Legal aid and human rights

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Introduction

Within five years of the end of WWII two major events took place affecting the future of state responses to the needs of the poor for access to law. In 1948 the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR), in which Article 7 proclaimed a universal right to equality before the law and its protection, without discrimination, a right reaffirmed and elaborated almost 30 years later in the International Covenant on Civil and Political Rights (ICCPR), Art. 26. The second event was the establishment in the UK in 1949 of a national Judicare legal aid scheme, which heralded an unprecedented emphasis on legal aid around the world, and the establishment of new legal aid schemes in a number of other welfare capitalist societies.

Little attention has been given to the connections between legal aid and human rights. This began to change in 2005 when Roger Smith presented a paper at the International Legal Aid Group Conference on legal aid and human rights in Europe, particularly on developments in the accession states of the European Union (EU). John Johnsen followed in 2006 with a paper on human rights in the development of legal aid in Europe, with special attention to the work of the European Council Commission on the Efficiency of Justice (ECCEJ), at the Legal Services Research Centre's International Research Conference.

This paper continues these conversations. Its coverage differs from the two earlier papers in two respects. The paper provides a snapshot of links between legal aid and human rights in other parts of the world. The paper also considers some aspects of the wider relationship of legal aid and human rights, and the implications of the changing relationships within law and human rights for the future of legal aid.

The first part of the paper briefly recounts the origins and development of legal aid, and the key features of legal aid schemes today. Next the paper reviews the fair hearing and related provisions in the UN, regional and national human rights regimes, the justiciability of the hearing provisions and the principles of the right to a fair trial. The final section of this part discusses the implications of the right to a fair trial for states and legal aid schemes.

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The middle part of the paper considers the wider relationship between legal aid and human rights, in particular, the shared ideal and common burden of the aspiration of equal justice for all. The next two parts of the paper discuss and illustrate how trends away from legal aid and changes in the politics of law since the 1970s have affected relationships between legal aid, law and human rights. The final part of the paper considers some aspects of the future of legal aid, in a world of human rights, amidst law's changing orders and fields.

The origins and development of legal aid

Legal aid is a product of first-phase modernisation. The period from the mid 1700s to the early 1900s saw the gradual transformation of Western society, and the establishment of its modern states and national legal systems (Galanter 1966: 153). Many factors contributed to the emergence of legal aid, including the growing political significance of modern social rights (Cappelletti 1975: 28), new social dynamics such as democratisation, industrialization and urbanization, migration, class conflict, electoral reform and mass education (Abel 1985: 586-92; Cousins 1994: 116-125; 1999) and the emergence of modern legal professions.

Legal aid evolved slowly. Until the 1900s no countries funded legal representation in criminal matters (Abel 1985). Instead continuing to relying on anachronistic measures, such as, in Australia and Britain, the *in formâ pauperis* procedure, sometimes legislatively enhanced, and dock briefs, and in Italy, to take an example from Europe, the *patroconio gratuito* (Cappelletti 1975: 33). Some jurisdictions provided token funding for the defence of poor accused charged with capital offences, and, in several Australian colonies, to indigenous people charged with indictable offences (Phillips 1987: 32-3).[1] A similar approach was taken in civil litigation. Nor did states fund legal advice and other outside-litigation services, an exception being Germany, where until WW1 some local governments funded legal advice and counselling services (Blankenburg and Reifner 1981: 218, 230-31). In most societies providing outside-litigation services and responding to the legal problems remained a charitable activity, a responsibility fulfilled by benevolent and social welfare organisations, churches, trade unions and legal professions.

Developments in the first half of the 20th century were erratic, often continuing to "mingle modern reform with anachronisms of a former era" (Cappelletti 1975: 32). Several Australian states, for instance, followed Britain (Pollock 1975: 12-14) in reforming the civil *in formâ pauperis* procedures. [2] At the same time there was innovation and expansion. In the USA county-based public defender programs established in the 1900s grew slowly (Handler 1979: 321). Public defenders or public solicitors were also established in Australia, and in the early 1940s New South Wales pioneered a comprehensive publicly-funded scheme (CIP 1975). In the USA benevolent legal aid societies established in the late 19th century grew slowly (Handler 1979: 319). In Sweden free process legislation and municipal legal aid plans provided some assistance to the poor with legal problems (Boman 1979: 245). Probably the distinctive feature of

[1] See Regulations Relative to Defence of Destitute Persons Charged with Capital Crimes and of Aboriginals charged with Indictable Offences, Victorian Government Gazette, 27 October 1915, No 148 at 4187.

[2] For example, *Poor Persons Legal Remedies Act 1918* (NSW).

this period was the growing interest of the legal professions in legal aid, at least in the common law societies.

In the 30 years after WWII legal aid experienced what has been aptly described as its charismatic phase (Blankenburg 1981: 224). Australia, Canada, Denmark, Finland, France, The Netherlands, Norway, Sweden, the UK and the USA reformed legal aid, establishing Judicare or mixed model schemes that for the first time offered the poor and low-income citizens a comprehensive range of legal aid services (Zemans 1979; Blankenburg & Cooper 1982: 276-77; Abel 1985: 475). Moreover, an image of legal aid as the modern answer to the ancient problem of justice for the poor – a first wave towards equal access to justice for all – was projected throughout the western world and its spheres of influence, particularly over the 1960s and 1970s (Cappelletti 1975: 5; Cappelletti and Garth 1981).

Today legal aid schemes operate in over 80 countries (Soar 2002: x).[3] Mostly responsibility for funding and administering legal aid rests with governments. National governments in countries such as Britain, Ecuador, Finland, The Netherlands and South Africa, and shared between national and state or provincial governments in federations such as the USA, Germany, Canada and Australia. In some countries local government is the principal legal aid provider, for example, Croatia and Hong Kong. In other countries such as the USA, Germany and Brazil local government complements legal aid services provided by other levels of government. Legal aid services are delivered in Judicare, salaried and mixed models of delivery. Non-state organisations also contribute to the provision of legal aid. In the countries of Latin America and South America in particular courts, law faculties and voluntary organisations also provide legal aid. Law faculties, non-profit organisations, other non- government organisations (NGOs) and community legal services also form part of the legal aid responses in countries such as Australia, South Africa and the USA, to varying and different degrees.
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Legal aid schemes vary significantly both in scale and scope, and in the availability of inside litigation and outside litigation services.[4] Inside litigation services are the major activity, predominantly providing legal representation for poor and low-income people. In most countries legal aid is more readily available in criminal matters. Applicants for legal aid are generally required to demonstrate an inability to pay for the legal services that are required. Legal aid schemes also generally require that an applicant's defence or case has merit, and reasonable prospects of success. Restrictions are often imposed on availability, in criminal matters, for example, legal aid is often unavailable in minor cases or pleas in mitigation, and, in civil matters, with respect to particular types of legal problems, for example, defamation (ibid: xi-xii).

The UN, regional and national human rights regimes

Generally speaking the UN, regional and national human rights regimes do not proclaim legal aid as a civil or political right. Instead the human rights regimes confer on individuals certain rights to due process in civil disputes and criminal proceedings.

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[3] See also Legal Aid Around the World http://www.ptla.org/international.htm (accessed 7 May 2007).

[4] 'In-litigation' refers to services required to resolve legal problems in courts. 'Outside litigation' services refer to assistance such as legal advice in legal problems not likely to end in court (Cohn 1943: 359).

Under the International Covenant on Civil and Political Rights (ICCPR), Art. 14 (1), ratified by 120 of the 192 UN member states everyone is entitled to a fair and public hearing within a reasonable time by an independent, impartial and lawfully established tribunal in the hearing of civil actions and criminal charges. [5] Comparable provisions are contained in the regional treaties, and in the national human rights regimes.

The 1948 American Declaration of the Rights and Duties of Man (American Declaration) provides that every individual in the 36 member Organization of American States (OAS) is entitled to enjoy basic civil rights, including the right to resort to the courts to ensure respect for her or his legal rights (Art. XVIII).[6] Article 8 (2) (d) of the 1978 American Convention on Human Rights (American Convention) entitles every individual in the 25 ratifying Latin American states to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature, and the determination of her or his rights and obligations of a civil, labour, fiscal, or any other nature. [7]

The due process rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) resemble the ICCPR equivalent. These entitle everyone in the 45 ratifying and acceding states to a fair and public hearing by law in determining civil rights and obligations and any criminal charges, within a reasonable time, and by an independent, impartial and lawfully established tribunal (Art. 6 (1); Smith 2005). Whilst the EU has no separate human rights regime the *Single European Act 1996* and the 1997 Treaty of Amsterdam acknowledged the importance of human rights and fundamental freedoms, and specifically tied the EU to the European Convention standards Smith 2005: 4-5). [8] Moreover, over the past 30 years the Council of Europe has adopted a number of policies encouraging EU member governments to develop legal aid (Johnsen 2006: 8-9).

