



STATE-GUARANTEED LEGAL AID AS A SOCIAL RIGHT OF AN INFRASTRUCTURAL NATURE

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ARTICLE INFO

Article History:

Received	23.06.2026
Accepted	16 .07.2026
Published	30.09.2026

Keywords:

State-guaranteed legal aid,
Social rights, Access to justice,
Positive obligations of the
state, Legal infrastructure

ABSTRACT

This article examines the legal nature of state-guaranteed legal aid and substantiates its classification as an autonomous social right of an infrastructural character. While legal aid has traditionally been regarded as a mechanism for ensuring access to justice and the effective exercise of the right to a fair trial, contemporary legal developments demonstrate that its significance extends far beyond judicial proceedings. In increasingly complex legal systems, access to qualified legal assistance has become an essential condition for the practical exercise of a wide range of rights and legitimate interests.

The study analyses the principal doctrinal approaches to legal aid developed within the European legal tradition, including procedural, human rights, and socio-legal perspectives. Particular attention is devoted to the relationship between legal aid and the state's positive obligations in the field of human rights protection. The article also explores European institutional models of legal aid and the role of international standards in shaping national systems of legal assistance.

The research argues that legal aid should not be viewed merely as a derivative procedural safeguard or as an instru-

ment of access-to-justice policy. Rather, it performs an independent social function by compensating for structural legal inequality and enabling individuals to make effective use of the legal opportunities available to them. Because legal aid creates the conditions necessary for the exercise and protection of rights across different spheres of law, it is characterised as a social right of an infrastructural nature. This approach contributes to the further development of social rights theory and contemporary understandings of the social state.

INTRODUCTION

In contemporary states governed by the rule of law, the effective protection of human rights and freedoms depends not only on their formal recognition but also on the existence of mechanisms that enable their practical exercise. The mere legal recognition of subjective rights does not in itself guarantee their realisation if individuals lack the means necessary to understand legal procedures, protect their interests, and interact effectively with public institutions. In this context, state-guaranteed legal aid has emerged as one of the key mechanisms for ensuring genuine access to law.

Traditionally, legal aid has been viewed as an element of the right to a fair trial and as a means of securing access to justice. While this understanding remains important, it no longer fully captures the place of legal aid within the contemporary relationship between the state, law, and the individual. The increasing complexity of legal regulation, the expansion of state intervention into various spheres of social life, and the persistence of social inequalities have made access to qualified legal assistance a necessary condition for the exercise of a wide range of rights extending well beyond the sphere of judicial protection.

A substantial body of scholarship has examined access to justice, positive state obligations, social citizenship, and institutional models of legal aid provision. Nevertheless,

state-guaranteed legal aid continues to be analysed predominantly as an instrument for implementing other rights or as a component of specific legal procedures. Considerably less attention has been paid to whether legal aid itself should be recognised as an autonomous social right with its own normative content and institutional guarantees. Such an approach offers a different perspective on the place of legal aid within the broader framework of human rights and on the criteria by which state reforms in this field should be assessed.¹ Recent scholarship has further expanded the understanding of access to justice by linking it to legal capability, legal needs, and people-centred justice, thereby shifting attention from formal procedural guarantees towards the practical ability of individuals to exercise and protect their rights in everyday legal relations.² These developments indicate a gradual transition from viewing legal aid solely as a procedural safeguard to recognising it as an institutional mechanism that

- 1 Sukhov, V., Gîlca, N. (2026). Legal aid as an element of social citizenship and an instrument of access to justice. *Vector European*, (1), 112-120. https://ibn.idsi.md/ro/vizualizare_articol/249860.
- 2 Pleasence, P., Balmer, N. (2025). Legal capability and access to civil justice. In Bloom, A., Engel, D. M., Jolly, R. L. (Eds.), *Research handbook on civil justice* (pp. 213–231). Edward Elgar Publishing. <https://doi.org/10.4337/9781035314584.00026>; Organization for Economic Co-operation and Development. (2025). *Making justice systems more effective and people-centred: Advancing a responsive rule of law*. OECD Publishing. <https://doi.org/10.1787/e02fd90b-en>.

enables the effective exercise of rights. At the same time, the question of whether state-guaranteed legal aid constitutes an autonomous social right with its own normative content and infrastructural function remains insufficiently explored in contemporary legal doctrine.

This article proceeds from the premise that state-guaranteed legal aid cannot be reduced solely to the function of ensuring access to justice and should not be regarded merely as a derivative procedural safeguard. Its broader significance lies in its role in compensating for structural legal inequality and facilitating the effective exercise of subjective rights. These characteristics invite a reconsideration of legal aid through the broader framework of social rights theory.

