



**ProRPC**  
STRENGTHENING PROCEDURAL RIGHTS IN POLICE CUSTODY

# From law to practice: STRENGTHENING PROCEDURAL RIGHTS IN POLICE CUSTODY

## Legal Aid

### FACTSHEET



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POLICE CUSTODY

# Legal Aid



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# Project description

## Authors

The Factsheet was developed in the framework of the EU Project 'From law to practice: Strengthening procedural rights in police custody (ProRPC)' implemented by the Rights International Spain (Spain) in cooperation with the Ludwig Boltzmann Institute of Fundamental and Human Rights (LBI GMR, Austria), APADOR-CH (Romania), Fair Trials Europe (Belgium), and the Irish Council for Civil Liberties (Ireland).

It was written by Rights International Spain. The chapter on the regional challenges draws heavily on work of Fair Trials Europe, who conducted in depth regional research in the framework of this Project.

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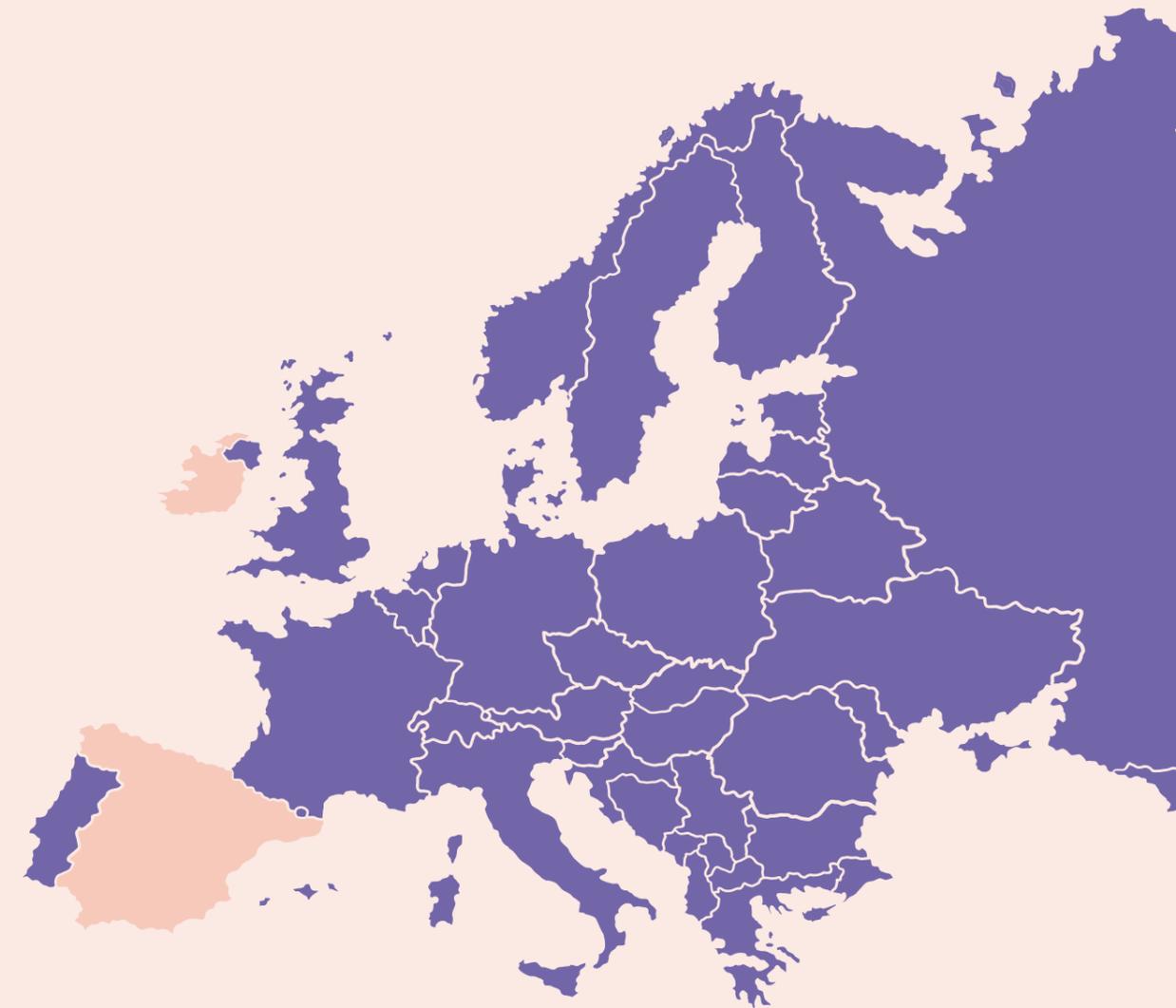
## Information about the Project and Factsheet

The Factsheet highlights the relevance of the right to legal aid during the criminal investigation phase. It reflects on identified challenges and discusses promising practices. The goal is to respond to the question WHAT can be done to strengthen procedural rights. To this end, the Factsheet unpacks the key elements of the promising practices and attempts to identify lessons learnt. Thereby, the Factsheet not only describes the promising practices, but also investigates three main questions:

- What are the main benefits of the promising practices?
- How did the promising practices come about? (e.g. What triggered their implementation? What were the challenges faced beforehand?)
- What are the remaining challenges in the implementation of the promising practices?

