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RESEARCH ARTICLE

## Concept of Legal Aid in Civil Litigation in Accordance with the Decisions of the European Court of Human Rights

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**Abstract**
Access to a fair trial is a fundamental human right that has been addressed both in international law and in the context of the European Convention on Human Rights (ECHR). Legal aid (free or affordable legal support/assistance/service) is evaluated as one of the elements of a fair trial. The well-known sixth article of the ECHR refers directly to legal aid. However, the third paragraph of ECHR art. 6 issues only criminal offenses. The European Court of Human Rights (ECtHR) implies the right to free legal assistance (legal aid) in civil cases. In our study, we will focus on the term of legal aid, types of legal aid and main legal aid systems, features of legal aid in civil matters, subject of legal aid and litigation costs and the procedure of legal aid application and who will be granted by legal aid in civil litigation.

**Keywords**
Fair Trial, Access to Justice, Types of Legal Aid, Litigation Costs, Legal Aid Provisions

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## I. Introduction

It would be helpful to start with the term 'legal aid'. The term legal aid has many potential meanings such as legal support, legal service or legal assistance, which has also been used in article 6. However, one of the most commonly used terms is legal aid. We think it emphasizes the urgency and necessity of the service. Legal service and legal assistance terms usually need to be used with the word 'free' to explain what is implied. As a term, 'legal support' would not clearly express the extent of legal service provided during legal aid procedures. Therefore we would prefer to use the general phrase 'legal aid' in our study.

Legal aid includes legal advice, assistance, and representation similar to any legal service. However, this is only one side of legal aid; on the other side, legal aid also includes reducing or exemption of court fees and expenses before legal bodies. Still, the critical part is that this kind of service is served free of charge or at a reduced rate with the government's financial support in many countries or with the help of social funds or charitable organizations (e.g., pro bono legal services working on civil cases in the United States). In this manner, legal aid is a financial term that indicates entirely or partly free legal service and litigation costs such as court fees and proceeding expenses. As such legal aid can be defined as free or cost-reduced legal service and/or the 'exemption of court fees and expenses' provided to people who cannot afford it/who have sufficient resources, according to jurisdictional criteria[1].

In a perfect and idealistic world, we can easily say that there should be no conditions, no criteria, or limitations on getting legal aid; everyone, whatever their situation is, should be able to obtain legal aid in any condition. An even better alternative would be providing entirely free (no charge) access to justice. But as all we know, financial resources are limited and it seems financial barriers are getting more severe in the last couple of years. Many developed countries, like the United States and England, have budget cuts on legal aid. Financial limitations increase the importance of conditions that we seek in the process of identifying who obtains legal aid and who doesn't.

Furthermore, collecting litigation costs from parties, such as court fees and expenses from proceedings and legal service fees of the adverse party, have essential functions. The distribution of litigation costs at the end of the trial according to the rightful party serves individual justice. Responsibility for litigation costs makes plaintiffs think twice before they bring a suit. And it is obvious that collecting litigation costs from parties is a significant money source for governments to sustain the justice system. Of course, those who want to access the court due to a specific demand or claim may contribute to costs. In this aspect, collecting litigation costs from parties serves social

1 Model Law on Legal Aid in Criminal Justice Systems with Commentaries, United Nations Office On Drugs And Crime, (United Nations, March 2017), 5; Ayşe Kılınç, *Medeni Usul Hukukunda Adli Yardım,* (Ankara: Adalet Yayınevi 2013), 8.

justice[2]. As a result, the legal service of advocates or the state is not free, nor should it be not free, but we need to answer a critical question: who will be granted legal aid and who will not?

Before examining legal aid conditions, it would be helpful to mention the fundamentals of legal aid. Legal aid is directly and intensely related to human rights. The well-known sixth article of the European Convention on Human Rights (ECHR) refers directly to legal aid. According to the third paragraph of Article 6, *'Everyone charged with a criminal offense has rights to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*'. Article 6 mentions only criminal proceedings according to Article 6 (3) letters. However, the European Court of Human Rights (ECtHR) found in 1979 that Article 6 (1) also implies the right to free legal assistance in certain civil cases (Airey v. Ireland, Application No 6289/73, Judgment of 9 October 1979). In newer documents of Human Rights Law, we see provisions on legal aid that indicate undoubtedly the right to legal aid in both criminal and civil matters. For example, the 47th article of 'Charter of Fundamental Rights of the European Union' states that there is no difference between criminal and civil matters. According to his article, *'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*'

Also, in United States Law, legal aid was born in criminal proceedings. As Rhode states, in 1932, the United States Supreme Court offered the common-sense observation that an individual's 'right to be heard (in legal proceedings) would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' (Powell v. Alabama, 287 U.S. 45, 68-69, 1932). In the years that followed, courts gradually built on that recognition to find a constitutional right to lawyers for indigent criminal defendants. However, judges have largely failed to extend guarantees of