The article's original contribution lies in substantiating the view that state-guaranteed legal aid should be understood not merely as a means of securing access to justice but also as an autonomous social right possessing its own normative content, minimum standards of implementation, and institutional guarantees.

METHODOLOGY

This article aims to provide a theoretical justification for classifying state-guaranteed legal aid as an autonomous social right. To achieve this objective, the article examines the principal doctrinal approaches to legal aid, analyses its relationship with the state's positive obligations in the field of human rights, and explores the institutional forms through which the state fulfils its responsibility to provide legal assistance.

The methodological framework combines doctrinal and comparative legal analysis with an institutional approach and selected insights from the sociology of law. This combination makes it possible to examine legal aid simultaneously as a legal institution, a mechanism for the implementation of human rights, and an element of state social policy.

FINDINGS AND DISCUSSION

1. DOCTRINAL APPROACHES TO LEGAL AID IN THE EUROPEAN LEGAL TRADITION

Within the approach that viewed state-guaranteed legal aid exclusively as an instrument for securing access to justice, its significance was determined by its capacity to overcome the economic barriers that hinder access to courts and participation in judicial proceedings. This position found its most systematic expression in the work of M. Cappelletti and B. Garth, who identified legal aid as one of the principal mechanisms of the first "wave" of the access to justice movement.³

The importance of this approach can hardly be overstated. It facilitated a shift from a formal understanding of the right to judicial protection towards recognition of the need for active state involvement in ensuring access to legal procedures. At the same time, viewing legal aid exclusively through the prism of judicial proceedings left unresolved the question of its role beyond procedural relationships. If the primary function of legal aid is merely to facilitate participation in court proceedings, its significance inevitably remains derivative of the right to judicial protection itself.

As legal systems became more complex and the scope of legal regulation expanded, this understanding increasingly attracted criticism. In his later work, Cappelletti shifted the focus from formal access to procedures towards the ability of legal institutions to secure the effective enjoyment of rights by socially disadvantaged groups.⁴ This development reflects a gradual broadening of the original procedural approach and laid the theoretical foundations for a more comprehensive understanding of legal aid.

The subsequent evolution of academic de-

3 Cappelletti, M., Garth, B., Trocker, N. (1976). Access to justice: Comparative general report. *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law*, 40(3–4), 673–676.

4 Cappelletti, M. (1989). The judicial process in comparative perspective. Clarendon Press, 8–11.

bate was marked by growing attention to the human rights dimension of legal aid. Within this approach, the significance of legal aid derives not so much from facilitating participation in judicial proceedings as from creating the conditions necessary for the effective enjoyment of human rights. Scholars who examine legal aid through the lens of the state's positive obligations argue that, in certain circumstances, the absence of legal assistance renders the exercise of subjective rights impossible despite their formal recognition.⁵

However, this approach also falls short of fully defining the independent legal status of legal aid. By treating it primarily as a means of implementing other rights, it leaves unresolved the question of whether legal aid possesses its own normative content or whether its significance is entirely exhausted by serving other legal institutions.

A distinctive place in contemporary scholarship is occupied by the socio-legal approach. In the work of H. Sommerlad, legal aid is understood as a mechanism for integrating individuals into the legal order and as an element of social citizenship.⁶ This idea has been further developed in more recent studies exploring the relationship between legal aid, access to justice, and social citizenship in the context of the transformation of the welfare state.⁷

Unlike the procedural approach, legal aid is viewed here not merely as a means of resolving specific legal disputes but as an institution that influences the distribution of legal resources within society. The focus shifts to an individual's ability to make effective use of the

law regardless of their financial circumstances or social status.

In our view, it is this approach that comes closest to conceptualising legal aid as an autonomous socio-legal institution. Nevertheless, even within the framework of social citizenship theory, the question of whether legal aid should be classified as an autonomous social right remains insufficiently explored. Most studies concentrate on the social function of legal aid without directly addressing its place within the broader system of social rights.⁸

It follows that contemporary European legal scholarship identifies at least three principal approaches to understanding legal aid: the procedural approach, the human rights approach, and the socio-legal approach. Each captures important aspects of the phenomenon under consideration, yet none provides a comprehensive answer to the question of legal aid's place within the system of social rights. This, in turn, necessitates further examination of legal aid through the lens of the state's positive obligations and the theory of social rights.