The African (Banjul) Charter on Human and Peoples Rights (African Charter) ratified by 53 countries entitles every individual to have her or his cause heard, and to be tried within a reasonable time by an impartial court or tribunal (Art. 7 (1). The 2004 revised Arab Charter on Human Rights (revised Arab Charter) proclaims that everyone is entitled to a fair trial that affords adequate guarantees before a competent, independent,

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[5] Safeguards guaranteeing protection of the rights of people sentenced to death or facing trial for capital offences adopted by the UN Economic and Social Council in 1984 include the right to legal assistance at least equal to the ICCPR, Art. 14, provisions (OHCHR).

[6] Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the USA, Uruguay and Venezuela. Cuba was excluded from membership in 1961

[7] Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

[8] The proposed Constitution for Europe (2004) contained a Charter of Rights and Freedoms included due process rights similar to the European Convention and, in addition, the possibility of being advised, defended and represented. The Charter obliged member states to make legal aid available to those lacking sufficient resources, insofar as legal aid was necessary to ensure effective access to justice (Smith 2005: 5-6).

impartial, lawfully constituted court to hear any criminal charge or to decide on her or his rights or obligations (Art. 13 (a); Rishmawi 2005). [9] States are required to guarantee those without the requisite resources legal aid to enable them to defend their rights.

Most western countries outside Europe have incorporated human rights provisions in national law since ratifying the ICCPR in 1976. [10] In Canada the 1982 Charter of Rights and Freedoms (Canadian Charter) entitles individuals to right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7). In New Zealand the *Bill of Rights Act 1990* , s. 27 (1), entitles every person to the observance of the principles of natural justice by any tribunal or other public authority empowered to make a determination in respect of her or his rights, obligations or interests protected and recognized by law. The notable exceptions are the USA and Australia, although two Australian jurisdictions have recently enacted bills of right legislation, which confer due process rights similar to the ICCPR, Art. 14 (1). [11]

Comparable due process provisions are found in other older states, for example, in Chile the constitution provides the law shall provide the means for legal counsel and defence to be rendered to those who should have been unable to obtain them on their own (Art. 19 (3). The human rights laws of the newer states that have emerged as a result of de-colonisation or reformation generally contains due process provisions. In South Africa under the Bill of Rights in the Constitution, Ch. 2, everyone is entitled to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, other independent and impartial tribunal or forum (s. 34). In Namibia all persons are constitutionally entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law in the determination of their civil rights and obligations or any criminal charges against them (Art. 12 (1)). In Azerbaijan the statement of principal human and civil rights and freedoms in the constitution provides that in specified cases legal help shall be rendered free at the expense of the State (Art. 61).

The human rights regimes entitle defendants in criminal cases to certain minimum guarantees of due process. Under the ICCPR, Art. 14 (3) (d), and the European Convention, Art. 6 (3), for example, accused have the right to conduct a defence, personally or through legal assistance of their own choosing. Under the Canadian Charter those charged with a criminal offence are entitled to the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent, impartial tribunal (s. 11 (d)).[12] In the American Declaration the rights of criminal accused include the right to an impartial and public hearing (Art. XXVI).

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[9] Jordan, UAE, Bahrain, Tunisia, Algeria, Djibouti. Saudi Arabia, Sudan, Syrian Arab Republic. Somalia. Iraq, Oman, Palestine, Qatar, Comoros, Kuwait, Lebanon, Libyan Arab Jamahiriya, Egypt, Morocco, Mauritania and Yemen.

[10] Constitutions referred to are accessible on the Constitution Finder database, University of Richmond (http://confinder.richmond.edu/: accessed 7 May 2007). See also Blaustein and Flanz 1971.

[11] *Human Rights Act 2005* (ACT), s. 21; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 24(1)

[12] See also the American Convention, Art. 8 (1) & (2) (d); *Bill of Rights 1990* (NZ), s. 11 (d)).

In most instances the minimum rights of an accused include a conditional right to state-funded legal representation. The way in which this right is expressed varies. Under the ICCPR an unrepresented accused is entitled to have legal assistance assigned, in any case where the interests of justice so require, without payment if an accused has insufficient means to pay for legal representation (Art. 14 (3) (d)). [13] Similar provision is made in the European Convention, Art. 6 (3). The American Convention confers an inalienable right on accused persons to be assisted by counsel provided by the state, paid or not as national law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law (Art. 8 (2) (e)). Under the revised Arab Charter in the course of prosecution and trial everyone charged with a criminal offence is entitled to minimum guarantees, including the right to conduct a defence in person or through legal assistance of her or his own choosing, and to have free legal assistance, if unable to conduct the defence personally or if the interests of justice so require (Art. 16 (c) & (d)).

Similar rights are conferred by national human rights regimes. In New Zealand individuals charged with an offence are entitled to receive free legal assistance if the interests of justice so require, and she or he does not have sufficient means to provide that assistance. [14] In South Africa every accused person has a constitutional right to a fair trial, which includes the right to have a legal practitioner assigned by the state, at public expense, if substantial injustice would otherwise result (s. 35 (3) (g)). Similar rights are conferred on all detainees including sentenced prisoners (s. 35 (2)). Rights akin to the ICCPR, Art. 14 (3) (d), are also conferred in the Australian law. In Victoria, for example, the minimum guarantees of those charged with a criminal offence include rights to be represented, if eligible, by the state legal aid agency, and to have legal aid provided if the interests of justice require, without cost if an accused satisfies the statutory eligibility requirements for legal. [15]

There are a few exceptions to the general rule. The 1995 Protocol to the African Charter, for instance, requires all ratifying states to ensure effective access by women to legal aid, and to support local, national, regional and continent-wide directed at providing legal aid for women (Art.8). In Indonesia the human rights legislation provides that everyone brought before a tribunal has the right to legal aid from the start of the hearing until a legally binding decision.[16] In East Timor access to the courts is constitutionally guaranteed to everyone for the defence of their legally protected rights and interests. Under the Constitution, s. 26, access to courts "is guaranteed to all for the defence of their legally protected rights and interests … Justice shall not be denied for insufficient economic means".

In some countries the provision of legal aid is a core principle of state public policy. In India, for instance, the principles of state policy in the constitution direct inter alia that the state shall provide free legal aid, by suitable legislation, legal aid schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (s. 39A). Such policy statements do not

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[13] Australia, Belize, Guyana, the UK and the USA reserved rights with respect to 14(3) (d) when ratifying, acceding or succeeding to the ICCPR.
[14] *Bill of Rights 1990* (NZ), s. 26 (f)). See also *Human Rights Act 200*5 (ACT), s. 21
[15] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 25(2).
[16] Republic of Indonesia, Legislation Number 39 of 1999 Concerning Human Rights, Art. 18 (4).

require states to provide legal aid, and are not legally enforceable. [17] They are intended to serve as core policy principles which it is the duty of the state to apply in legislating.

The justiciability of the hearing provisions

The rights to a hearing conferred by human rights regimes are not always justiciable. The ICCPR does not operate automatically as domestic law. Each ratifying state undertakes to take the necessary steps, in accordance with its constitutional processes and the ICCPR, to give effect to the rights recognized in the ICCPR, where not already provided in legislative and other measures (Art. 2 (2). Unless the ICCPR is given effect in domestic law the remedies of individuals alleging violations of their rights to due process are limited. The first Optional Protocol, Art. 1, to the ICCPR, recognizes the competence of the UN Human Rights Committee to hear complaints against a state from individuals within its jurisdiction who allege violations of ICCPR rights.[18] Alternatively, an individual may lodge a complaint with a national human rights agency, in Australia, for instance, the Human Rights and Equal Opportunity Commission.[19]

A similar situation exists obtains under two of the regional human rights regimes. The American Convention restricts standing before the Inter-American Court on Human Rights to member states and the Inter-American Commission on Human Rights (IACHR) (Arts. 52 & 61 (1)). Furthermore, the standing of individuals to complain of human rights violations to the IAHCR, which in any event only exercises reporting powers, is subject to conditions. [20] The revised Arab Charter does not establish any judicial process to determine alleged violations, and the powers of the Arab Human Rights Committee are limited to reviewing triennial compliance reports from member states.

Complaints from individuals claiming that the hearing rights conferred by the European Convention have been violated are justiciable before the European Court of Human Rights (ECHR), provided that all domestic remedies have been exhausted (European Convention, Arts. 34 & 35 (1)). Legislation constituting the African Court of Human and Peoples Rights (ACHPR) established under the African Convention is yet to be promulgated, and its location agreed (PICT). The jurisdiction of the ACHPR extends beyond the African Convention, to all instruments, including all UN instruments that codify human rights ratified by defendant states (2004 Protocol to the African Convention 2004, Art. 3 (1); see also PICT). Individuals will have standing to bring cases alleging violations of the African Convention against African Union member states, provided that the subject member state has accepted the jurisdiction of the ACHPR to hear such cases.