2 Stamps explains why legal aid is restricted in the fourth title. The first reason is that a full national service without any limit can be more easily abused than rights under other social services; and the fact that the litigant must pay a part of the cost will prove a powerful and proper deterrent against bringing unjustified claims. A second reason for these restrictions is the expense involved. Since not all taxpayers are expected to have recourse to the courts, they should not be expected to contribute more than enough to make the courts available to everyone who should need to bring an action to protect his rights. Thirdly, if a means test is to be applied, something must be done to preserve a balance between the assisted and unassisted taxpayers. It would be unfair for the state to entirely finance the expense of an assisted litigant and at the same time compel his unassisted opponent to pay the costs of his defense. A fourth reason for these restrictions is the very practical consideration that there must be some limitation to the scheme if the legal profession is to be able to work it. [L. Norman Stamps, 'Equal Justice Under Law: The English Approach' (1952) 20 University of Missouri-Kansas City Law Review, https:// heinonline.org/ accessed 20 October 2022 49, 51-52].

legal assistance to civil contexts, even where crucial interests are at stake. In the leading decision on point, Lassiter v. Department of Social Services., the Supreme Court interpreted the due process clause to require appointment of counsel in civil cases only if the proceeding would otherwise prove fundamentally unfair. In making that determination, courts must consider three basic factors: 'the private interests at stake, the government's interest, and the risk that [lack of counsel] will lead to erroneous decisions.' (Lassiter v. Department of Social Services, 452 U.S. 18, 27, 31, 1981)[3].

Besides being a significant element of a fair trial, we can seek roots of legal aid deeper in law. Legal aid is also a significant element of the equality principle, one of the oldest and major law principles. It has long been recognized that equality before the law includes more than equal treatment by the judge, and something should be done to give the poor man equal access to the courts[4]. Without an effective legal aid system, legal protections that are available in principle may be inaccessible in practice. 'Equal justice' implies equal access to the justice system. The underlying assumption is that social justice is available through procedural justice[5]. Various arrangements were worked out at different times to improve access to justice, and we are still working on it.

Legal aid is also directly connected with the social state or welfare state principle. In many European countries (for example, Germany, France, Turkey), one of the fundamental principles of constitutions is the social state principle. The social state is such a deep and complicated concept and is explained in many different ways. In the scope of our study, we can simply quote a sentence from a decision of the Turkish Constitutional Court (16.10.1988 dated and 19/13 numbered decision, Offical Gazette 11.12.1988 and 20016): *'The social state is a state which is liable to confirm social justice and public balance thus true equity via protecting weak people against strong people'.* An effective legal aid program also helps redress social unbalances and ensures everyone shall have an effective remedy in which he will be heard by a tribunal[6].

The right to access justice is a well-known but complicated expression and undoubtedly one of the fundamental human rights. The right to access justice ensures that everyone can equally access justice through courts, whether rich or poor, guilty or innocent, child or adult. Much of the discussion of civil legal aid occurs within the context of conversations about access to justice[7]. Proper settled conditions for

3 Deborah Rhode, 'Access to Justice: Connecting Principles to Practice', (2004) 17 Georgetown Journal of Legal Ethics, https://heinonline.org/ accessed 25 November 2022 369, 375.

4 Stamps, (no 2), 49.

5 Rhode, (no 3), 372.

6 Muhammet Özekes, *Medeni Usul Hukukunda Hukuki Dinlenilme Hakkı*, (Ankara Yetkin Yayınevi, 2003), 303-306.

7 John Bolan, 'Civil Legal Aid and Global Access to Justice', (2012) 6 Toronto Associations of Law Libraries 5, 6.

legal aid will prevent the inability to access justice because of insufficient means. It can be considered that providing legal aid is an obligation of governments in the jurisdictional circumstances according to human rights law[8].

The relationship between access to justice and a fair trial is getting complex. The right to have access to justice has no normative basis as the right to a fair trial. In recent years, we have increasingly seen the term 'right to access to justice' used as an term that includes the right to fair a trial, an effective remedy, and some other related rights. Juriloo indicates the relationship between the right to access justice and legal aid that

> 'Access to justice is an umbrella term encompassing several fundamental human rights, such as the right to a fair trial, the right to have access to the court, the right to an effective remedy, and equality before the law. Using access to justice as a starting point, the argument that free legal aid is a human right touches upon all aspects of the wide-ranging right to access justice.'[9]

ECtHR mentioned even in 1975 that the Article 6 guarantee of the right to a fair trial must be considered to include the right to have access to the courts in general, in civil as well as in criminal matters (Golder v. United Kingdom, Application no 4451/70, Judgment of 21 February 1975). As the title of Article 6' is 'fair trial' and the right to access justice is not regulated separately in ECHR, the ECtHR considers that the right to a fair trial includes access to a tribunal. In view of these statements, access to justice has two different meanings: one narrow and one broad meaning. The narrow meaning of access to justice corresponds to the right of access to a tribunal and shall be evaluated as an element of a fair trial. According to the main and classical opinion, which we endorse, a fair trial has four fundamental elements; (1) trial before an independent and impartial tribunal (access to the tribunal) (2) trial within a reasonable time (3) fair hearing (right to heard by the tribunal) (4) public hearing. These four elements are not independent of each other; on the contrary, they are mixed up and related[10]. The broad meaning of access to justice covers similar but also different topics regarding a fair trial and broader in some aspects; as we described above. The broad meaning of access to justice includes the right to a fair trial and other related concepts which cover bringing a suit before a tribunal to achieve a fair definitive judgment.