Recent scholarship has further developed these doctrinal approaches by moving beyond the traditional focus on access to courts towards broader concepts of legal capability, legal needs, and people-centred justice. Rather than assessing legal aid solely as a procedural guarantee, contemporary research increasingly examines its contribution to enabling individuals to understand, exercise, and effectively enforce their rights in everyday legal life. This shift reflects the emergence of a more user-centred conception of justice, in which legal aid is viewed as part of a wider institutional framework designed to respond to people's legal needs rather than merely to facilitate judicial proceedings.⁹

5 Chicu, M. (2013). The right to legal aid in non-criminal matters through the glance of the human rights rationale (Doctoral dissertation). Central European University, 61-63.

6 Sommerlad, H. (2004). Some reflections on the relationship between citizenship, access to justice, and the reform of legal aid. *Journal of Law and Society*, 31(3), 345-347. <https://doi.org/10.1111/j.0021-8553.2004.00299.x>.

7 Sukhov, V., Gilca, N. (2026). Legal aid as an element of social citizenship and an instrument of access to justice. *Vector European*, (1), 112-120. https://ibn.idsi.md/ro/vizualizare_articol/249860.

8 Sommerlad, H. (2004). Some reflections on the relationship between citizenship, access to justice, and the reform of legal aid. *Journal of Law and Society*, 31(3), 345-347. <https://doi.org/10.1111/j.0021-8553.2004.00299.x>.

9 Pleasence, P., Balmer, N. (2025). Legal capability and access to civil justice. In Bloom, A., Engel, D. M., Jolly, R. L. (Eds.), *Research handbook on civil justice* (pp.

2. STATE-GUARANTEED LEGAL AID IN THE CONTEXT OF THE STATE'S POSITIVE OBLIGATIONS

The development of contemporary human rights doctrine has been accompanied by a gradual reassessment of traditional understandings of the state's role in securing subjective rights. Whereas the classical liberal approach primarily emphasised the state's duty to refrain from interfering with individual freedom, contemporary conceptions of human rights are increasingly associated with the need to create the conditions necessary for their effective enjoyment. The focus has shifted from the mere legal recognition of rights to the actual ability of individuals, situated in different social and economic circumstances, to exercise them in practice.

This understanding is reflected in the concept of the state's positive obligations. At its core lies the recognition that the formal existence of a right does not in itself guarantee its effective realisation. An individual may possess a right in normative terms, yet the absence of adequate resources, information, or institutional support may render its exercise practically impossible. In such circumstances, the state is viewed not only as a guarantor of non-interference but also as an actor responsible for creating the conditions necessary for the effective enjoyment of rights.

Significantly, the development of this concept has been accompanied by a gradual departure from the rigid distinction traditionally drawn between civil and political rights on the one hand and social rights on the other. As Fredman observes, the effective enjoyment of virtually every right requires some degree of positive state action. Even rights traditionally regarded as requiring only state restraint depend upon the existence of legal institutions, enforcement mechanisms, and procedures for their protection. In this sense, the distinction

between negative and positive obligations is relative rather than absolute.¹⁰

This approach has acquired particular importance in the jurisprudence of the European Court of Human Rights. For several decades, the Court has consistently maintained that the rights guaranteed by the Convention must be not theoretical and illusory but practical and effective. This principle is of fundamental importance for understanding the place of legal aid within the system of human rights guarantees, as it shifts the focus from the formal existence of legal opportunities to an individual's actual ability to make use of them.

The most well-known illustration of this approach is the judgment in *Airey v. Ireland*. In considering the applicant's access to judicial proceedings, the Court concluded that, in certain circumstances, the absence of legal aid may effectively deprive an individual of the possibility of exercising a right to which they are formally entitled. In doing so, the Court articulated an important legal principle: state obligations are not exhausted by the mere creation of judicial procedures if those procedures remain inaccessible to a significant segment of the population for economic or other reasons.¹¹

However, this judgment does not support the conclusion that the state is under a universal obligation to provide legal aid in all circumstances. It is precisely at this point that one of the most interesting debates in contemporary legal scholarship begins. If rights must be practical and effective, does this necessarily require the continual expansion of state-funded legal aid schemes?

Proponents of a more cautious approach answer this question in the negative. Bar-endrecht argues that access to law may be promoted through a variety of mechanisms, including procedural simplification, the development of legal information, improvements in

213–231). Edward Elgar Publishing. <https://doi.org/10.4337/9781035314584.00026>.

10 Fredman, S. (2008). *Human rights transformed: Positive rights and positive duties*. Oxford University Press, 499-503.