Alleged violations of hearing rights conferred by national human rights regimes are generally justiciable in the courts. In both Canada and South Africa, for example, the Supreme Court has jurisdiction to hear such matters. In the states such as Namibia that have legislated to give effect to the ICCPR breaches of its Art. 14 rights are also

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[17] Constitution of India, s. 37. See also de Villiers 1992: 33-4.
[18] In 2003 there were 104 state parties to the Optional Protocol (DFAT 2004:32).
[19] *Human Rights and Equal Opportunity Act 1986* (Cth), s. 11 (1).
[20] Admission of petitions by individuals and NGOs is subject inter alia to the requirement that remedies under domestic law have been pursued and exhausted, unless the domestic legislation of the state concerned does not afford due process of law for the protection of the rights that have allegedly been violated.

justiciable. In some states rights to due process by national law are not justiciable. In Indonesia, for example, complaints of violations may be made to the National Commission on Human Rights, but are not enforceable in the courts.[21]

The principles of the right to a fair trial

The human rights regimes confer a right to a fair trial that embodies the 'right to a court' (Jayawickrama 2002: 481-2). Enabling individuals to assert the right to fair trial requires more of states than merely ensuring that courts and tribunals are accessible to all, or that everyone, in the case of civil disputes, has the right to institute proceedings. In *Airey,* for example, the respondent argued that as the applicant was not prevented from appearing unrepresented her right to a fair trial was not infringed.[22] The ECHR rejected this argument, re-affirming that the European Convention was: "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective". A guarantee that was particularly apposite with respect to: "the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial".[23] The right to a fair trial comprises the right of access to a court, and the guarantees relating to its composition, organisation and conduct, as the ECHR said in *Golder*, in: "sum whole makes up the right to a fair hearing" (ibid: 482). [24]

The scope of the right is not necessarily conterminous with national law with respect to due process, or rights to a fair trial, such as those articulated in Australia in *Dietrich*.[25] The ECHR, for instance, interprets the concepts of the European Convention autonomously (Johnsen 2006: 6). In some states the scope of the right to a fair trial is governed by general interpretative directions with respect to human rights values. In South Africa, for example, courts interpreting the bill of rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. [26] The right to a fair trial is recognized without any distinction as to race, colour, national or social origin, means, status or other circumstances (Jayawickrama 2002: 493).

The right is exercisable in respect of all criminal and civil proceedings. In interpreting the meaning of a "criminal charge" courts look to the substance of the offence and its procedures. The ECHR, for instance, has specified three relevant criteria: the classification of the proceedings under national law, the nature of the proceedings, and the nature and degree of the penalty (ibid 2002: 494-5). This means, for instance, that under the European Convention administrative sanctions such as tax and customs penalties and conditional release from prison might qualify as criminal charges (Johnsen 2006: 6).

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[21] Republic of Indonesia, Legislation Number 39 of 1999 Concerning Human Rights, Art. 90. Provision is made (Art. 104) for a Human Rights Tribunal in the case of gross breaches of human rights.
[22] *Airey v. Ireland* (1979) 2 EHRR 305.
[23] Ibid.
[24] *Golder v United Kingdom* (1975) 1 EHHR 524.
[25] *Dietrich v R* (1992) 109 CLR 385.
[26] Constitution, s. 39 (1). See also *Government of the Republic of Namibia and ors. v. Mwilima and ors.* (2002) (Case no. SA 29/2001).

The concept of "civil rights and obligations" covers all proceedings decisive of private rights and obligations in relation to a genuine dispute over a right at least arguably recognised under national law, or its scope or manner of exercise (Jayawickrama 2002: 498). In the ECHR these principles have been applied to a wide range of proceedings including with respect to termination of employment, divorce, custody and access to children, approval of private land sales, licensing of professionals and private businesses, expropriation of property and social security (ibid: 499: Johnsen 2006: 5-6).

Legal representation is not always required to enable an individual to exercise the right to a fair trial. In civil proceedings self-representation without professional assistance can satisfy the fair trial requirements. [27] In the ECHR the test applied is proceeding unrepresented "would be effective", in the sense of whether a party would be able to present her or his "case properly and satisfactorily". Each case will depend upon the particular facts and circumstances.[28] The ECHR in *Airey*, for instance, considered that it was unrealistic to expect that in judicial separation proceedings the applicant "could effectively conduct her own case", notwithstanding any assistance by the trial judge. [29]

Nor is legal representation always required in criminal proceedings. In less complicated and less serious proceedings an accused may receive sufficient protection from the operation of the institutional processes of the courts. In *Mwilima*, for instance, a majority of the Supreme Court of Namibia considered that in a criminal proceeding involving only one or two defendants, and not raising complicated issues of law, the presumption of innocence, the role of the trial judge in ensuring procedural fairness and the prosecutors' duties to treat an accused fairly may be sufficient to ensure a fair trial. [30]

In civil matters relevant consideration in determining whether a person can obtain a fair trial without legal representation include the importance of the case, and the complexity of the proceedings (Johnsen 2006: 3). The ECHR in *Steel and Morris*, for example, gave weight to the potentially significant financial consequences for the applicant defendants if the plaintiff succeeded in its defamation action, as it did to the scale and complexity of the proceedings, involving over 300 hearing days, including 100 days of legal argument, over 40,000 pages of evidence and 130 witnesses. [31]

Similar considerations apply in criminal proceedings. *Mwilima* is an example *in extremis*. The charges against the accused were serious and on conviction would attract long periods of imprisonment. The 128 accused faced 275 mainly serious charges, the prosecution expected to call 500 witnesses, interpreters were required and the hearing was expected to last two years. Many of the accused were indigent and unable to afford the cost of obtaining transcriptions of the evidence, further contributing to what one judge described as a likely "logistical and organizational nightmare". [32]

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[27] *Steel and Morris v The United Kingdom* (Application no. 68416/01), 15 May 2005 EHCR, p. 23; *Airey*, above n 22, p. 12.
[28] Above n 22.
[29] Ibid, p. 10.
[30] *Government of the Republic of Namibia and ors. v. Mwilima and ors.* (2002) (Case no. SA 29/2001), pp. 36-7.
[31] Above n 27
[32] Above n 30.

The capacity of individuals to self-represent is also a relevant factor (Johnsen 2006: 3). In *Steel and Morris* the applicants had been largely self-represented defendants in complex and prolonged defamation proceedings. The defendants were "articulate and resourceful", had been partly successful, and had obtained some legal representation, and assistance from the trial courts. The ECHR held that the right to a fair trial had been violated, these factors being no substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel".[33]

In *Mwilima* some of the accused were relatively well-educated people including a former parliamentarian, teachers, civil servants and former policemen. [34] The appellant state argued that the fact these accused "did not have the profile of typical criminal defendants" weighed against granting legal representation. However, the majority of the court preferred the view expressed in *Powell v Alabama* that even the intelligent and well-educated lay person generally lacks the forensic skills to be able to properly answer and conduct a defence to a criminal charge. [35]

The nature of the proceedings is also a factor. In *Steel and Morris* the ECHR noted that the proceedings were not determinative of important family rights and relationships, in contrast to earlier cases in which legal representation was held to be necessary for a fair trial. It also noted that the European Convention organs had observed that a defamation action should be distinguished from an action for a judicial separation. Nevertheless, the ECHR held that legal representation was necessary, as the defendants did not bring the defamation action, but were defending it: "to protect their right to freedom of expression, a right accorded considerable importance under the Convention" [36]

In *Mwilima* in some instances the charges against the accused were based on the doctrines of common purpose and conspiracy. The majority of the court considered that legal representation was required. These charges were complicated and difficult to understand, even for legal practitioners. A defence would require obtaining particulars and discovery from the prosecution, steps requiring a detailed knowledge of the relevant law. [37] The defence would also require lengthy and skilled cross-examination, which not all the accused could master, notwithstanding assistance from the trial judge. Challenges to the admissibility of statements and confessions would also be required, involving difficult questions of fact and law, the outcome of which could be conclusive for the guilt or otherwise of the accused.[38]

There are other relevant factors. One such factor is the amount of the costs of the proceedings and the capacity of an individual to pay those costs. Violation of the right to a fair trial: "will be established if the costs appear as an actual barrier against access to court" (Johnsen 2006: 3). In *Airey*, for example, the respondent government argued that the barrier to access to the court faced by the applicant was not official action, but the fact that her financial circumstances rendered her unable to pay the costs of engaging a lawyer. The EHCR responded by saying the "hindrance in fact" can

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[33] Above n 27, pp. 25-6.
[34] Above n 30, pp., 36-7.
[35] (1932) 287 US 45.
[36] Above n 27, pp. 23-4.
[37] Above n 27.
[38] Ibid

contravene the Convention, just like a legal impediment". [39] Differences in the scope and scale of the legal representation available to the parties may also be a factor. The ECHR *in Steel and Morris*, for example, considered that the disparity in levels of assistance between the parties was: "of such a degree that it could not have failed … to have given rise to unfairness".[40]

Some national legislation departs from the approach of the UN and regional arrangements. In Canada, for instance, the Charter, s. 7, does not always require state-funded legal representation when decision are made affecting an individual's right to life, liberty or security of the person. Important considerations are the seriousness of the interests at stake and the complexity of the proceedings. An accused charged with a serious and complex offence unable to afford to retain counsel is entitled to state-funded counsel, but not to counsel of choice. If legal aid is refused, a trial judge may, if she or he believes that legal representation is essential to a fair trial, and is satisfied that an accused lacks the means to employ counsel, stay the proceedings until the necessary funding is provided. The responsible legal aid plan or the Crown is required to fund counsel if the trial is to proceed. [41]