8 Paula Galowitz, 'Litigating Economics Social and Cultural Rights: Legal Practitioner's Dossier', (2006) Centre on Housing Rights & Evictions, *'Right to Legal Aid and Economic, Social and Cultural Rights Litigation'*, http://www.right-to-education.org/resource/litigating-economic-social-cultural-rights-legal-practitionersdossier accessed 10 November 2022 41, 42-43; Kristel Jüriloo, 'Free Legal Aid – a Human Right', (2015) 33:3 Nordic Journal Of Human Rights 204, 210.

9 Jüriloo, (no 8), 204.

10 Hakan Pekcanıtez, Medeni Yargıda Adil Yargılanma, (1997) 2 İzmir Barosu Dergisi 35, 39-51; Süha Tanrıver, Hukuk Yargısı (Medenî Yargı) Bağlamında Adil Yargılanma Hakkı, (2004) 53 Türkiye Barolar Birliği Dergisi 191, 193-194.

## II. Type of Legal Aid Procedures

### A. Legal Aid in Civil Proceedings and Criminal Proceedings

In many European civil justice systems, having an attorney is permissive, but the complexity of law rules may force parties to apply for professional legal assistance. Mandatory representation practice is seen far more in criminal proceedings. However, in some countries, representation by an attorney is mandatory as a principle even in civil proceedings. For instance, in Germany, parties have to be represented by an attorney (deZPO § 78); of course, this rule has many exceptions for specific conflicts (for example, FamGO art. 114). In Turkey, there is no obligation for parties to represent themselves by a lawyer in civil litigation as a principle (there are a few exceptions); however, a criminal defendant has to be represented by a lawyer in many criminal proceedings. For example, if the criminal defendant is a child or charged with a criminal offense that requires more than five years in jail, attorney representation is mandatory.

We can mention fundamental legal aid differences in criminal proceedings and civil proceedings. First, we must express that governments' policies can be different. The Turkish legal system is a typical example that establishes different systems for these two types of proceedings. When the representation is mandatory, it is adequate to provide legal aid and appoint a lawyer whom the bar association selects when the criminal defendant declares that he has no attorney to represent them. After this declaration, an attorney is appointed whose charges are covered by the government even though the defendant does not want one. In permissive representation, the defendant is asked if they want an attorney during transactions before the police, prosecutor or judge. If the defendant wants an attorney, but has not arranged one already, the government offers an attorney whose wage is paid by the government. Whether mandatory or permissive representation in criminal proceedings, nobody determines personal conditions like sufficient means for granting legal aid in Turkish law. Of course, the usage of limited resources in this way could possibly be criticized. However, legal aid is granted limitless in criminal litigation, and nobody will suffer because of the lack of legal support.

In civil proceedings which do not render compulsory representation, a declaration or the will of a litigant is never enough to be granted legal aid. Despite criminal proceedings, the state is not required to provide legal aid for every dispute relating to civil rights; that's why the state may determine specific conflicts, conditions or law fields to provide legal aid. The ECtHR decided that the Convention does not impose a duty on the state to provide free legal aid in every civil case brought before a court (Airey v Ireland).

Family law matters are among the most common legal aid practices in civil proceedings[11]. In many countries, governments establish special provisions to protect children during the divorce process or prevent any illegal acts against children. Labour law is another common practice of legal aid; workers whose rights are breached have financial problems and usually do not have enough knowledge about their rights. In many labor law cases, workers may not have sufficient financial income because of the conflict between them and their employers.

There are no limitations or special rules in the Turkish legal system regarding the type of dispute in civil proceedings [e. g. contrary to Norwegian law][12]. People can apply for/demand legal aid within the same conditions in family matters, labor matters, and commercial conflicts. Besides, the criteria for getting legal aid are not related to criticism of the conflict or the importance of what is at stake according to Turkish Civil Procedure Law. However, we would like to mention that Turkey has two different legal aid systems. One is provided and determined by the Bar in every province of Turkey according to the Regulation (The Legal Aid Regulation of Turkish Bar Associations, adopted 30 May 2004), and the other is determined by courts/judges according to civil procedure law. In practice, province bars usually evaluate how critical the conflict is depending on the broad consideration of authority recognized by the related Regulation. In our study, we will examine conditions in the Turkish Civil Procedure law which was amended recently according to European Union legislation and the ECtHR's decisions.

## B. Legal Aid Systems Depending on Legal Service Funding and Provider

One of the most critical problems concerning legal aid is funding. Who will fund and provide legal aid? Government, private entities like bar associations, charity organizations or independent public authorities or a mix of all these… Even among countries with a common legal ancestry like the UK, Canada and the United States, the structure of legal aid systems varies with local culture and history, there are numerous types of legal aid delivery systems in place, and many modern systems incorporate mixed models that rely on a combination of public funding, support from the legal profession, and the participation of non-government entities[13].

