.<sup>154</sup> They can provide crucial support for

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<sup>148</sup> Cranston (n 10) 73, 74.

<sup>149</sup> Ibid 72.

<sup>150</sup> Ibid 72.

<sup>151</sup> Financial Ombudsman Service, 'Who we are' <https://www.financial-ombudsman.org.uk/> accessed 10 October 2024.

<sup>152</sup> Financial Ombudsman Service for small businesses <https://sme.financial-ombudsman.org.uk/> accessed 10 October 2024.

<sup>153</sup> Cranston (n 10) 73.

<sup>154</sup> Flood and Whyte (n 64) 3 and 10; Cranston (n 10) 54.

litigants in person, or for people who have exhausted all other avenues to make a complaint against a company or industry but do not have the resources to embark on civil litigation.

- 65 Yet, these alternative services for legal assistance do not and cannot remedy the civil justice gap that exists as a result of limited funding for formal legal aid for civil matters. These centres may still have income thresholds that limit who can access their services (as in the United States and New Zealand), or the demand for services can exceed the resources and capacity available.<sup>155</sup> While such services can provide useful support to many communities, they cannot replace the need for public funding for legal aid.

## 6 PUBLIC FUNDING: PARTICULAR ISSUES

- 66 This final section examines whether legal aid is available in particular situations (for alternative dispute resolution) and for particular stakeholders (micro and small enterprises). These particular issues are of growing importance given the changing landscape of civil litigation and the increasing costs of accessing civil justice.

### 6.1 Legal Aid for Alternative Dispute Resolution (ADR)

- 67 Given the popularity of alternative forms of dispute resolution other than litigation, legal aid is becoming increasingly available for ADR in some jurisdictions. Its availability is particularly important for arbitration, where concerns of high costs are often raised as an access to justice issue.<sup>156</sup>
- 68 The availability of legal aid for mediation and arbitration is by no means the norm. Some countries provide legal aid generally for mediation of civil law disputes (such as Bulgaria, Greece and New Zealand),<sup>157</sup> or for arbitration of civil disputes (such as Australia, Ghana, Namibia, India and Bangladesh).<sup>158</sup> Yet, often, certain restrictions are placed on its availability. Legal aid for ADR can be restricted to certain kinds of disputes (for example in specific family matters as in Austria, Switzerland and in Florida in the US),<sup>159</sup> or for exceptional situations (as in Japan where legal aid for ADR was statutorily provided for the

<sup>155</sup> Stewart and Toy-Cronin (n 98) 19; Neighbourhood Legal Services, 'Financial Eligibility Guidelines' <https://nlsa.us/> accessed 10 October 2024; Flood and Whyte (n 64) 12.

<sup>156</sup> P Butler and D Prasad, *A Study of International Commercial Arbitration in the Commonwealth* (London, Commonwealth Secretariat 2020) 47 and 48.

<sup>157</sup> K J Hopt and F Steffek, 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues' in K J Hopt and F Steffek (ed) *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 3, 42.

<sup>158</sup> Butler and Prasad (n 156) 99, 156, 301 and 328.

<sup>159</sup> Hopt and Steffek (n 157) 42.

victims of the Great East Japan earthquake).<sup>160</sup> Even when legal aid is available for ADR, it may only be available to cover limited costs (as in Hungary where it is only available for the costs of legal advice in the course of mediation).<sup>161</sup> Means and merits tests may also prohibit access to legal aid for ADR (as in Singapore).<sup>162</sup> And, as with traditional forms of legal aid, parties must contribute their own money to access legal aid for ADR (as in the Netherlands where parties must contribute a minimum of EUR 51 for legally aided mediation services).<sup>163</sup>

- 69 Some jurisdictions use legal aid as a means of achieving certain policy goals, or to encourage the use of ADR. The European Union has directed that legal aid should be funded for ADR mechanisms where parties are obliged by law to resort to these or if the parties have been ordered to do so by the court.<sup>164</sup> In England and Wales, legal aid for litigation is linked to mediation – legal aid for litigation is refused if mediation is advisable first.<sup>165</sup> Further, in Austria, legal aid in family matters is only granted when a mediator of sufficient quality (has at least five years of professional experience, has a certain professional background and is registered on the List of Mediators) is deemed.<sup>166</sup> In the Netherlands, the efficiency of mediation is encouraged through legal aid, as mediators eligible for legal aid cases also have to be available for mediation within two weeks after a request has been filed.<sup>167</sup>
- 70 Legal aid, of course, is only necessary where ADR mechanisms are not free of charge in the first place. While parties are usually required to share the costs of arbitration, the costs in mediation proceedings can sometimes be reduced or waived. For example, in Japan in traffic accident cases the costs of mediation are waived for the parties.<sup>168</sup> Further, in some jurisdictions (such as in France and Germany) judicial mediation that is initiated during ongoing court proceedings does not result in additional mediation costs as they are already paid for by court costs.<sup>169</sup>

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<sup>160</sup> Ikenaga et al (n 81).