The implications for states and legal aid schemes

Governments are ultimately responsible for ensuring the effectiveness of the right to a fair trial. States ratifying the ICCPR undertake to respect and ensure to all individuals within jurisdiction the civil and political rights it recognises without distinction of any kind (Art. 2 (1)). The regional human rights regimes exact similar undertakings, state parties to the European Convention, for example, accept a responsibility to organize their judicial systems consonant with human rights (Johnsen 2006: 4). [42] Ultimate responsibility also rests with governments under the national human rights regimes, directly, as in, for example, South Africa and Indonesia, or indirectly, as, for example, in Victoria where all public authorities have a statutory obligation to act in a way that is compatible with human rights.[43]

The obligation to ensure a fair trial does not generally require governments to establish legal aid schemes. Under the European Convention, for example, member states may choose different strategies to ensure that the Art. 6 due process rights are effective, for instance, by simplifying law and procedure, citizens' legal education, developing ADR or establishing effective self-representation processes (ibid: 7-8). If an individual litigant or accused requires legal representation in order to obtain a fair trial states cannot avoid the obligation to provide legal aid. This obligation is enforceable irrespective of the particular statutory arrangements that operate for legal aid. In *Steel and Morris*, for example, the UK government argued unsuccessfully that as states do not have unlimited resources to fund legal aid systems it was legitimate to impose restrictions on eligibility

[39] Above n 22, p. 11.
[40] Above n 27, p. 26.
[41] Canadian Charter of Rights Decisions Digest, Section 7, para. [11] Referring *inter alia* to *Rowbotham et al. v. R.* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).
[42] Citing *Hadjinis v. Greece* (2005) as a recent example of the ECHR applying this principle.
[43] Constitution of South Africa, s. 7 (2); Republic of Indonesia Legislation Number 39 of 1999 Concerning Human Rights, Art. 18 (4); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 1(2 (c).

for legal aid in certain types of low priority matters, even if that meant denying applicants requiring legal aid for a fair trial under the European Convention assistance. [44]

The point is very clearly illustrated in *Mwilima* in which the respondents were refused legal representation under a statutory legal aid scheme for lack of resources. The Ministry of Justice declined to provide any additional funds. Art. 95 (h) of the Namibian Constitution required the state to adopt policies providing free legal aid, subject to available resources. The government argued that Art. 95 (h) limited its duty to provide legal aid to available resources, including legal aid in relation to the right to a fair trial. A majority of the Supreme Court held that Art. 95 (h) served to recognise Namibia's limited resources in manpower and finances, which justified restricting the availability of legal aid under the statutory scheme. At the same time the state had an unqualified legal duty to uphold constitutional fundamental rights and freedoms, including the right to a fair trial. The government could not shirk this duty and the obligation to provide legal representation in appropriate circumstances on the basis of lack of resources. [45]

A decision in a particular case that a state is required to provide legal representation to a litigant or accused does not require legal aid to be provided in all similar cases. In *Airey* the Irish Government argued that granting the applicant legal aid would require it to provide free legal aid in all civil cases. An argument it sought to bolster on the basis that as Ireland had reserved rights with respect to the European Convention, Art. 6 (3), it could not be said to have implicitly agreed to provide unlimited civil legal aid. The ECHR rejected both arguments, holding that the European Convention did not guarantee "any right to free legal aid as such", and that its decision in favour of the applicant could not be generalized: "the conclusion does not hold good for all cases concerning "civil rights and obligations or for everyone involved therein". [46]

The implications of these state obligations for legal aid schemes vary. The main variable is justiciability and enforceability. In jurisdictions in which human rights are not justiciable or part of domestic law rights to a fair trial have only a moral sway. This means that legal aid schemes refusing qualifying applicants legal representation run the risk of public criticism, from the media, access to justice interest groups and human rights defenders. Save that the Australian decision in *Teoh* may be relevant. [47] In *Teoh* the High Court held that ratification by Australia of international conventions such as the ICCPR founded a legitimate expectation that administrative decision-makers would act in conformity. Notwithstanding that such conventions may not be part of Australian law, absent any contrary statutory or executive policy indications (Roberts 1995). [48] If this

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[44] Above n 27, p. 21.

[45] Above n 30, per Strydom CJ and Mtambanengwe and Manyarara AJA at pp. 22-36. The majority also found the state was bound to give effect to the rights to a fair trial guaranteed by the ICCPR, Art. 14, as it formed part of the law of Namibia.

[46] Above n 22, pp. 11-12.

[47] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353.

[48] Almost immediately the Australian Government acted to counter the *Teoh* principle administratively, stating that it was not legitimate for the purpose of applying Australian law to expect that treaty provisions not incorporated into domestic law would be applied by decision makers (Joint Statement 1995). Subsequently the government made three attempts to override the principle legislatively. In 2000 the UN Human Rights Committee requested the bill be withdrawn, as legislation would breach the ICCPR, Art. 2. A fourth unsuccessful attempt to pass the legislation was made in 2001 (see Defence for Children International – Australia).

approach has any traction internationally it may have implications for legal aid schemes in other countries in which international human rights regimes are not part of domestic law. Compelling legal aid administrators to consider the existence of due process rights in decision-making about scope and eligibility, but not necessitating decision-making to implement such rights, or action to ensure that legal representation is available to qualified applicants.

In some jurisdictions in which rights to a fair trial are justiciable and enforceable the legal responsibilities of legal aid schemes are clearly stated, at least in part. In South Africa, for example, the responsibilities of the Legal Aid Board include providing legal aid to persons constitutionally entitled to legal representation at state expense.[49]In other jurisdictions the legal responsibilities of legal aid schemes to ensure that legal aid is available to persons requiring legal representation to give effect to their right to a fair trial are far less clearly articulated. In many instances governments appear to send mixed or confused policy messages to legal aid schemes and administrators. In British Columbia, for example, the statutory objects of the Legal Services Society are inter alia to establish and administer an effective system for providing legal aid to low income individuals.[50] In the UK, its constituent legislation requires the Criminal Defence Service to ensure that individuals involved in criminal investigations or criminal proceedings have access to the legal advice, assistance and representation as the interests of justice require. [51] In neither British Columbia nor the UK does the legal aid legislation appear to expressly refer to human rights. Yet the Canadian Charter applies to the legislature and government of all provinces in respect of all matters within the authority of the legislature of the province.[52] The *Human Rights Act 2000* requires that all UK legislation should so far as is possible be read and put into effect in a way that is compatible with the European Convention. [53] An approach which appears to place no positive obligation on the Legal Services Commission to ensure that its legal aid eligibility criteria are human rights compliant. In Australia the legislation in Victoria attempts a solution to this issue by subjecting the guarantee of free legal representation for persons charged with a criminal offence to the condition that she or he meets the eligibility criteria set out in the statutory scheme.[54]

The principles of the right to access courts indicate the minimum requirement of a legal aid scheme that enables individuals to exercise their right to a fair trial is that legal representation should be available for the purposes of all legal proceedings. In civil litigation, to defend criminal charges and in legal inter-actions between individuals, and individuals and states, affecting rights, in the wider sense described above. A number of questions arise.

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[49] *Legal Aid Act 1969* (SA), s. 3.
[50] *Legal Services Society Act 2002* (SBC), s. 9 (1) (b).
[51] *Access to Justice Act 1999* (UK), s. 12 (1).
[52] Section 32 (1). There is a provision for contracting out in that the Canadian parliament or the legislature of a province may expressly declare in an act that some civil and political rights do not apply.
[53] Legislation found not to capable of being so interpreted can be made the object of a declaration of incompatibility, encouraging governments to make a remedial order, and parliament to amend the legislation. See Report of the ACT Bill of Rights Consultative Committee 2003: 50-1.
[54] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 25(2) (f)

One question is the scope of legal assistance required, and when it must be made available. At least in more complex civil matters legal advice is required in order to ready a case for hearing. Most civil disputes are settled before hearing, often on the cusp of the trial, in circumstances in which lack of access to legal advice or representation is very likely to prejudice litigants' outcomes (Johnsen 2006: 7). In *Golder* a majority of the ECHR considered the right to a fair trial comprehended a right to make an informed decision on whether or not to exercise that right. [55] Suggesting the duty imposed on states by the European Convention, Art. 6 (1), may extend to providing access to pre-trial counselling, at least in meritorious cases (ibid: 6).

Similar issues arise in criminal proceedings, which involve complex chains of events, with many actors and processes. Decisions made by police, prosecutors and the defendant in relation to investigation and other pre-trial processes can impact significantly on the outcome of the trial. The principles of the right to a fair trial suggest that the obligations of states may extend to the provision of legal advice or legal representation for the purposes of these pre-trial processes (ibid: 7). In South Africa, for example, everyone detained in relation to criminal offences is constitutionally entitled to legal representation at state expense, if substantial injustice would otherwise result. [56] Similarly individuals complaining of administrative abuses of state power may also require legal assistance in pre-hearing procedures if their rights to due process are to be adequately protected (ibid).