11 Dickson G, 'Legal Aid Breakthrough', (1999) 24:3 LawNow 52, 58-59.

12 Jüriloo explains which civil matters are within the scope of legal aid according to Norwegian law (Jüriloo, no 8, 203-204). Stamps found a similar approach in the English Advice Act (Stamps, n 2, 51). Of course, specific litigants may need more legal support in specific matters, such as a woman in divorce conflict or an employee who has a conflict with the employer. However, it is challenging to differentiate matters as simple or hard, important or unimportant. For example, Rhode states that two-thirds of surveyed Americans agree that simple wills, uncontested divorces, minor accidents, consumer disputes, landlord-tenant problems, employee grievances, and government benefit claims are the kinds of matters for which legal representation is an unaffordable luxury (Rhode, no 3, 369). In this manner, legal aid shall be granted with no limitation on civil matters as Turkish law system.

13 Bolan, (n 7), 6-7; Smith R, 'International and Legal Aid', *Türkiye'de Adli Yardım: Karşılaştırmalı İnceleme ve Politikalar Yuvarlak Masa Toplantısı 16 Nisan 2004,* (İstanbul Bilgi Üniversitesi Yayınları 90, İnsan Hakları Hukuku Çalışmaları 3, İstanbul, Şubat 2005) 140, 146.

Legal aid-providing systems could be generally classified into three categories: Assigned counsel/panel lawyers or ex officio (judicare) system, public defender (staff attorney) system, and contract service system (contract firms). Of course, these systems have no sharp edges; countries may have mixed or combined systems models, but these models mainly describe many countries' legal systems[14].

The Judicare model is the most common way of delivering legal aid services worldwide. In this model, private lawyers provide legal aid services to clients either systematically (by state or bar association) or on an ad hoc basis and are compensated for their services by the State. In an ad hoc assigned counsel system, the appointment of a counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for lawyers. In such systems, lawyers are often assigned on rotation, must meet minimum education and qualification standards. Assigned counsel systems may pay lawyers either on an hourly basis or a flat rate per case or hearing. Assigned counsel systems are often criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed lawyer. In many countries, it is common for appointments to be taken by recent law school graduates looking for experience. Additionally, flat-fee arrangements can create a disincentive for lawyers to devote time to a particular case. In others, bar associations play an active role; they organize and bound advocates, beneficiaries and courts, arrange rotation between advocates and establish qualifications and training requirements. Similar issues such as lack of experience and inability to devote enough time are also observed with advocates appointed systematically by bar associations[15].

The main legal aid system in the United Kingdom is classified as the judicare system. The legal aid system in the United Kingdom is presently (until 1988) administered by the Legal Services Commission, which the Ministry of Justice oversees. The civil and criminal aid services are run under different schemes. The Community Legal Service scheme applies to civil cases and the Criminal Defence Service to criminal cases. To obtain legal advice, applicants select a solicitor from a list of participating lawyers. Individuals must apply to determine whether they qualify for assistance, which is awarded based on a sliding scale. The legal aid system in the United Kingdom is plagued by issues like the sufficiency of payments and limitations of coverage[16]. In Turkey, the legal aid system is also classified as a judicare system. There is no administrative office of the State. The court or the bar association (especially before bringing a case) may decide on legal aid depending on the demand of the related person in civil litigation. In criminal litigation, polices or prosecutors shall

14 Model Law, (n 1), 82; Bolan, (n 7), 7; Smith, (n 13), 149.

15 Model Law, (n 1), 83-84.

16 Bolan, (n 7), 7

or may call the bar association for legal aid even without the demand of the related person according to the accusation. The bar association appoints the advocate from a previously determined list, including assigned and certified lawyers, whether the legal aid decision is made by the court or the bar association. As in other countries, the honourees of advocates are not high and participating advocates are certified but not really experienced. However, the system works fast and without delay; in many cases, an advocate may be ready at a police station or courthouse in one or two hours. In civil litigation, the bar association can also make an appointment instantly and the offended party may meet with an advocate the same day.

Public defender (staff attorney) systems include governmental, quasi-governmental or sometimes non-governmental legal aid institutions that employ staff to provide legal aid services to qualified recipients, usually on a full-time basis. Public defender institutions can include: (a) State institutions or agencies or (b) independent or quasi-governmental institutions. Public defender systems ensure that the staff working in these institutions are trained specifically to provide legal aid services. A dedicated staff and budget also allow for more robust data-collection systems to monitor the quality of services and more effective advocacy for systemic reform to improve access to justice. Public defender systems convene their staff regularly for the systematic exchange of knowledge, experience and perspective. This helps to improve the quality of legal aid services. However, funding is often limited and demand for services can be high, thus leading to excessive caseloads and negatively affecting the quality of services delivered[17].

The system in the United States is based on a staff-attorney model that relies on government-funded offices employing salaried lawyers to provide legal services. The American landscape features separate systems at local, state and federal levels. However, these systems are in practice commingled and jointly funded. To the extent that there is a 'system' of civil legal aid in the United States, it is made up of different types of service providers funded by different sources. In general, there is no sliding scale of eligibility and aid is restricted to those close to the poverty line. The US Legal Services Corporation (LSC) funds civil legal advice centres across the country. Organizations that accept LSC funding are prohibited from engaging in activities such as class actions and lobbying. The US legal aid scene features public interest law firms, various legal aid centres and a substantial amount of pro bono work by attorneys at private law firms[18].

