

# **ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES**

## **Response to the Fourth Periodic Report of the United States to the United Nations Human Rights Committee August 2013**

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### Introduction and Issue Summary

Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system. Yet, in the United States, millions of people who are poor or low-income are unable to obtain legal representation when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination, termination of subsistence income or medical assistance, or loss of child custody. Indeed, in the United States, only a small fraction of the legal problems experienced by low-income people – less than one in five – are addressed with the assistance of legal representation.<sup>1</sup> A categorical right to counsel in civil cases is not recognized under the federal Constitution.<sup>2</sup> And federal programs to provide civil counsel are under-funded and severely restricted. The result is a crisis in unmet legal needs which disproportionately harms racial minorities, women and those living in poverty, and which particularly impacts those in immigration proceedings.

In ratifying the ICCPR, the United States committed itself to ensuring meaningful access to justice, including meaningful access to counsel in civil cases where the interests of justice so require. Article 14 guarantees procedural fairness. Article 2 establishes the right to an effective remedy. Article 26 reiterates the guarantee of non-discrimination. Through General Comment 32, the U.N. Human Rights Committee has interpreted these provisions to ensure the right to counsel in civil cases.

Other U.N. experts have similarly identified the importance of a right to counsel in civil cases, particularly in protecting the rights of racial minorities, low-income individuals, women, and migrants. The CERD Committee, in its 2008 review of the U.S., noted the disproportionate impact that the civil justice gap has on vulnerable communities in the United States and

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<sup>1</sup> Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low Income Americans*, 1 (Sept. 2009), [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>2</sup> The U.S. Supreme Court has established a right to counsel in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamelin*, 407 U.S. 25 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges). However, the U.S. Supreme Court has not established a similar protection for individuals in the civil context. In fact, the Court has created a presumption against appointing counsel in any civil case where physical liberty is not in the balance. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (finding no categorical right to counsel when termination of parental rights is at stake). And it has refused to find a categorical right to counsel even in some civil cases where lengthy jail sentences are, in fact, imposed. *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (finding no categorical right to counsel for indigent contemnors facing jail time for failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

recommended that the U.S. allocate sufficient resources to ensure legal representation of racial, ethnic and national minorities, especially where basic human needs are at stake.<sup>3</sup>

Recently, the U.N. Special Rapporteur on the Independence of Judges and Lawyers noted that “legal aid is an essential component of a fair and efficient justice system founded on the rule of law... it is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights.”<sup>4</sup> The Special Rapporteur emphasized that the right to free legal assistance applies in “any judicial or extrajudicial procedure aimed at determining rights and obligations”<sup>5</sup> and that “the notion of beneficiaries of legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel.”<sup>6</sup>

### Relevant Questions in Committee’s List of Issues

In its List of Issues for the United States, the Human Rights Committee requested that the U.S.:

- provide information on steps taken to improve legal representation for civil proceedings, in particular for defendants belonging to racial, ethnic, and national minorities;<sup>7</sup>
- clarify whether detained immigrants on a criminal charge are promptly informed of the charges against them, promptly brought before a judicial authority, and are given access to legal counsel and legal assistance;<sup>8</sup> and
- provide information on steps taken to ensure legal representation for women victims of domestic violence.<sup>9</sup>

### U.S. Government Response

In its Fourth Periodic Report to the Human Rights Committee, the U.S. government concedes inequalities in its civil justice system, “in part because neither the U.S. Constitution nor federal statute provide a right to government-appointed counsel in civil cases when individuals are unable to afford it.”<sup>10</sup> The government identified several mechanisms it employs to mitigate the justice gap. Chief among those mentioned are the Legal Services Corporation, the Department of Justice’s Access to Justice Initiative (ATJI), and the federal *in forma pauperis* statute.<sup>11</sup> The government reiterates the importance of the ATJI in its response to the

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<sup>3</sup> Comm. on the Elimination of Racial Discrimination, *Concluding Observations--United States of America*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

<sup>4</sup> Special Rapporteur on the Independence of Judges and Lawyers, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, Human Rights Council, ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013) (by Gabriela Knaul).

<sup>5</sup> *Id.* at ¶ 27.

<sup>6</sup> *Id.* at ¶ 35.

<sup>7</sup> Human Rights Comm., *List of Issues In Relation to the Fourth Periodic Report of the United States of America*, ¶ 8(e), U.N. Doc. CCPR/C/USA/Q/4 (April 29, 2013).

<sup>8</sup> *Id.* at ¶ 19(b).

<sup>9</sup> *Id.* at ¶ 20.