Ensuring compliance does not prevent legal aid schemes from applying means tests and other financial eligibility criteria to applicants seeking assistance to exercise the right to a fair trial. The human rights regimes and the principles of a fair trial only clearly require legal aid schemes to provide free legal assistance in two circumstances. First, in criminal proceedings in which a defendant requires to be legally represented in order to obtain a fair trial, and she or he is unable to afford the cost of legal representation. Secondly, in all proceedings in which the right to a fair trial demands legal representation, and poor or low-income accused and litigants lack any financial capacity to pay for the costs of legal representation.

In other situations legal aid schemes are able to impose conditions on an approval of legal aid. In *Steel and Morris* the ECHR held that the right to a fair trial conferred by the European Convention was not absolute, and could be made subject to restrictions and pursued "a legitimate aim and are proportionate" (see also Jayawickrama 2002: 482-93).[57] Exactly what type of restriction on legal aid will qualify as proportionate is unclear. Conditions requiring that middle-income people pay "ordinary legal costs themselves", or imposing a high level of contribution on high income people, may be acceptable. On the other hand, a legal aid scheme that caps the costs that are payable, or uses percentage contributions, without any ceiling, might violate the right to a fair trial, if costs in the proceedings become high (Johnsen 2006: 5).

Conventional means tests which focus on the income and assets of applicants may be inappropriate, depending upon the capacity of the criteria to adequately consider the financial circumstances of individuals, and their financial capacity to meet the cost of legal representation in particular proceedings. Complaint financial eligibility criteria

[55] Above n 24.
[56] Section 35 (2) (c).
[57] Above n 27 at 23.

must satisfy two minimum conditions. One condition is that the criteria must address and assess the financial capacity of applicants in the context of the particular proceedings. Applicants unable to afford the cost of legal representation where such representation is necessary for them to effectively exercise their rights to due process must be eligible for legal aid, which means that eligibility cannot be restricted to poor and low-income people (ibid: 7). If the cost of legal representation is high, or the proceedings are complex or prolonged, middle income and high income people must also be eligible for assistance (ibid). The second condition is that the criteria, and the administrative arrangements, should make provision for re-assessment and review. A long trial or unforeseen delay or legal complexity, for instance, may lead to unanticipated changes in the financial circumstances of a party or accused.

Legal aid schemes can also legitimately also restrict the scale of legal representation. In *Steel and Morris* the ECHR held that states are not required to ensure total equality of arms between an assisted person and the opposing party: "as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary".[58] In some circumstances the obligation to provide legal representation imposed by the right to a fair trial may be fulfilled by co-representation, provided that there is no conflict of interest (ibid). [59]

A shared ideal and a common burden

There is another and important connection between legal aid and human rights. Legal aid has a conceptual dimension, in addition to its tangible forms, in public policy, and legal aid schemes. In *Towards Equal Justice* Cappelletti and his co-authors envisaged legal aid as the modern answer to the ancient problem of providing justice for the poor (1975: 5). An answer which involved western societies accepting in principle an obligation to "affirmatively and effectively guarantee the right of all to competent legal assistance", albeit a right of "great imprecision and indefiniteness" (ibid: 31-64), differing in scope and meaning in the common law and civil law societies, and within particular societies over time. In 20th century Australia, for example, politicians, legal professions and law reforms justified legal aid on a disparate canvas: a prerogative duty owed to the poor, a government responsibility, an adjunct to justice systems, a right of citizenship, a means of achieving equality between rich and poor, a social duty of the legal profession and a means of maintaining its dominant market position. [60]

An investigation in 1985 of the ideology of legal aid in other western societies including the Netherlands, the UK, Canada and the USA revealed a similar disparity, leading the investigator to conclude that legal aid lacked a coherent ideology, at: "various times and in different environments legal aid has been justified as advancing values that are not only divergent but often fundamentally inconsistent" (Abel 1985: 485). The dominant conception was probably the "image of legal aid as equal access to law (embodied in courts)" (ibid: 487). This image resonates with Cappelletti and Garth's portrayal of legal aid as the "first wave" towards fulfilling a basic purpose of a legal system, ensuring that its dispute resolution processes are "equally accessible to all" (1978: 6 & 20).

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[58] Ibid.

[59] See also *Mwilima* above n 30, *per* Strydom CJ and Mtambanengwe and Manyarara AJA at p. 42.

[60] See also National Legal Aid Advisory Committee 1990: 285-6.

Comparable conceptions of equality before the law inform the due process provisions, and other provisions in the human rights regimes. The UDHR, Art. 7, proclaims a universal right to equality before the law and its protection, a right reaffirmed in the ICCPR, Art. 26. Similar statements appear in the regional human rights regimes (African Charter, Art. 3; American Declaration, Art. XVII; American Convention; revised Arab Charter, Art. 11), and in the national constitutions and human rights and bills of rights legislation. In India, for example, the state is constitutionally mandated not to deny any person equality before the law or its equal protection (s. 14). In South Africa the Constitution, s. 9 (1), guarantees equality before the law. So, too, does the Canadian Charter, s. 15 (1). Human rights legislation, in Indonesia, for example, entitles everyone to be recognized, guaranteed, protected and treated fairly before the law, and to equal legal certitude.[61]

In 1948 when the UDHR first proclaimed equality before the law as a universal right a dissonant connection existed between legal aid and human rights. Like many civil and political rights articulated in the UDHR this right to equality before the law derived from the first ten amendments to the US Constitution, and its jurisprudence (Rustow 1980: 19; Wright 1980: 24). Notwithstanding that the growth of the market economy, notably its economic individualism and powerful pressure groups, and urbanisation and mass transport, production and communication had undermined law's social fabric in America (Hurst 1950: 442-43). By 1948 these social dislocations "had moved far enough to call into question" the capacity of the courts to mediate, and had created "a sense of popular disconnection" with law and its institutions (ibid).

Moreover the modern legal order in the developed societies had failed dismally to meet the needs of the poor. In Britain, for example, an emphasis on private property rights during legal modernisation quickly diminished the relevance of the common law for the poor (Abel-Smith and Stevens 1967: 12-13; Atiyah: 1979: 102). Later reforms to the courts and civil justice did little to alleviate their plight: "the court system and trial procedure amounted until well into the modern age to a denial of justice to the economically weaker groups" (Rheinstein 1954: 353). The situation was not significantly different in the mid-20th century. In Australia in 1943, for example, the Attorney-General in New South Wales believed that reforming the administration of justice was the most important of all social reforms: "'Equality of all men before the law' is the proud boast of British jurisprudence, but it is no more than a boast when justice is withheld from thousands because of their inability to pay for it". [62]

Human rights and legal aid began to share responsibility for achieving law's noblest aspiration –equality in access to justice for all, including the poor and disadvantaged. A burden which for human rights was made doubly difficult by its aspiration to enable all the world's peoples to effectively mobilise their universal rights to justice, at a time when the very emergence of the post-war human rights project reflected the shortcomings of the modern western legal order, especially its impotency in relation to the horrors and devastation of WWII.

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[61] Republic of Indonesia, Legislation Number 39 of 1999 Concerning Human Rights, Art. 3 (2).
[62] Captain C E Martin, Attorney-General in the McKell Labor Government, second reading speech introducing the Legal Assistance Bill, NSW PD 1943, Vol. CLXX at 2709-10.

The trend away from legal aid

Towards the end of the 20th century the relationship between legal aid and human rights began to change. One was reason for this was the trend away from legal aid. In the welfare capitalist societies which had reformed and expanded legal aid in the early and intermediate post-war period the interest of governments peaked in the 1970s. In the 1980s and 1990s funding levels fell, or at least did not increase to match demand. Legal aid schemes began to decline in scope. Means tests and assets tests in societies such as Australia, the UK, Canada, The Netherlands and Sweden became ever-more restrictive. Financial contributions were increased, or imposed on applicants, and caps applied on payments and service delivery. The range of matters in which legal representation was available was restricted. Legal aid was increasingly targeted at the poor, and increasingly restricted to serious criminal cases (Regan 1999: 2). Legal aid in the USA also declined. This situation continues to afflict legal aid schemes in many societies. In the UK, for instance, according to one commentator last year: "the topical debates are all about detail: value-for-money, contracting with suppliers, competitive tendering, holding down the budget, restricting asylum claims, furthering social inclusion and, alas and all too often, cuts" (Smith 2006: 2). A similar situation exists in Australia.

The reasons for these changes cannot be generalised, and are complex. National differences with respect to factors such as rates of marital breakdown and divorce, religion, conflict and violence and developments in legal systems affect developments in legal aid, as they did in the post-war world (Abel 1985: 000; Cousins 1994: 000; Blankenburg 1981: 00). It is however possible to identify three cross-national factors that have contributed to the trend away from legal aid.