The contract service model involves a government contract with a lawyer, a group of lawyers, a bar association or a non-governmental organization that will provide representation in some or all of the criminal legal aid cases in a particular jurisdiction.

17 Model Law, (n 1), 83.

18 Bolan, (n 7), 7.

Under this system, individuals or organizations enter into contracts with the government to provide legal services to a defined class of eligible clients in a given geographical region. Contract service systems can be an effective way for governments to effectively and efficiently deliver legal aid services through privatization or contracting with effective and well established law firms or non-governmental organizations. It can also achieve many of the benefits of a public defender model, without burdening the State with the need to establish a government public defender agency. One concern about many contract systems is that governments may be incentivized to offer the lowest possible bids and they may fail to provide appropriate budgets for necessary support staff (e.g. paralegals, investigators, experts), and often have unrealistic or non-existent caseload limits. Additionally, quality may suffer because once a firm has successfully obtained the contract for a bundle of cases, it has an incentive to treat every case as a simple one—the firm's income for that bundle of cases is now fixed, and it can only increase its own profit margin by reducing its own operational costs for each case, which may lead to rushing or cutting corners. However, regular and effective control of the government may reduce these disadvantages[19].

### C. Different Types of Legal Aid

We can classify legal aid depending on different criteria. For example, legal aid can be classified into four stages according to the periods in which legal aid is provided: (1) the preliminary stage to litigation, (2) applying to a tribunal, (3) during litigation and (4) the enforcement stage of the decision. In the first period, legal aid services were conducted as legal advisers to determine possible rights and claims and also possible legal remedies. ADR procedures, which could be applied before bringing a case, shall also be within legal aid's scope[20]. The necessity of legal aid mainly occurs in the second period, when applying to court because the court allowances and some litigation expenses are paid at this stage. The requirement for legal aid continues during litigation. At this stage, the sum of evidence may cause expenses; investigation processes may cause expenses. The assistance of an interpreter may be needed related to ECHR art. 6/III e.. The cost of interpreter assistance shall be considered in the scope of legal aid[21]. At the last stage, legal aid shall be necessary to apply for enforcement procedures. A court decision may not be enough for a person who seeks justice; justice on paper may mean nothing. Because procedures may also be expensive and complex; legal aid shall also cover enforcement procedures.

19 Model Law, (n 1), 85.

20 It is clearly stated that a party may benefit from legal aid for mediator fees in Turkish Law. A party who needs legal aid may apply to a competence court to have legal aid for mediator fees according to Turkish Mediation in Civil Matters Code art. 13/III.

21 Pekcanıtez, (n 10), 51; Tanrıver, (n 10), 212.

Legal aid can be classified into three according to people who are granted legal aid; legal aid for plaintiff, defendant and intervener. Of course, this classification is related to civil litigation. In criminal litigation, subjects may differ.

## III. Litigation Costs

### A. Court Fees

To evaluate legal aid, we have to start from the basics; in other words, we have to look for reasons which make establishing legal aid systems necessary. Put simply, we need a legal aid system because accessing the court is not free and not affordable for many people. Why is justice so expensive? Because three different types of costs are required to be paid by litigants in almost every lawsuit. We can simply name these three types of costs: court fees, litigation expenses and attorney's wages.

Many people serve in the legal system like judges, legal officers, ministry of justice employees… The official system needs many workers to run the system, besides complex facilities such as courthouses, enforcement offices, prisons… When we consider all these, legal services of government costs can be really high. In this manner, the claimant shall generally pay court fees at the beginning of the trial to participate in the government's expenditure in almost every lawsuit. As a principle, court fees are not collected to suspend all government expenditures on the jurisdiction system. Court fees are only a particular value, which has to be paid by claimants or plaintiffs. The primary financial source of the official legal system is obviously taxes. That's why court fees are relatively affordable, in some cases totally free. Often, court fees are the smallest part of the claimant's total financial burden. Legal aid practice regarding court fees usually appears as provided an exemption for the related party by the government.

We would like to express that eliminating court fees and making courts totally free should not be an option. This will cause an increase in general taxes and it will be unfair when we consider some people have not experienced legal conflicts. Regarding the functions of court fees mentioned above, we do not support making litigation free of charge for parties. Of course, our opinion is limited to civil litigation. Criminal litigation principles and procedures are significantly different from civil litigation; that's why full-free litigation may be seen as rightful.

### B. Proceeding Expenses

In the jurisdiction process, judges and parties need help or service from people who do not work directly in the legal system. For instance, post officers deliver legal notices, legal experts assist in evaluating the matters subject to conflict, and in

some discovery processes may need transportation… As it is seen, one group of the cost is litigation expenses. In many legal systems, including Turkey, court fees and sometimes even litigation expenses shall be paid at the beginning of the trial. If the plaintiff does not pay costs, his action will be dismissed even without investigating whether he is right. The ECtHR does not consider a violation of the sixth article to laying down payment conditions in civil lawsuits (Tunc v. Turkey, Application no 20400/03, Judgment of 21 February 2008).