<sup>10</sup> *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, ¶ 301, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011).

<sup>11</sup> *Id.* at ¶¶ 301-2.

Committee's List of Issues.<sup>12</sup> None of these measures, however, are sufficient to address the serious justice gap in the United States.

The Legal Services Corporation, the chief delivery system for federal legal aid for low-income and poor people in the United States, has experienced crushing budget cuts and places onerous restrictions on how legal services providers can conduct their work. Congressional appropriations for LSC have steadily decreased over the past several years, from \$420 million in 2010 to \$341 million in 2013.<sup>13</sup> As a result, since 2010, LSC has been forced to eliminate more than 1,000 staff positions and close more than 30 offices.<sup>14</sup> LSC-funded programs have nowhere near the funding and resources necessary to respond to the need for services.<sup>15</sup> LSC-funded organizations are also unable to meet the legal needs of low-income and poor clients because of restrictive federal rules governing who may receive their legal services and the types of activities they may engage in.

A positive new initiative with strong potential for addressing civil legal needs, the Department of Justice's Access to Justice Initiative nevertheless has institutional and resource constraints that prevent it from comprehensively addressing the dire need for civil legal services in the United States. Currently, the ATJI is operating at limited capacity without a permanent Senior Counselor and with insufficient staffing. The Initiative lacks the capacity to engage in its own research or analysis, to disseminate best practices, and to engage extensively in public education to raise awareness around the importance of civil and criminal legal assistance in the United States.

Finally, while the federal *in forma pauperis* statute affords federal courts the discretion to request an attorney to represent indigent litigants, courts rarely exercise this discretion, the statute provides no funding for this purpose, and the statute does not apply to state courts.

Efforts at the state and local level to address the justice gap are important, yet patchwork. State laws and jurisprudence provide for counsel in certain categories of civil cases, primarily those concerning certain family law matters, involuntary commitment, and medical treatment.<sup>16</sup> In addition, many state bar associations and access to justice commissions have undertaken research on the impact, cost, and need for counsel in civil cases, organized lawyers to provide *pro bono* services, and fundraised for organizations providing civil legal representation. However, resources for these efforts vary substantially, and they are unable to comprehensively address the need for counsel in civil cases. In order to meet its ICCPR commitments, the federal

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<sup>12</sup> *United States Written Responses to Questions From the United Nations Human Rights Committee Concerning the Fourth Periodic Report*, ¶ 29, U.N. Doc. CCPR/C/USA/Q/4/Add.1 (July 8, 2013).

<sup>13</sup> Legal Services Corporation, *LSC Funding*, <http://www.lsc.gov/congress/lsc-funding>. In September 2012, Congress allocated \$350 million to the Legal Services Corporation for FY 2013. This was eventually reduced to \$341 million due to sequestration in late March 2013. *Id.*

<sup>14</sup> John G. Levi, *Opening Remarks at the 2013 White House Forum on Increasing Access to Justice* (April 16, 2013), available at <http://www.lsc.gov/board-directors/chairmans-page/statements/lsc-chairman-john-levis-remarks-2013-white-house-forum>.

<sup>15</sup> *Id.*

<sup>16</sup> See generally John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763 (2013).

government must support state and local efforts and uniformly improve meaningful access to counsel for low-income individuals.

### **Recommended Questions**

We respectfully recommend that the Human Rights Committee ask the U.S. delegation to:

Please provide information on measures the federal government is taking to address the civil justice gap, including measures to fully fund and ease restrictions on the federal Legal Services Corporation, improve and expand the Access to Justice Initiative, and establish a right to counsel in civil cases where basic human needs are at stake, including in immigration proceedings.

### **Suggested Recommendations**

To more effectively address the civil justice gap and meet its obligations under international law, the United States should take the following actions:

- support research to assess the immediate and long-term financial and other consequences for courts, court users, and communities when court users lack counsel in civil cases;
- fully fund the Legal Services Corporation at a level sufficient to meet the need for free or low cost legal assistance and lift restrictions that prevent legal services lawyers from providing the full array of necessary services;
- intensify the Access to Justice Initiative's activities with respect to civil legal services and provide it with necessary leadership, funding and other support to reach its full potential;
- file supportive amicus briefs in right-to-counsel litigation in federal and state courts;
- support and coordinate efforts on the state and local level to establish a civil right to counsel by: funding state access-to-justice initiatives; developing, evaluating, and disseminating “best practices” for state and local governments; and urging adoption of the ABA Model Access Act; and
- enact federal legislation to guarantee right to counsel in immigration proceedings and all civil cases in federal court where liberty interests or basic human needs are at stake.