The first is the changed dynamics of welfare capitalism. Post-war welfare capitalism succeeded in consolidating social citizenship rights, in unity with full employment, mass education and well-functioning industrial relations systems (Esping-Andersen 2000: 13 & 31). In these contexts some societies including, as discussed earlier, the UK, the USA, Sweden and Australia acted to reform legal aid (Regan 1993: 15; *see also* Marshall 1950: 40). Other societies such as France and Germany did not, reflecting differences between welfare regimes and welfare expenditure, and in levels of economic prosperity (Blankenburg 1997, 1982: 1 & 9-18; Regan 1995: 16).

There have been dramatic changes in the economic and social foundations of welfare capitalism. Vanishing industrial and manufacturing modes of work, the emergence of a new integrated global economic order, technological innovation and the rise of the service economy have transformed the economic base of welfare regimes (Esping-Andersen 2002: 2; see also Gray 1999: 19-20). Labour markets demand flexibility, and generate new levels of personal insecurity, exhibiting high demand for skilled labour, while simultaneously creating many low-skilled, low-paid jobs, the social costs of which are often borne by women and young people (Esping-Andersen 2002: 2). Economic transformation has been accompanied by major social change. Women's expectations of lifelong employment, less stability in marriages and family life, increasing inter-family resource inequality and shrinking working age cohorts have placed new demands on welfare states (ibid: 2-3).

Australia, Canada, the UK and the USA were the first societies to begin to re-engineer post-war welfare regimes (Castles 1990). By the end of the 1990s the growing pressures and demands on welfare regimes began to encourage other welfare capitalist

societies to follow, although not in ways that necessarily reproduced the Anglo-Saxon experience. In 2000, for instance, strategies adopted by the EC to improve global competitiveness included the modernization of the European social model (Esping-Andersen 2002: viii). In re-engineering welfare regimes governments in Australia, Canada, the UK and the USA have retreated from post-war emphases on social citizenship, including citizens' rights to legal aid. Such a shift may be more difficult in Europe, where the different models of welfare regime share a fundamental commitment to social citizenship. Moreover, recent research suggests the welfare *status quo* remains very popular, a fact that is likely to provide an obstacle to reform (ibid: 7-8).

Change affecting legal professions is the second cross-national factor contributing to the trend away from legal aid. Legal professions were significant and often seminal actors in the post-war expansion of legal aid (Abel 1985: 000). In the societies in which legal aid reforms did not occur legal professions exerted less influence, or had less positive attitudes towards legal aid, reflecting national differences in professional culture, legal education, demand for lawyers' services and success in defending market privileges (see Blankenburg 1982: 249-50 1997: 9-18; Paterson & Nelken 1984: 99-101).

In the common law world relations between legal professions, the state and society have changed. In Australia, for example, nation-wide microeconomic reform and competition policies led to regulatory reform of the legal profession and its work. Re-regulation and greater competition within the legal services industry, a product of globalisation and microeconomic reform, has encouraged on-going re-negotiation of legal professionalism, by governments, consumers and amongst legal professionals (Fleming & Daly 2007; see also (Paterson 1993 & 1996). This phenomenon is also evident elsewhere, although perhaps less pronounced in the USA. In the other common law societies re-engineering welfare regimes, regulatory reform and greater competition has diminished the incentives for legal professions to support legal aid, and seen the professional mainstream shift towards a *pro bono* focus. Civil law societies such as The Netherlands have also experienced problems in supply in legal aid markets. Legal professions in societies that did not reform legal aid in the post-war period probably have no greater reason now to support legal aid. In fact, the emphasis among elite lawyers likely to shape law reform policies and the directions of the bar is now on human rights.

In 1978 the Florence Access to Justice Project identified an emerging 'third wave' of reform affecting law and the poor. An access-to-justice approach, which included legal representation and advocacy, but much wider in scope and ambition, focusing on: "the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies" (Cappelletti 1978: 39). The access-to-justice approach has since come to dominate strategies across the world intended to improve popular access to law. In the 1980s and 1990s in Australia, Canada and the UK, for example, access-to-justice gradually replaced legal aid as state access to law strategy, in the course of reviews of legal and legal services system established in response to rising concerns about the cost of access to law (Woolf Report 1996; OLRC 1996; ALRC 2000; see also (SCLCA 1993 (a) & (b); NLAAC 1990; AJAC 1994; SLCRC 1997). Increased attention to issues such as the role of the judiciary, the non-discriminatory application of law and effective remedies in actioning equality before the law has also seen access-to-justice approaches incorporated in human rights strategies internationally (OECD 2005: 3).

The emergence of the access-to-justice approach is the third cross-national factor contributing to the trend away from legal aid. As Cappelletti predicted (1981: 5-6) access-to-justice approaches have not rendered legal aid obsolete. Legal aid schemes remain important means of providing legal services to poorer and low-income people. Instead, the access-to-justice approach has absorbed legal aid, access to legal services becoming part of wider strategies aimed at legal and institutional reform, and achieving equal and equally effective access to law. In Europe, for example, legal aid reform is one institutional reform required of the EU accession states (see Smith 2005), and one strategy in broader CEPEJ policies targeting justice systems reforms (Johnsen 2006: 11).

This diminished prominence of legal aid is even more pronounced in access-to-justice strategies intended to promote human rights or reform, build and re-build legal institutions in developing states, and war-ravaged societies. In this context law and development programmes of developed states, the World Bank, NGOs and other non-state organisations such as the Ford Foundation adopt a very broad conception of the justice sector, including justice administrators, penal systems, penal reform organisations, state and non-state policing, neighbourhood watch schemes and other social-crime prevention initiatives (OECD 2005: 3). This conception confers no special status on legal aid, and places legal aid schemes alongside access-to-justice strategies intended to promote informal and traditional forms of legal ordering, such as customary and traditional courts (ibid).

Changes in the politics of law

The second reason why the relationship between legal aid and human rights has shifted is the changes in the politics of law. Since WWII human rights has emerged as a new force in national and international legal orders. Within states human rights regimes, bills of rights and human rights legislation have changed national legal systems, as has rights conferred by international and regional human rights regimes in states in which such rights apply domestically. Both developments have increased citizens' legal rights, changed the dynamics of legal systems, and, as discussed earlier, placed new pressures on states and legal aid schemes.

The fundamental rights and freedoms first proclaimed in the UDHR are now the centrepiece of a global legal order. Internationally the UN General Assembly, its Economic and Social Council and the International court of Justice provide a legal framework administering the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the conventions on racial discrimination, the crime of apartheid, discrimination against women, torture and the rights of the child (Jayawickrama 2002: 130-55; DFAT 2004: 17-28). In 2001 only four UN member states were not a party to these core human rights treaties (Jayawickrama 2002: 153). [63] At the regional level a comparable role is performed by courts such as the ECHR and the Inter-American Court on Human Rights and bodies such as the IACHR and the Arab Human Rights Committee.

International human rights law is a growing and ever more important field of law. The concept of a legal field was applied to explore the role of international commercial arbitration in the emergence of a legal order for the resolution of trans-national business

[63] Brunei Darussalam, Malaysia, Saudi Arabia and Singapore.

disputes. In particular, to explore the phenomenon that although "no objective thing called international commercial arbitration" existed, despite its surrounding networks, relationships and institutions, it revealed and contributed to "the reorganization and reshuffling of hierarchies of positions, modes of legitimate authority and structures of power" (Dezalay and Garth 1996: 15 &17). The concept of legal field – a "symbolic terrain with its own networks, hierarchical relationships, and expertise … subject to modification over time and in relation to other fields" - was adopted to understand the social space between, around and about the networks, relationships and institutions of the surrounding emergent legal order (ibid: 16). [64] A social space, on the one hand, inhabited by communities and networks organised around beliefs in an ideal of private international justice, and involving, on the other hand: "an extremely competitive market involving big business and megalawyering" (ibid).

Like other international legal fields international human rights law is an arena of struggle (ibid: 317). Within international civil society the authority of human rights institutions, the scope of human rights regimes and the responsibilities of states and the rights of individuals and peoples are spaces of development and transformation. International human rights institutions and human rights and development organizations inter-act and cooperate with each other. NGOs, for example, play an important role in pushing the UN to develop its human rights machinery, and have a growing presence within states, promoting awareness of human rights and helping victims and neglected groups to bring their claims forward (Eide 2006: 236). Similarly, international human rights law can be seen as a virtual space "for battles that may vary in intensity in different times and places – and that have more or less strong echoes in national and local power relations" (Dezalay and Garth 1996: 316).

The factors contributing to the trend away from legal aid have also changed the politics of law. The administrative demands of the post-war welfare states created: "a giant machine for making and applying law [and for] social control … exercised through law" (Friedman 1985: 2). This development produced a massive increase in the legal power of states, and in citizens' needs for effective access to law. These needs were never adequately met by states and legal aid schemes, even in those societies which expanded legal aid provision, notwithstanding the rights to equality before the law proclaimed in the human rights regimes, and the growing momentum of human rights, especially in the later post-war period.