### C. Lawyer Fees

The last type of cost is attorney's fees. As a principle, attorney's fees are determined freely between lawyer and client but there are many rules, especially in continental European law systems that limit the freedom of determination of fees to protect both attorney and client. Determination of very low or very high attorney's fees could be considered an interruption to public order or public welfare. That's why states limit the minimum amount of attorney fees according to related civil or criminal cases. A plaintiff shall pay for his advocate in advance and he may have to pay the adverse party's advocate fee if his case is dismissed at the end of the trial. Of course, the same principle is also valid for the defendant. He shall pay for his advocate in advance and may have to pay the adverse party's advocate fee if the action is accepted.

In many cases, lawyers' fees are the most expensive part of the sum of costs. As a general principle in civil proceedings, we can say that lawyer fees and other litigation costs are collected from the unjustifiable party at the end of the proceeding. Although this principle is an important rule on the share of the financial burden, the main problem is providing a serious amount of money during preparation and application period.

## IV. Conditions for Legal Aid

### A. In General

We would like to explain that the main conditions, which we will examine in further paragraphs, were determined according to ECHR and Judgments of the ECtHR. It is clear that the European Convention on Human Rights is not the only treaty that includes provisions on legal aid. For example, the African Charter on Human and People's Rights and the InterAmerican Convention on Human Rights and related regulations also have conditions for legal aid and assessment criteria. However, significant scientific articles also include suggestions on conditions for legal aid[22]. But we will focus on conditions settled by the European Convention on Human Rights and ECtHR in our current study because of lack of time and room.

22 Galowitz (n 8); Jüriloo (n 8); Durbach A, 'The Right to Legal Aid in Social Rights Litigation', *(2008)* In M. Langford (Ed), *Social Rights Jurisprudence – Emerging Trends In International And Comparative Law*, Cambridge University Press 59.

Before an examination of these conditions, we may emphasize that these conditions will be proven by the litigant who demands legal aid. However, the judge or related body shall not seek conclusive proof for these conditions. Submitting convincing evidence will be considered sufficient to grant legal aid. Of course, the adverse party may maintain the contrary and object to the legal aid demand and submit his own evidence to ensure the dismissal of the demand. According to one point of view, the adverse party has no opportunity to object to the insufficient means condition because this condition is related only to the beneficiaries party but generally accepted that the adverse party can object to legal aid demand and submit evidence against this demand and related conditions[23].

## B. Insufficient Resources/Means

The main condition for granting legal aid is the lack of sufficient resources to pay litigation costs. The ECtHR has no definite 'sufficient means' in general; instead, the court indicates taking all individual circumstances of each case to determine the litigant's financial situation. The ECtHR requires a case-by-case assessment of legal aid conditions.

First of all, insufficient means criteria do not refer directly to poorness or low income. A person with no problem providing for his and his family's living in normal conditions can also be granted legal aid. To determine the financial situation of the litigant, the amount required to ensure his and his family's living shall be decreased from the litigant's total income. After that, this amount should be compared with litigation costs that had been calculated for specific conflicts. If litigation costs are far more than the determined part of income, the litigant shall obtain legal aid. Some countries, such as France and England, also establish certain monetary limits to determine financial situation[24].

The litigant bears the burden of proving that he cannot afford to pay legal assistance, but he does not have to prove his indigence 'beyond all doubt'. In Pakelli v Germany, the court relied on 'some indications' that the applicant had been unable to pay for his lawyer, including tax-related statements and the fact that the applicant had spent the previous two years in custody. But I would like to express that only a declaration of the applicant is not enough and indications are required. In Bakan v Turkey, the ECtHR decided that representation by a lawyer could not be the only reason for the dismissal of legal aid; evaluation should be on the litigant's financial status **(**Bakan v. Turkey, Application No 50939/99, Judgment of 12 June, 200; exactly the same assessment, 10.02.2021 dated and 2017/21882 numbered decision of the Turkish Constitutional Court, Official Gazette 19.3.2021 and 31428). Of course, lawyers can

23 Özekes, (n 6), 309-310.

24 Kılınç, (n 1), 199-200.

work pro bono or delay their fees in some cases. However, the ECtHR also took into account that the applicant was represented by a lawyer retained by his family in the case of Santambroggio v. Italy (Santambroggio v. Italy, Application no 50939/99, Judgment of 21 June 2004).

The 2013/C 378/03 numbered European Commission Recommendation refers to a means test in the process of assessing insufficient income conditions. Of course, the test itself should be prepared by states, but the Recommendation expresses some criteria for this test. Accordingly, the applicant's economic situation assessment should be based on objective factors such as income, capital, etc., and a defense lawyer's cost.

Understanding insufficient income in the Turkish legal system is not different from the ECtHR. Provisions regarding legal aid in Turkish Civil procedure law rules have been amended recently to adopt ECtHR decisions but provisions on insufficient means have not been changed. There are no monetary limits in the Turkish Law System; the judge shall decide to consider all specific circumstances in every case.