<sup>161</sup> Hopt and Steffek (n 157) 42.

<sup>162</sup> Butler and Prasad (n 156) 533–534.

<sup>163</sup> Ibid 44.

<sup>164</sup> E Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press 2008) 174 and 175.

<sup>165</sup> Hopt and Steffek (n 157) 42.

<sup>166</sup> Ibid 43.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid 40.

<sup>169</sup> Ibid 40 and K Deckert, 'Mediation in France: Legal Framework and Practical Experiences' in Ks J Hopt and F Steffek (ed), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 457, 472.

## 6.2 Access to Legal Assistance for Micro and Small Enterprises

- 71 Another important issue is the assistance to legal services by micro and small enterprises (MSEs). MSEs are a key part of a state's economy. However, even though they are businesses in many respects their characteristics are more similar to that of natural persons. MSEs can be as vulnerable as indigent persons, especially when trading cross-border, and a single dispute can put an MSE in jeopardy.<sup>170</sup> Disputes can particularly threaten the existence of MSEs as MSEs might not have the resources and/or financial capacity to respond adequately.
- 72 Australia in particular has acknowledged the vulnerability of MSEs through a range of mechanisms. Its Competition and Consumer Act 2010 treats MSEs as consumers in certain circumstances, giving them particular rights.<sup>171</sup> In recognition of MSEs' need to resolve disputes in a cost-effective way and in a way that caters to their needs, Australia established the Office of the Small Business and Family Enterprise Ombudsman.<sup>172</sup> This Ombudsman service provides advice to small businesses, access to ADR processes and generally advocates for small businesses in research, policy and law reform.<sup>173</sup> There are a number of agencies in the Australian states and territories that also provide free initial legal assistance to small businesses, including:<sup>174</sup>
- a) in the Australian Capital Territory, the University of Canberra (in conjunction with Legal Aid ACT) runs the Small Business Legal Advice Clinic which provides legal advice on matters including debt, small business leases, winding up, contracts and general regulations;<sup>175</sup>
  - b) the Legal Aid Commission of Tasmania runs a telephone advice service that provides free initial legal advice and is also available for small businesses; and
  - c) Victoria's Legal Aid Act 1978 explicitly extends legal aid to body corporates.<sup>176</sup>

<sup>170</sup> P Butler and D Prasad (n 156) 99.

<sup>171</sup> Australian Competition and Consumer Commission, *Small Business and the Competition and Consumer Act: Your rights and responsibilities* (Commonwealth of Australia 2012).

<sup>172</sup> P Butler and D Prasad (n 156) 99, 156 and Australian Small Business and Family Enterprise Ombudsman, 'About us' <https://asbfeo.gov.au/> accessed 10 October 2024.

<sup>173</sup> Australian Small Business and Family Enterprise Ombudsman (n 172).

<sup>174</sup> Butler and Prasad (n 156) 99 and 156.

<sup>175</sup> Legal Aid Act, 'Legal Advice' <https://legalaidact.org.au/> accessed 10 October 2024.

<sup>176</sup> Legal Aid Act 1978 (Vic) ss 2(2) and 24.