11 European Court of Human Rights. (1979). *Airey v. Ireland* (Application No. 6289/73). Strasbourg. <https://hudoc.echr.coe.int/eng?i=001-57420>.

dispute resolution systems, and greater accessibility of public services. From this perspective, legal aid is only one possible means of overcoming legal barriers rather than the sole method by which the state fulfils its positive obligations.¹²

Developing this argument further, Barendrecht, Kamminga, and Verdonchot propose that access to law should be understood primarily through the needs of its users. In their view, the effectiveness of legal institutions should be assessed not by the quantity of legal services provided but by their capacity to help individuals resolve the problems they encounter in everyday life. Such an approach embraces a broader understanding of access to law and allows for the use of a wide range of instruments, from legal information and advice to alternative dispute resolution mechanisms and simplified procedures for interacting with public authorities.¹³ Within this framework, legal aid remains important but is regarded as one component of a broader system designed to secure access to law.

This position deserves serious consideration. Not every legal problem requires professional legal representation. In many cases, barriers arise from inadequate legal awareness, the complexity of administrative procedures, or the absence of clear mechanisms for interacting with public authorities. In such circumstances, the development of legal information systems and public legal education may prove no less effective in promoting access to law than the expansion of legal aid programmes.

This conclusion is supported by research on universal access to legal information. As noted elsewhere, a substantial proportion of legal problems arise before individuals seek professional legal assistance. Greater legal awareness, the development of accessible information re-

sources, and the availability of advisory services can prevent many disputes from emerging or significantly reduce their complexity at an early stage.¹⁴

At the same time, recognising the value of alternative mechanisms does not diminish the importance of legal aid. On the contrary, it enables a more precise identification of the circumstances in which legal aid becomes particularly significant. Legal information may help individuals understand the content of their rights, but it cannot always overcome the consequences of substantial inequalities in legal capacity. In many situations, individuals face not only a lack of information but also complex legal frameworks, multi-layered administrative procedures, or professionally represented state bodies and large organisations.

It is precisely in such circumstances that the limitations of a purely formal understanding of equality become apparent. As the jurisprudence of the European Court of Human Rights demonstrates, identical procedural rules do not necessarily provide equal opportunities for the protection of rights. This problem was particularly evident in *Steel and Morris v. the United Kingdom*, where the applicants became involved in complex litigation against a large corporation possessing vastly superior financial and organisational resources. Under such conditions, formal equality between the parties did not eliminate the practical inequality of their ability to defend their interests.¹⁵

A similar approach can be seen in *McVicar v. the United Kingdom*. The Court did not recognise a general obligation to provide legal aid in all civil cases, but it emphasised the need to

12 Barendrecht, M. (2011). Legal aid, accessible courts or legal information? *Global Jurist*, 11(1), Article 3. <https://doi.org/10.2202/1934-2640.1377>.

13 Barendrecht, M., Kamminga, P., Verdonchot, J. (2014). Prioritizing the needs of users in access to justice. *Hague Institute for the Internationalisation of Law*, 7-15.

14 Suhov, V. (2024). Mechanisms and Strategies for Ensuring Universal Access to Legal Information and Assistance: The Experience of the Republic of Moldova, *The Annals of "Dunarea de Jos" University of Galati. Legal Sciences*. Fascicle XXVI, 7(2), 102-112. <https://www.gup.ugal.ro/ugaljournals/index.php/als/article/view/7243>.

15 European Court of Human Rights. (2005). *Steel and Morris v. the United Kingdom* (Application No. 68416/01). Strasbourg. <https://hudoc.echr.coe.int/eng?i=001-68224>.

assess the specific circumstances of each case, including the complexity of the dispute, the individual's ability to represent themselves, and the consequences of the absence of professional legal assistance. In doing so, the Court identified an important limit to the state's positive obligations: the necessity of legal aid depends not on the abstract nature of a right but on the practical possibility of exercising it in the circumstances of a particular case.¹⁶

In our view, this approach most accurately reflects the contemporary understanding of the state's positive obligations. Legal aid is neither the sole mechanism for securing human rights nor a substitute for other forms of legal support. Nevertheless, there are situations in which neither legal information, procedural simplification, nor other organisational measures are capable of compensating for significant inequalities in legal capacity. In such circumstances, the absence of legal aid calls into question the very possibility of the effective exercise of rights.

Accordingly, the significance of state-guaranteed legal aid cannot be reduced to facilitating access to judicial procedures alone. In a broader sense, it constitutes one of the instruments through which the state fulfils its positive obligations to ensure the effective enjoyment of human rights.