### C. The Interests of Justice

The interest in justice is also not defined by the ECtHR or international regulations. One of the most important Judgments of SCtHR about the interest of justice is Quaranta v. Switzerland case. The court stated specific tests depending on the interest of justice that triggers legal aid, which is considered the seriousness of the offense, the complexity of the case and the ability of the defendant to provide his representation (Quaranta v. Switzerland, Application no 12744/87, Judgment of 24 May 1991). ECtHR decisions are consistent in the interest of justice. The ECtHR determined similar factors as relevant in its assessment of the obligation to provide free legal aid in the case of Airey (Airey v Ireland, Application No 6289/73, Judgment of 9 October 1979, para 26) and in the case of Steel and Morris (Steel and Morris v. United Kingdom, Application no. 68416/01, Judgment of 15 February 2005): the importance of what is at stake for the applicant in the proceedings; the complexity of relevant law and procedure; the applicants capacity to represent himself effectively. ECtHR found no violation of Article 6 because of the denial of legal aid demand in a case of a customs offence where neither the legal nor the factual issues are complex, there was no indication of the possibility of a sentence of imprisonment and the applicant was capable of defending himself because he was an educated economist (Wolff v. Switzerland, Application no 31983/96, Commission admissibility decision of 24 May 1991).

The importance of what is at stake for the applicant in civil matters and the seriousness of the offense and the severity of the potential penalty in criminal

matters should be considered in the assessment of legal aid demand. For instance, when the penalty includes a custodial sentence, the interest of justice criterion should be considered as fulfilled in criminal proceedings according to the 2013/C 378/03 numbered European Commission Recommendation. The ECtHR decided that applicants should be granted legal aid while contesting the severance of their parental right in child abuse proceedings, because of the complexity of the case, the importance of what was at stake and the highly emotional nature of the subject matter (P, C & S v. United Kingdom, Application no 56547/00, Judgment of 4 October 2003). However, the European Commission of Human Rights mentioned that defamation cases are not necessarily serious as family matters (Airey test) for the litigants when the consequences are considered (Munro v. United Kingdom, Application no 10594/83, Commission decision of 14 July 1987).

The complexity of the case, particularly when the legal representation is mandatory by law and the capacity of the applicant to effectively exercise his right to have access to the court should be evaluated together. Especially immigrants, foreign workers, or those with the inability to communicate with skilled people can be granted legal aid more easily than merchants or landlords. The ECtHR decided that the applicant, who was an illegal immigrant with no settled employment did not have the means to retain counsel before the Court of Cassation (Biba v. Greece, Application no 33170/96, Judgment of 26 September 2000). In the Airey v Ireland case, the ECtHR drew attention to the fact that the applicant was from a humble background, had gone to work as a shop assistant at a young age before marrying, had four children and had been unemployed for much of her life. On the other hand, the ECtHR found no violation of the Article 6 (1) in McVicar v United Kingdom case because the applicant was a well educated and experienced journalist, and the law was not sufficiently complex to require a person in the applicant's position to have legal assistance (McVicar v United Kingdom, Application no 46311/99, Judgment of 7 May, 2002).

Despite the first condition, Turkey had hard times before the ECtHR because of abandoned provisions of the Civil Procedure Code. Turkey sought basic/simple proof of rightfulness on the claim regarding the legal aid application. Judges considered the possibility of accepting the claim at the beginning of the case to decide whether to grant or not grant legal aid. The ECtHR found this criterion against the Convention in the Bakan v Turkey case even though the court accepted the assessment of the successful chance of the claim regarding legal aid application but refused the assessment rightfulness of the claim. The Turkish Civil Procedure Code's related provisions had amended by 6459 numbered and 11.04.2013 dated Law after a serious time following the ECtHR decisions. According to the new provision (Turkish Civil Procedure Code art. 334/I), the applicant's claim should not be clearly unmeritorious for granting legal aid.

We believe not having obviously unmeritorious criteria should be consistent with Article 6 and the ECtHR's judgments and ECtHR Commission's decisions. In Thraw v. United Kingdom, the applicant, the administrative authority (of the United Kingdom) refused legal aid on the basis that the applicant had shown no grounds for being a party to the proceedings and his claim had very little prospect of success and the Commission found the applicant's complaint ill-founded (Thaw v. United Kingdom, Application No 27435/95, Commission decision of 26 June, 1996). In the first related case of Belgium (Aerts v. Belgium) the court decided that the right to tribunal had been impaired when the Legal Aid Board had refused the application because the claim did not at that time appear to be well-founded (Aerts v Belgium, Application no 25357/94, Judgment of 30 July 1998). After that, the related Belgium Law was amended and the rule that came into force states that the claim should not be manifestly ill founded. This new rule was not considered a violation of the European Convention by ECtHR in the Debeffe v Belgium Case (Debeffe v. Belgium, Application no 64612/01, Judgment of 9 July 2002). Also, Jüriloo suggested without any relation to the Court decision that the criterion should be regarded as unfulfilled only if it is clear that there is no chance of success[25].

## VI. Conclusions

In many cases, access to courts requires payment of serious litigation costs. Sum of court fees, proceeding expenses and lawyer fees can reach non-affordable amounts for many people who want to bring a claim to seek justice. The right to access justice is undoubtedly a fundamental human right that requires everyone to be able to bring a case or claim before a court whether he is rich or not, competent enough or not. Ineligibility to have access to justice because of insufficient means is a breach of the ECHR.