Re-engineering the post-war welfare regimes to respond to new economic and social conditions is unlikely to reduce this increased dissonance between law - and legal aid – and human rights. In fact, the Anglo-Saxon experience has been the reverse. In Australia and the UK, for example, the adoption of new, market-oriented welfare regimes has adversely affected the relationship between citizens' and law. The "financialisation" of public policy (Dore 2000: 2-6) saw governments retreat from their post-war role as legal guarantors of social wellbeing, towards an even greater focus on the demands and needs of business and large corporations. The regulatory paradigm of the 'public interest' under the 'rule of law' was displaced by New Public Management, or, as it is also known, managerialism, or new managerialism (Davis 1992: 259; Bayne 1992: 90). Managerialism has an uneasy relationship with the governmental and civic assumptions of the modern Anglo-Australian legal order, its very logic tending to ignore: "substantive public service obligations like maintaining the rule of 'law', upholding citizen' rights of

[64] Referring to Bourdieu 1987: 816 and Bourdieu and Wacquant 1992: 94-100.

access to fair and equitable government administration, and providing high quality legal services" (Yeatman 1987: 341).

Wider factors influencing the re-engineering of welfare capitalism also affected the politics of law. One historian argues that the 1980s and 1990s witnessed the decline of the Western empire, and the illusion of stability its modern states brought to national and international social ordering (Hobsbawm 2000: 31-59). Regionalisation and globalisation have "blurred and splintered" (Snyder 1999: 7) the reach of the modern nation state, and the spread of refugees on an unprecedented scale is challenging the social integrity of many welfare capitalist states (Hobsbawm 2000: 145-6). The dictates of the new world economic order, international treaties such as the North American Free Trade Agreement and the re-negotiation of the General Agreement on Tariffs and Trade in the 1986-94 Uruguay Round and formation of the World Trade Organization further weakened traditional rights of sovereignty of modern nation states (WTO; Rifkin 2000: 227-8).

The emphasis on access-to-justice strategies has also changed the politics of law. These strategies evolved from recognition that legal representation alone was insufficient to effectuate citizens' legal rights, which: "forced a rethinking of the system of supply – the judicial system" (Cappelletti and Garth 1978: 51). Within developed states promoting: "comprehensive, radical innovations, which go much beyond the sphere of legal representation" (ibid: 52). These new strategies were incorporated into human rights, 'rule of law' and legal capacity building programs in developing and re-constructing states. The access-to-justice approach has renewed emphasis on and attention to non-state - unofficial and indigenous - legal ordering, in developed and developing states. Ultimately, as Galanter argued: "access to justice is not just a matter of bringing cases to the font of official justice, but also at the primary institutional locations of their activity – home, neighbourhood, work-place, business setting and so on" (1981: 161-2). An objective that has changed the relationship between official and unofficial law, and presents new challenges (ibid: 172-3 & 180-1), including, in some instances, in the relationship between unofficial law and human rights.

The politics of official law itself has also changed. National legal systems are: "institutional-intellectual complexes … connected to the state, guided by and propounding a body of normative learning" (ibid: 163). Official law, in other words, is simultaneously a legal order – a meta-institutional and regulatory conglomerate – and a legal field, in the sense described earlier, which is, a social space, of ideology, relationship and transformation. As a legal order generating and administering law, and as a legal field, shaping law's norms, ideals and images.

The politics of official law - as a meta-legal field – have shifted, although it remains a pre-eminent and omnipresent mega-social force. Within national legal systems human rights, international human rights law, re-engineering welfare regimes, access-to-justice strategies and greater recognition of unofficial law have introduced new competitive dynamics, challenging modern law's social hegemony, and its alliances with the state. The Australian experience provides a convenient example. There legal centralism – the image of law as "made and administered by the state; and access to law is provided in courts by legal professionals" (Arthurs 1985: 2) – remains the basic paradigm of official law, as throughout the common law world. In the 1970s the flowering of the post-war welfare state rapidly expanded the volume, scope and significance of bureaucratic law. Leading to increased tensions with legal centralism, and the imprint of its arenas and

fields of action on official law. In the 1980s the rise of economic rationalism had implications for both legal centralism and its guardians, and bureaucratic law. Economists and econometricians displaced judges and lawyers in key decisional forums, part of a wider decline in the influence of legal professions (Bayne 1992: 92).[65] NPM and other regulatory ideals associated with economic rationalism most markedly impacted on bureaucratic law. Elevating economic rationality and undermining legal rationality – which had underpinned modern bureaucratic work - and attempting to: "replace the legal and procedural framework of the classical model" (ibid).

These changes also unleashed the regulatory potential of non-government corporate actors. Private corporations, industry and trade associations, service providers were freer than previously to order their own affairs and to regulate their external relationships. In the 1990s the adoption of National Competition Policy and its reform agendas subjected legal centralism, bureaucratic law and the political balance of the Australian legal order to new challenges (see Morgan 2003).

Developments occurring internationally also changed the dynamics of official law. The 1950s and 1960s were the decades in which: "the revolution of modernization entered its most intense worldwide phase" (Rustow 1980: 30). The lowering of trade barriers, the spread of multi-national corporations to countries such as Brazil, Hong Kong, South Korea, and Taiwan, cheaper and rapid air travel and cinema spread western culture across the world (ibid), including its legal ideals. In particular, legal centralism – the ideology underpinning official law in the common law world.

This was particularly true of the version of official law that had emerged in the USA. The powerful proselytising aspects of modern American society and its culture was a contributing factor, as was the influence of American legal and civil ideals on the shaping of the human rights regimes, referred to earlier (ibid: 30 & 19). In the 1950s, for instance, the Ford Foundation began to support groups that: "use the law to secure human rights and improve the lives of people in vastly different settings around the world" (McClymont & Golub 2000: 1). Early human rights defenders such Amnesty International, the International Commission of Jurists and the International League for Human Rights actively also promoted modern western legal ideals in protecting and promoting human rights (Newberg 1980: 2).

The global projection of official western law continues. In 2000, for instance, the Ford Foundation funded public interest law groups in 25 countries, the common link being the "use law as an instrument to promote the rights and advancement of disadvantaged populations and to further social justice" (McClymont & Golub 2000: 1). Human rights defenders and bodies such as the World Bank support and fund similar programs on a large scale. Access to justice and rule of law processes are also now key arenas for international engagement by states (OECD 2005: 1). Since the 1970s the United States Agency for International Development Funding (USAid) has funded programs focused on building justice capacity to prevent human rights abuses, in Latin America, and in constitutional projects in countries such as Nepal, the Philippines and Egypt (ibid). Other countries such as Canada, the UK, Germany, Norway and Switzerland have organisations that promote rule of law and justice building reforms (Samuels 2006: 25). In Canada, for instance, the goals of the Canadian International Development Agency

[65] Referring to Considine 1988.

include the realisation of civil, political, economic social and cultural rights, and reforms to ensure effective and fair and social justice legal institutions (CIDA 2007: 1-3).

The future of legal aid

Despite the investment in legal aid schemes and the creation of human rights regimes, institutions and law over the past 50 neither legal aid nor human rights have achieved the goal of universal equal access to justice. Changes in the economic and social foundations of welfare capitalism have exposed high-risk groups such as the less skilled, youth and single-parent families. There are signs of the emergence of long-term social excluded social strata, the new 'underclass in the UK and the USA, and the 'two-thirds society' in Germany (Esping-Andersen 1999: 10; see Rifkin 2000: 5). In developing and post-conflict states huge unmet needs exist for building the legal capacity that is a pre-condition for equal and effective access to justice. In these societies access to law is important, not only to protect and enforce legal rights, but as an instrument to overcome the discrimination and economic deprivation experienced by disadvantaged groups, including the rural and urban poor, women, indigenous peoples, migrants, refugees and internally displaced people and people living with HIV/AIDS and disabilities (UNDP 2005: 3 & 155-76). Whether human rights will succeed where law and legal aid have failed in making effective access to justice available to all is an issue for another day. Instead, this part of the paper considers the future of legal aid in a world of human rights, and amidst the changed politics of law's orders and fields.

The post-war human rights regimes re-emphasised the responsibilities of states and governments to provide effective access to law. Most states today make minimal provision for legal aid, and mainly target services at the poor and low-income citizens. In those states that reformed legal aid in the post-war period the scope and coverage of national legal aid schemes has contracted. In some instances to pre-reform levels, and, in concentrating on funding criminal and family law cases, arguably as much meeting state needs, as those of needy citizens. Increasingly states are seeking alternatives to legal aid, promoting self-help and legal profession *pro bono* programs, and supporting less expensive solutions, such as funding community managed legal services and ADR and other unofficial forms of dispute resolution. In failing to make adequate provision for legal aid states are neglecting their obligations under the human rights regimes, and failing to respect the human rights of citizens and populations.

At the same time in international human rights law the expectation that states should provide adequate legal aid have never been greater. In 1990, for example, the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Role of Lawyers. Article two of the Basic Principles expects governments to ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for everyone subject to their jurisdiction, without distinction of any kind, including property and economic status. In addition, governments are expected to ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons (Art. 3). Governments are also expected to give special attention to assisting the poor and other disadvantaged persons to enable them to assert their rights, where necessary asking legal professions to assist (Art. 4). The Basic Principles do not have the force of international covenants, and have not been adopted by the General Assembly.