At the same time, this conclusion does not in itself determine the place of legal aid within the system of human rights. If legal aid serves to compensate for structural legal inequality and enables the practical exercise of subjective rights, the question arises whether it should be regarded merely as an auxiliary mechanism for implementing other rights or as an autonomous element within the broader system of social guarantees.

3. INSTITUTIONALISING STATE OBLIGATIONS IN THE FIELD OF LEGAL AID: EUROPEAN MODELS AND INTERNATIONAL STANDARDS

Unlike many other legal guarantees, legal aid cannot be secured solely through the formal recognition of a corresponding right. Its effective implementation requires the existence of dedicated organisational structures, sustainable sources of funding, service delivery procedures, and quality control mechanisms. For this reason, an examination of institutional models of legal aid makes it possible to assess not only the ways in which legal aid is organised but also the nature of state responsibility in this field.

Within the European legal space, the development of legal aid systems has been closely associated with the expansion of the state's social function and the gradual recognition of the need to ensure meaningful access to law for individuals in vulnerable situations. Unlike minimalist approaches that are limited to the formal recognition of a right to legal aid, most European states have sought to establish durable institutional mechanisms for its provision. Research has long demonstrated that legal aid should be regarded not as a one-off social service or a charitable measure of support, but as an element of legal infrastructure integrated into justice systems and public administration.¹⁷ This understanding has subsequently been reinforced by contemporary legal scholarship and European institutional assessments, which emphasise that the effectiveness of legal aid depends not only on statutory guarantees but also on institutional design, sustainable funding, accessibility, and the capacity of legal services to respond to people's legal needs.¹⁸

16 European Court of Human Rights. (2002). *McVicar v. the United Kingdom* (Application No. 46311/99). Strasbourg. <https://hudoc.echr.coe.int/en-g?i=001-60450>.

17 Public Interest Law Institute. (2009). *Making legal aid a reality: A resource book for policy makers and civil society*. Public Interest Law Institute. <https://www.pilnet.org/wp-content/uploads/2020/04/Making-Legal-Aid-a-Reality.pdf>.

18 Pleasence, P., Balmer, N. (2025). Legal capability and access to civil justice. In Bloom, A., Engel, D. M., Jolly, R. L. (Eds.), *Research handbook on civil justice* (pp.

These general principles are reflected in different institutional arrangements adopted across European legal aid systems, despite significant variations in their organisational structure and methods of service delivery.

Comparative analysis of the legal aid systems of Finland, Germany, the Netherlands, England and Wales, and the Republic of Moldova reveals three principal institutional models: centralised state-run systems, models based primarily on the participation of the legal profession, and mixed institutional arrangements involving a division of responsibilities between public authorities, professional associations, and non-governmental organisations. Despite significant differences in institutional organisation, administrative structures, and the role of legal professionals, all of these systems are based on the same fundamental legal principle: the state retains ultimate responsibility for financing legal aid, establishing eligibility criteria, ensuring quality standards, and guaranteeing effective access to legal services. Comparative analysis therefore demonstrates that differences between European legal aid systems concern the institutional arrangements through which legal aid is delivered rather than the legal character of the state's obligation to ensure effective access to legal assistance.¹⁹

Of particular importance is the fact that none of these models operates exclusively on a market basis. Even in systems that rely extensively on private legal practitioners and members of the legal profession, the state retains responsibility for funding, establishing eligibility criteria, setting quality standards, and overseeing the use of public resources.²⁰ This demonstrates that legal aid is regarded as an object of sustained public responsibility rather than a sphere entirely delegated to private regulatory mechanisms.

This conclusion is further supported by empirical research. Studies of different legal aid systems indicate that their effectiveness depends not only on the level of funding but also on the quality of their institutional organisation. The formal existence of a right to legal aid does not guarantee effective protection of rights where services are provided under conditions of administrative dependence, excessive workloads for service providers, or inadequate quality assurance mechanisms. Accordingly, the academic literature emphasises the importance of institutional guarantees of independence, professional accountability, and adequate remuneration as essential components of a functioning legal aid system.²¹

The international dimension of legal aid institutionalisation is reflected in the gradual development of universal and regional standards defining the core requirements for national legal aid systems. Although most of these instruments are not legally binding, they reflect an emerging international consensus regarding the place of legal aid within the broader framework of human rights protection. International standards proceed on the assumption that legal aid should be accessible, timely, of high quality, and responsive to the needs of vulnerable groups. Moreover, its scope extends beyond

213–231). Edward Elgar Publishing. <https://doi.org/10.4337/9781035314584.00026>; Organisation for Economic Co-operation and Development. (2025). Making justice systems more effective and people-centred: Advancing a responsive rule of law. OECD Publishing. <https://doi.org/10.1787/e02fd90b-en>; European Commission for the Efficiency of Justice. (2024). European judicial systems: CEPEJ evaluation report 2024: Evaluation cycle (2022 data). Part 1: General analysis. Council of Europe. <https://www.coe.int/en/web/cepej/special-file>.