The scope of legal aid varies in civil and criminal litigation and varies country by country and system by system. All kinds of legal support, before a case, during or after a case and all kinds of financial support for litigation costs or reduction of litigation costs by the government may be considered as legal aid. Of course, providing legal aid unconditionally and limitlessly does not serve the legal aid's purpose.

Providing legal aid is basically a financial issue, even though there are other ways to obtain legal aid like simplifying the applicant's procedure. Financial sources have limits as always. States are allowed to settle conditions or criteria for granting legal aid because it is clear that there is no option to provide everyone with legal aid. However, organizing all judicial systems out of litigation costs is also not seen as possible or necessary. In light of these facts, we should settle proper conditions to determine who is granted legal aid and who is not. We have to be sure to provide legal

25 Jüriloo, (n 8), 217.

aid to those who need it most. Two main criteria are established as insufficient means and interest of justice in this aspect.

The assessment of legal aid criteria should be done case by case according to the individual properties of the case and applicant. The litigant bears the burden of proving that he cannot afford to pay legal assistance, but he does not have to prove his indigence 'beyond all doubt'. The litigant should indicate that his income is not enough to pay both litigation costs of the specific conflict and his or his family's living expenses.

The interest of justice conditions for granting legal aid mainly refers to the consideration of the seriousness of the offense, the complexity of the case and the ability of the litigant to provide his representation. All these should be taken into account for every specific case. Prevention of ineligibility to access justice depends on the precious assessment of criteria for legal aid in every case.

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## Bibliography

Bolan J, 'Civil Legal Aid and Global Access to Justice', (2012) 6 Toronto Associations of Law Libraries 5.

Dickson G, 'Legal Aid Breakthrough', (1999) 24:3 LawNow 52.

Durbach A, 'The Right to Legal Aid in Social Rights Litigation', In M. Langford (Ed), *Social Rights Jurisprudence – Emerging Trends In International And Comparative Law*, (59 Cambridge University Press 2008).

Galowitz P, 'Litigating Economics Social and Cultural Rights: Legal Practitioner's Dossier', Centre on Housing Rights & Evictions, *'Right to Legal Aid and Economic, Social and Cultural Rights Litigation' (2006)*, http://www.right-to-education.org/ resource/litigating-economic-social-cultural-rights-legal-practitioners-dossier accessed 10 November 2022 41.

Jüriloo K, 'Free Legal Aid – a Human Right', (2015) 33:3 Nordic Journal of Human Rights 204.

Kılınç A, *Medeni Usul Hukukunda Adli Yardım,* (Ankara: Adalet Yayınevi 2013)

Model Law on Legal Aid in Criminal Justice Systems with Commentaries, United Nations Office On Drugs And Crime, (United Nations, March 2017).

Pekcanıtez H, Medeni Yargıda Adil Yargılanma, (1997) 2 İzmir Barosu Dergisi 35.

Rhode D, 'Access to Justice: Connecting Principles to Practice', (2004) 17 Georgetown Journal of Legal Ethics, https://heinonline.org/ accessed 25 November 2022 369.

Smith R, 'International and Legal Aid', *Türkiye'de Adli Yardım: Karşılaştırmalı İnceleme ve Politikalar Yuvarlak Masa Toplantısı (16 Nisan 2004),* İstanbul Bilgi Üniversitesi Yayınları 90, İnsan Hakları Hukuku Çalışmaları 3, (İstanbul, Şubat 2005) 140.

Stamps L. N, 'Equal Justice Under Law: The English Approach' (1952) *20* University of Missouri-Kansas City Law Review, https://heinonline.org/ accessed 20 October 2022 49.

Tanrıver S, 'Hukuk Yargısı (Medenî Yargı) Bağlamında Adil Yargılanma Hakkı', (2004) 53 Türkiye Barolar Birliği Dergisi 191.

Özekes M, *Medeni Usul Hukukunda Hukuki Dinlenilme Hakkı*, (Ankara Yetkin Yayınevi, 2003).

## ECtHR Decisions and Judgements

Commission decisions of ECtHR

*Munro v. United Kingdom*, Application no 10594/83, 14 July 1987

*Thaw v. United Kingdom*, Application No 27435/95, 26 June 1996

*Wolff v. Switzerland*, Application no 31983/96, Commission admissibility decision of 24 May 1991

Judgments of ECtHR

*Aerts v Belgium*, Application no 25357/94, 30 July 1998

*Airey v. Ireland*, Application No 6289/73, 9 October 1979

*Bakan v. Turkey*, Application No 50939/99, 12 June 2007

*Biba v. Greece*, Application no 33170/96, 26 September 2000

*Debeffe v. Belgium*, Application no 64612/01, 9 July 2002

*Golder v. United Kingdom*, Application no 4451/70, 21 February 1975

*McVicar v. United Kingdom*, Application no 46311/99, 7 May 2002

*P, C & S v. United Kingdom*, Application no 56547/00, 4 October 2003

*Quaranta v. Switzerland*, Application no 12744/87, 24 May 1991

*Santambroggio v. Italy*, Application no 50939/99, 21 June 2004

*Steel and Morris v. United Kingdom*, Application no. 68416/01, 15 February 2005

*Tunc v. Turkey*, Application no 20400/03, 21 February 2008