Moreover in 1998 the UN General Assembly Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms reaffirmed the responsibility of states to protect, promote and implement all human rights and fundamental freedoms (Art. 2(1)). Responsibilities that include taking steps consistent with the UN Charter and other international obligations to create the legal guarantees required to ensure citizens can enjoy such rights and freedoms in practice, and to implement appropriate measures to promote understanding of human rights (Arts. 2 (1), 3 & 14 (1)).

Legal aid's fieldworkers- legal aid lawyers, legal professions and access-to-justice interest groups – have adapted to the new foci of the access-to-justice approach, and many are active as human rights defenders, and in human rights organisations. The capacity of legal aid boards, managers and administrators to act to adapt legal aid schemes to the demands of human rights law depends on state public policy. The adoption of a human rights approach to eligibility and services would require increased funding, and, in some instances, changes to statutory powers and functions. Schemes revising eligibility and other criteria to minimally meet the requirements of the due process provisions could take the opportunity to make wider changes, if funding permits.

Many legal aid schemes in developed states have adapted their operations in response to state access-to-justice strategies. Typically the result is that legal aid agencies increasingly serve *de jure* or *de facto* centrepiece or umbrella organisations for managing and mobilising state access-to-justice programs. The planned complex model of legal services under consideration in Scotland is one example (Scottish Executive 2004: 20-21). Developments such as these reverse to some extent the trend away from legal aid, and provide opportunities for greater integration of legal aid agencies and schemes into national justice and administrative sectors (e.g., ibid 47-61). The accumulated experience of the western legal aid sector and its growing familiarity with access-to-justice strategies provides opportunities to contribute to legal capacity building in international aid programs. In poorer and developing countries people: "have a huge need for basic advice services, access to information about assistance programs, rights, financial matters – how banks work – and how government works" (Narayan 1999: 283-5; see also Liebenburg 2006: 194-95). Some national legal aid schemes may already be partnering with state overseas aid organisations or NGOs in legal capacity building in developing states, and more should be doing so, as Smith argues in relation to the older EU countries (2005: 17-18).

The passing of the torch of equal justice for all to human rights and the changed politics of law present fresh opportunities for legal aid schemes and its fieldworkers to bring their skills and commitment to bear. Human rights and international human rights law is continuing to evolve, and faces real challenges. Until recently human rights regimes have concentrated on protecting individuals and peoples from abuses of state power, and regulating state-citizen relationships. These objectives remain central, as the expansion of the legal powers of states in the 'war on terrorism', often with little regard for the civil liberties and human rights of populations, reminds us (Talbot 2002: 123). The global community is moving from a mono-centric world clustered around states towards a polycentric world with different actors, state and non-state, affecting: "the way human rights and freedoms of individuals and groups are implemented", arguably rendering a state centred focus obsolete. (Andreassen 2006: 119-20).

Trans-national corporations, for example, have co-located to poorer and less-developed countries, often experiencing dysfunctional governance, conflict and human rights abuses. Many have adopted voluntary codes of conduct incorporating social and human rights responsibilities into their corporate objectives. In some cases adoption of such codes has seen genuine and positive changes in corporate behaviour. Other trans-national corporations have engaged in entrepreneurialism, competing for sales through public commitment to human rights (ibid: 123). This has highlighting the need to develop new legal principles capable of establishing the human rights responsibilities of corporate businesses, and other non-state actors (ibid: 119-23 & 139). [66]

Importantly there is also renewed interest internationally in the 1986 UN Declaration of the Right to Development. In 1998 the General Assembly proposed that its statement of inalienable human rights be placed on par with the UDHR (Marks and Andreassen 2006: vi). The Declaration entitles all humans and peoples to participate in, contribute to, and enjoy economic, social, cultural and political development, in which human rights and fundamental freedoms can be fully realized (Art. 1 (1)). States are required to undertake all necessary measures for the realization of the right to development, by encouraging popular participation in its spheres, including ensuring women have an active role in development processes, and implementing reforms to eradicate social injustice (Art. 8 (1) & (2)). The Declaration of the Right to Development also requires states to give equal attention and urgent consideration to political, economic, social and cultural rights (Art. 6 (2)).

Very few countries have taken adequate steps to incorporate the Declaration into their national legal systems (Sengupta 2006: 21). One explanation is that questions remain unanswered about its scope. The more compelling explanation is that implementing the Declaration would involve major and sometimes radical political changes. Article 6 (3), for example, requires states to eliminate obstacles to development resulting from failure to observe civil and political rights. States are also required to constantly improve popular and individual well-being, on the basis of active, free and meaningful participation, and fairly distribute the resulting benefits, to ensure the full exercise and progressive enhancement of the right to development (Arts. 2 (3) & 10). One commentator argues that implementing the right to development requires the creation of a legal-institutional framework in which poorer and excluded groups can participate effectively in policy formulation, involving simultaneous efforts to promote a range of civil and political rights, including equal access to justice (Osmani 2006: 269-70).

The task of shaping the new national legal systems demanded by the Declaration of the Right to Development adds to the momentous challenges presented by the changing dynamics of law's orders and fields for human rights, and the goal it shares with legal aid – equal justice for all. Indeed, some critics believe that international human rights law is itself in danger of becoming another barrier to the achievement of that goal. Assisting in the reproduction on a global scale forms of administration and power confronted within states by legal aid and human rights defenders in earlier periods in the struggle for equal access to justice (Guilhot 2005: 222-3).

In response to another challenge facing human rights – protection of the common interest of human kind in the access to and utilization of genetic resources – one scholar has recently proposed an international biotechnology legal framework : 'through the lens

[66] Referring to Steinhardt 2005: 178ff and Alston 2005: 4.

of a fixed catalogue of human rights" (Francioni 2006: 1). [67] Access-to-justice is not science, and the forces allied against the rights of individuals and population around the world to equal and effective access to justice far exceed even: "the blind power of science and industry" (ibid). Nevertheless the universally shared values of respect for life, human dignity and non-discrimination articulated in international human rights law similarly provides the basis for an international access-to justice framework. This is a task that the changed politics of law since the post-WWII developments in legal aid and human rights has made urgent and pressing, and towards which legal aid, its institutions and fieldworkers can contribute their own experiences and expertise of striving towards equal justice for all.

Conclusion

This paper has glimpsed into the wider world of legal and human rights. It has reminded us that from the outset legal aid and its fortunes have mirrored the development and institutions of the modern legal order. Apart from a few glittering years in the post-war period legal aid schemes in the 20th century provided minimal levels of access to law, to a limited range of people. Today the experience around the world is mixed and diverse. Charitable, Judicare salaried, mixed model and complex planned mixed model schemes of services operate in different societies, targeting the poor and disadvantaged, and all resources poor. The evidence presented in the paper indicated that states in the developed world still have some way to go to accommodate the needs of individuals wishing to assert their human rights to a fair trial. This is quite apart from the issue of funding legal aid schemes to enable people to assert other human rights conferred by international human rights orders, and national law. The experience in developing and reforming states seems to be different, and often exciting. This was an arena not explored in any depth in this paper, but it clearly demands greater international attention, and from which access-to-justice policy makers in developed states may have much to learn.

In the wider context the paper has demonstrated legal aid is not a spent force. Within states and societies legal aid has been subsumed into access-to-justice strategies, lowering its profile in public policy, and increasing competition for funding and influence. At the same time war, globalisation, technological change, the re-engineering of welfare regimes and law's changing orders and fields – within states and globally – has increased the needs of individuals around the world for affordable, timely and affective access to law, and other forms of dispute resolution. The size of the world's population and the poverty in which the majority of its peoples live making the scale of the problem of providing equal and effective access to justice greater than ever before. The adoption of access-to-justice strategies provide legal aid schemes and its fieldworkers with new partners in the quest for equality before the law, and new opportunities to market and develop more than a century of accumulated knowledge and expertise in the management and delivery of legal services.

Finally the paper drew attention to the original dissonant relationship between legal aid and human rights, and, briefly, to the dissonance between the emergence of the post-WWII human rights project and the modern legal order. In the 1950s, 1960s and 1970s legal aid and human rights co-existed. Since the 1970s human rights has increasingly

[67] See also Francioni and Scovazzi (2006) and Francioni 2007 (forthcoming).

assumed the role of the flag bearer of legal aid's goal of equality before the law for all. Whether or not the activities of courts upholding and promoting the human rights of individuals and national and international human rights legal orders and international human rights law can motivate national legal systems to finally adequately protect the legal rights and interests of poor and socially groups excluded remains to be seen. In any event, the paper has argued that changes to law's orders and fields in the past 20 years have been so profound, and the challenges confronting human rights are so momentous, that legal aid and its fieldworkers have another opportunity to seize the day, and form new partnerships with those leading the way in developing and articulating an international legal framework of access-to-justice.

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