19 European Commission for the Efficiency of Justice. (2024). European judicial systems: CEPEJ evaluation report 2024: Evaluation cycle (2022 data). Part 1: General analysis. Council of Europe. <https://www.coe.int/en/web/cepej/special-file>; Ministry of Justice. (2024). Review of civil legal aid: Comparative analysis of legal aid systems report. Ministry of Justice. <https://www.gov.uk/government/publications/review-of-civil-legal-aid-comparative-analysis-of-legal-aid-systems-report>.

20 Sukhov, V. (2021). World's models of free legal aid provision. *Relații internaționale. Plus*, 2(20), 241–246. https://ibn.idsi.md/ro/vizualizare_articol/146093.

21 Moorhead, R., Sherr, A., Paterson, A. (2003). Contesting professionalism: Legal aid and nonlawyers in England and Wales. *Law & Society Review*, 37(4), 770–773. <https://doi.org/10.1111/1540-5893.3704002>.

legal representation in court and encompasses a broader range of measures aimed at ensuring access to law.²²

Institutional analysis also allows for a critical assessment of proposals to replace legal aid with alternative mechanisms for promoting access to law, such as legal information services, digital tools, or simplified procedures. The value of these instruments is undeniable; however, research demonstrates that their effectiveness has objective limits. In complex and socially significant categories of cases, they are incapable of fully compensating for the absence of professional legal assistance. For this reason, replacing legal aid with less costly forms of support may result not in greater efficiency but in the reinforcement of structural legal inequality and a reduction in the actual level of rights protection.²³

Viewed from a broader socio-legal perspective, institutional models of legal aid affect not only the functioning of justice systems but also the character of social integration. Research indicates that the weakening of institutional guarantees of legal aid contributes to the legal marginalisation of socially vulnerable groups and undermines public trust in institutions. Conversely, stable and professionally organised legal aid systems strengthen legal inclusion and promote the principle of substantive equality.²⁴

Despite the diversity of national legal aid models, they share a common characteristic: access to professional legal assistance is recognised as a matter of sustained public responsibility. This development reflects the broader expansion of the social dimension of citizen-

ship described by T. H. Marshall, whereby the state assumes responsibility for creating the conditions necessary for individuals to participate fully in social life.²⁵

The analysis of institutional models therefore demonstrates that, within contemporary European legal systems, legal aid is not regarded as an optional supplement to particular legal procedures but as a stable institution of public responsibility supported by dedicated funding mechanisms, organisational infrastructure, and professional standards. Regardless of the specific features of any given model, the state retains a central role in ensuring both the accessibility and effectiveness of legal aid. This observation is of fundamental importance for addressing the broader question of whether legal aid should be understood not merely as an instrument for implementing other rights but also as an autonomous element within the system of social rights.

4. STATE-GUARANTEED LEGAL AID AS A SOCIAL RIGHT OF AN INFRASTRUCTURAL NATURE: A THEORETICAL JUSTIFICATION

Despite the significant transformation of approaches to legal aid in contemporary legal scholarship, its classification as an autonomous social right remains contested. The prevailing view continues to regard legal aid as a derivative guarantee of the right to judicial protection, the right to a fair trial, or the broader concept of access to justice. From this perspective, legal aid possesses no independent content of its own and exists solely as a means of facilitating the implementation of other rights.

This position is not without foundation. Historically, the development of legal aid institutions was indeed closely linked to judicial protection and the need to ensure procedural equality between parties. For this reason, legal aid was long perceived primarily as an auxil-

22 United Nations Office on Drugs and Crime. (2017). Model law on legal aid in criminal justice systems with commentaries. United Nations. https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf.

23 Barendrecht, M. (2011). Legal aid, accessible courts or legal information? *Global Jurist*, 11(1), Article 3, 6-8. <https://doi.org/10.2202/1934-2640.1377>.

24 Sommerlad, H., Sanderson, P. (2013). Social justice on the margins: The future of the not for profit legal sector as a service provider. *Journal of Social Welfare and Family Law*, 35(3), 309–312. <https://doi.org/10.1080/09649069.2013.829712>.