73 However, legal aid and assistance is not routinely provided to MSEs. Indeed, only 9 percent of Commonwealth countries extend legal aid to MSEs.<sup>177</sup> Yet, alongside Australia, the following countries also provide some forms of funded legal support to MSEs:<sup>178</sup>

- a) In the Bahamas legal assistance to businesses is given through Eugene Dupuch Law School clinics which provide legal aid in the country's capital Nassau. The Law School also specifically runs a Commercial Law Clinic which includes practice areas such as company formation, litigation and arbitration.
- b) Legal aid is available for businesses in Malawi because of the broad definition of who a 'legally aided person' includes. However, legal aid is specifically excluded for certain kinds of disputes such as drafting documents for the registration of companies and firms. Therefore, while not all business-related disputes may be covered, some disputes (such as contract negotiation) can be covered by legal aid.
- c) Malaysian businesses can access legal aid for civil matters, including for business-to-business disputes. However, certain disputes are excluded, such as matters involving debt recovery.
- d) While legal aid is not clearly extended to businesses in Singapore, it appears possible under Singaporean legislation.<sup>179</sup> The Singaporean Law Society also provides legal aid for community organizations through its Community Organisation Clinic and Project Law Help. The Clinic offers free basic legal advice on operational issues for charities, voluntary welfare organizations, non-profit organizations and social enterprises in Singapore that aim to meet community concerns or needs.<sup>180</sup> The Project Law Help advises these same community organizations on non-litigation commercial legal services including issues in corporate law, employment law, intellectual property and property law.<sup>181</sup>

74 Given the particular needs and vulnerabilities of MSEs, it is somewhat surprising that publicly funded legal assistance is not routinely available for such businesses. It is evident

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<sup>177</sup> Butler and Prasad (n 156) 48.

<sup>178</sup> Ibid 168, 377, 388.

<sup>179</sup> See Legal Aid and Advice Act 1995 (Singapore) 2 'aided person' and Interpretation Act 1965 (Singapore) 2 'person'.

<sup>180</sup> Law Society Pro Bono Services, 'Community Organisation Clinic' [lawsocprobono.org](http://lawsocprobono.org) accessed 10 October 2024.

<sup>181</sup> Law Society Pro Bono Services, 'Project Law Help' [lawsocprobono.org](http://lawsocprobono.org) accessed 10 October 2024.

that legal aid for such entities requires further research and investment to ensure that a vulnerable sector of social enterprise is not excluded from accessing civil justice.

## 7 CONCLUSION

- 75 Access to publicly funded legal services in civil matters is critical for empowering poor and marginalized communities. These services have a long history and continue to be fundamental today in order to provide meaningful and equal access to justice. This chapter has identified that civil legal aid and community-based indirect legal aid services are common within many jurisdictions, albeit that they come in a range of shapes and sizes. What is also often common between jurisdictions is that access is limited based on financial means and the availability of state resources. As the costs of civil litigation increase and governments cut back public spending for civil legal assistance, it is more important than ever that we pause to consider the important role of these services. The funding of a range of public civil legal assistance needs to be secured in order to ensure fewer individuals have unmet civil needs.

## ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
-ATCCP	Code of Civil Procedure (Austria)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BID	<i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
et al	and others
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies

ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
NZ	New Zealand
NZD	New Zealand Dollar
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank
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## LEGISLATION

### International/Supranational

Convention on the Elimination of All Forms of Discrimination Against Women 1979

Convention on International Access to Justice 1988

Convention for the Protection of Human Rights and Fundamental Freedoms 1950

The International Covenant on Civil and Political Rights 1966

Universal Declaration of Human Rights 1948 (GA Res 217 A (III))

European Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2002/8/EC of 27 January 2003 (EU)

### National

Financial Services and Markets Act 2000 (UK)

Competition and Consumer Act 2010 (Aus)

Legal Aid Act 1978 (Victoria)

Legal Services Act 2011 (NZ)

Disputes Tribunal Act 1988 (NZ)

Legal Aid and Advice Act 1995 (Singapore)

Interpretation Act 1965 (Singapore)

Constitution of the Italian Republic 1947

German Basic Law 1949

Constitution of India 1949

Constitution of the Fifth French Republic 1958

Constitution of the Republic of South Africa 1996

**CASES****International/Supranational**

*Airey v Ireland*, Case 6289/73 (ECtHR), Judgment 9 October 1979  
[ECLI:CE:ECHR:1979:1009JUD000628973]

*Tolstoy Miloslavsky v United Kingdom*, Case 18139/91 (ECtHR) Judgment 13 July 1995  
[ECLI:CE:ECHR:1995:0713JUD001813991]

*Waite and Kennedy v Germany*, Case 26083/94 (ECtHR) Judgment 18 February 1999  
[ECLI:CE:ECHR:1999:0218JUD002608394]

*Steel and Morris v United Kingdom*, Case 68416/01 (ECtHR) Judgment 15 February 2005  
[ECLI:CE:ECHR:2005:0215JUD006841601]

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