25 Marshall, T. H. (1950). *Citizenship and social class and other essays*. Cambridge University Press, 28-29.

iary mechanism whose significance derived not from its own content but from its capacity to facilitate the exercise of other legal rights. However, the analysis undertaken in this article raises questions as to whether this explanation remains sufficient.

As demonstrated above, the evolution of European legal doctrine has been marked by a gradual departure from a narrowly procedural understanding of legal aid. In the work of M. Cappelletti, the focus increasingly shifted from formal access to judicial procedures towards the effective enjoyment of rights by socially vulnerable groups. Human rights scholarship linked legal aid to the state's positive obligations, while the socio-legal approach, most notably associated with the work of H. Sommerlad, highlighted its role in promoting legal inclusion and social citizenship. At the same time, the institutional development of European legal aid systems demonstrated that states increasingly regard legal aid not as an occasional form of assistance but as a stable component of public responsibility.

These developments signify more than a mere expansion of the scope of legal aid. They reflect a gradual transformation in perceptions of its legal nature. Whereas legal aid was initially understood as a means of participating in particular legal procedures, it is now increasingly viewed as a mechanism for securing access to the very process through which rights are realised.

Against this theoretical background, the central question is no longer whether legal aid performs a social function, but what distinguishes its legal nature from that of other social rights. This constitutes its defining characteristic. Most social rights are directed towards the provision of a specific social good or the satisfaction of a particular social need. The right to education provides access to educational resources; the right to healthcare is concerned with the protection of health; and the right to social security is aimed at supporting individuals in disadvantaged socio-economic circumstances. Legal aid performs a different function.

Its purpose is not to provide an independent social good but to create the conditions necessary for individuals to make use of the entire system of subjective rights.

This understanding is consistent with recent civil justice scholarship, which emphasises that the effective enjoyment of rights depends not only on the availability of legal rights but also on individuals' ability to recognise legal problems and act upon them effectively. This perspective further supports the view that legal aid performs a broader enabling function by facilitating the practical exercise of rights rather than merely providing procedural representation.²⁶

In this sense, legal aid possesses an infrastructural character. It supports the functioning of the mechanism through which rights are realised in much the same way that educational or judicial infrastructure enables the operation of the corresponding social institutions. The absence of legal aid does not necessarily result in the violation of any specific right; however, it may render the practical exercise of a wide range of rights and legitimate interests impossible. This explains why the consequences of inaccessible legal aid extend far beyond the confines of individual legal proceedings.

The understanding of legal aid proposed here as a social right of an infrastructural nature partially overlaps with existing concepts in human rights theory that emphasise rights facilitating the exercise of other rights. At the same time, the category employed in this study has a more limited scope. It does not focus on the normative priority of a particular right or its position within the hierarchy of human rights. Rather, it emphasises the function performed by that right within the legal system. Legal aid is characterised as an infrastructural right precisely because it provides individuals with access to the mechanisms through which subjective rights are realised and protected,

26 Sandefur, R. L. (2025). Civil legal needs. In Bloom, A., Engel, D. M., Jolly, R. L. (Eds.), *Research handbook on civil justice* (pp. 199–209). Edward Elgar Publishing. <https://doi.org/10.4337/9781035314584.00023>.

regardless of the branch of law to which those rights belong.

This understanding is consistent with broader developments in the theory of social rights. T. H. Marshall's classical conception of social citizenship links social rights to the ability of individuals to participate fully in social life and to the mitigation of social inequality.²⁷ In contemporary societies, participation in social life cannot be understood solely in terms of material well-being. Equally important is access to legal resources that enable individuals to interact effectively with public institutions, protect their interests, and make meaningful use of the rights available to them. In this respect, legal aid performs a function comparable to that of other social rights, as it seeks to overcome one particular form of social exclusion—legal marginalisation.

Contemporary understandings of equality further reinforce this conclusion. As Fredman argues, the purpose of social rights is not merely to provide formally equal opportunities but also to remove the structural obstacles that prevent individuals from making effective use of those opportunities.²⁸ From this perspective, legal aid constitutes one of the mechanisms through which substantive equality is promoted. It helps compensate for disparities in legal knowledge, access to professional support, and the ability to navigate complex institutional procedures. Its social function therefore extends beyond facilitating access to particular legal processes and includes mitigating the consequences of structural legal inequality.

A possible objection to recognising legal aid as an autonomous social right is that it merely serves as an instrument for implementing other rights. Such an argument, however, is ultimately unpersuasive. Many social rights also possess an instrumental dimension. Education creates the conditions necessary for the exercise of political, economic, and cultural rights.

Social security enables individuals to participate in society with dignity. Healthcare provides the preconditions for the enjoyment of a broad range of other rights and freedoms. The instrumental nature of a right does not in itself deprive that right of autonomous significance within the human rights framework.

Indeed, it is precisely legal aid's capacity to facilitate the exercise of a wide range of other rights that justifies its recognition as a right of a particular kind. Unlike most social rights, it is not directed towards the satisfaction of a specific need but towards maintaining the functioning of the entire system of legal opportunities available to the individual. This is what gives legal aid its infrastructural character and, at the same time, its distinctive place within the system of social rights.

The conclusion that legal aid possesses a social-rights dimension is further supported by the application of traditional criteria used to identify social rights. First, its implementation is impossible without active state involvement, including regulation, funding, and organisational support. Secondly, it possesses a minimum normative content encompassing accessibility, timeliness, and effectiveness. Thirdly, its operation is directly linked to specialised institutions and the allocation of public resources. Finally, legal aid is directed towards mitigating the effects of social and legal inequality, a function traditionally regarded as one of the defining characteristics of social rights.

Accordingly, state-guaranteed legal aid cannot be reduced either to a derivative procedural safeguard or to an instrument of access-to-justice policy. Its purpose is to secure the practical exercise of the entire system of subjective rights by compensating for structural legal inequality. It is this function that justifies treating legal aid as an autonomous social right of an infrastructural nature, occupying a distinctive place within the human rights framework of the modern social state.

27 Marshall, T. H. (1950). *Citizenship and social class and other essays*. Cambridge University Press, 28-29.

28 Fredman, S. (2008). *Human rights transformed: Positive rights and positive duties*. Oxford University Press.

CONCLUSION

The present study demonstrates that the traditional understanding of state-guaranteed legal aid as a derivative procedural safeguard no longer fully reflects its place within the contemporary human rights framework. Although the historical development of legal aid was indeed closely linked to securing access to justice and ensuring the right to a fair trial, contemporary legal doctrine and practice reveal a significantly broader range of functions performed by legal aid.

Legal aid provides not only the opportunity to participate in specific legal procedures but also access to the very mechanisms through which subjective rights are realised. In a context characterised by increasingly complex legal regulation, the expanding scope of state intervention, and persistent social inequality, an individual's ability to make effective use of their rights depends ever more heavily on the availability of professional legal support. In the absence of such support, many rights and legitimate interests continue to exist in a formal sense but become difficult, or even impossible, to exercise in practice.

An analysis of the state's positive obligations makes it possible to regard legal aid as one of the instruments through which the effective enjoyment of human rights is secured. At the same time, its significance cannot be reduced to a merely auxiliary function in relation to other rights. Unlike traditional social rights, which are directed towards satisfying specific social needs, legal aid possesses an infrastructural character. Its purpose is to provide individuals with access to the entire range of legal opportunities offered by the contemporary legal order. It is this distinctive feature that justifies treating state-guaranteed legal aid as an autonomous social right.

The social nature of legal aid is determined not by the object of provision but by the function it performs—namely, compensating for structural legal inequality and ensuring that different social groups have an equal capac-

ity to exercise their rights. In this respect, legal aid occupies a distinctive position within the system of social rights. Rather than serving primarily as a mechanism for the distribution of material benefits, it functions as a means of promoting legal inclusion and enabling individuals to participate fully in social life.

The proposed approach has implications not only for legal theory but also for public policy. If legal aid is regarded solely as an instrument of procedural policy, its scope and forms may be determined primarily by considerations of administrative convenience and budgetary efficiency. If, however, it is recognised as an autonomous social right, the assessment of legal aid systems must extend beyond economic indicators and include their capacity to ensure genuine access to law for socially vulnerable groups. Such an approach entails higher standards in relation to the sustainability of legal aid systems, the quality of services provided, and the guarantees of their accessibility.

Ultimately, the development of state-guaranteed legal aid reflects a broader transformation in the evolution of the modern social state. Alongside education, healthcare, and social security, legal aid contributes to the creation of the institutional conditions necessary for the effective exercise of rights in increasingly complex legal systems. For this reason, the further development of social rights theory requires legal aid to be recognised not merely as an instrument of access to justice, but as an autonomous subject of scholarly inquiry whose place within the human rights framework should be reconsidered in light of its infrastructural function.

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