The Factsheet is intended for all criminal justice actors and advocates who are interested in reforming their national system. Other factsheets of the series cover the areas the right to information, access to a lawyer, and audio-visual recordings. The factsheets should be read in combination with the final report that provides insights into HOW the envisaged change can be achieved.

The research on the promising practices focused especially on the practices of four EU Member States: Austria, Ireland, Spain, and Romania. Additional practices and examples from other EU Member States were gathered via regional consultations as well as the regional research conducted by Fair Trials Europe. As each practice came about in a specific national context, in order to successfully replicate them, it will always be important to tailor them to the national contexts, dynamics and cultures. Yet we hope that disseminating information on the reform processes occurred in other countries can offer useful inspiration to strengthen procedural rights and overcome existing barriers.



# Project definitions

For the purposes of this factsheet:<sup>1</sup>

## Legal Aid

The provision of legal advice, assistance and/or representation by a legal aid lawyer provider either at no cost or subject to a financial contribution.<sup>2</sup>

## Lawyer

A person qualified and authorised according to national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.

## Legal Advice

The provision of information by a legal aid provider on a person's legal rights and/or responsibilities and on the manner of and existing possibilities for solving a particular legal issue.

## Legal Assistance

Assistance by a legal aid provider, including, for example, assistance in drafting documents and court pleadings, support in mediation and help in navigating the rules and procedures.

## Legal Aid Provider

Any person (legal or natural, and whether professionally qualified in law or not) involved in the delivery of State-funded legal aid, whether it be provided on a full-time, part-time or case-by-case basis.

1. Definitions source: 2021 CoE guidelines on [“The efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law.”](#)

2. Among its legal bases are: European Convention on Human Rights art 6.3.c., European Union Charter of Fundamental Rights art. 48.2, Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings 2013/C 378/03.

## Means test

The means test requires Member States to consider factors such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that State in order to determine whether a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.

## Merits test

The merits test requires Member States to consider the seriousness of the offence, the complexity of the case and the severity of the sanction at stake in order to determine whether the interests of justice require legal aid to be granted

## Child

A child is any person below the age of 18 years, as provided by Art 1 of the UN Convention on the Rights of the Child (CRC). When referring to a child who is a suspect or accused person, the term child may extend to persons older than 18 in certain cases as established by the EU Directive (EU) 2016/800 of 11 May 2016.

## Interview

The questioning of a suspect or accused person by a law enforcement officer regarding their alleged involvement in a criminal offence.

## Persons in a situation of vulnerability

Any person who, because of his or her specific situation or circumstances, requires specific care, attention or assistance.

# Introduction

In 2020, there were 96.5 million people in the European Union (EU) at risk of poverty or social exclusion according to Eurostat, representing 21.9% of the population.<sup>3</sup> Lack of access to fundamental rights, including access to a lawyer and to justice, is a component of poverty. As stated by the former UN special rapporteur on extreme poverty and human rights, “[l]ack of access to justice is a major reason why people fall into and remain in extreme poverty, and therefore access to justice is not only a human right in itself but also an essential tool to tackle poverty and inequality.”<sup>4</sup>

Access to legal advice and legal representation is essential to understanding and exercising one’s rights, including those of suspects and accused persons. Access to legal aid is central to enabling people living in poverty to access justice. Systems which do not provide effective access to legal advice and representation contribute to further the impoverishment and social exclusion of people living in poverty, entrenching deep societal inequalities. When it comes to criminal proceedings, the issue of access to legal aid needs to be assessed in the light of the fact that those who enter the criminal justice system are overwhelmingly people experiencing poverty.<sup>5</sup>

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3. Eurostat, [One in five people in the EU at risk of poverty or social exclusion](#), 15 October 2021.

4. Conference Proceedings “[How access to justice can help reduce poverty](#)” 2013.

5. See for example Fair Trials, [Disparities and Discrimination in the European Union’s Criminal Legal Systems](#), 2021, p.6, <https://www.fairtrials.org/articles/publications/disparities-and-discrimination-in-the-european-unions-criminal-legal-systems/>.

# International and European standards

**International standards** build on the assumption that **legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law** and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.

Early and effective access to a lawyer, as well as effective assistance, are central to guaranteeing rights such as liberty and security, the right to defence, the right to information, the right to be presumed innocent, to be tried without undue delay (avoiding arbitrary and excessive pre-trial detention), non-discrimination and safeguarding against ill-treatment. Hence, the **International Covenant on Civil and Political Rights**<sup>6</sup> states that everyone charged with a criminal offence shall be entitled to legal assistance and the **Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment**<sup>7</sup> provide that a detained person shall have the right to be assisted by counsel. Accordingly, the **United Nations Basic Principles on the Role of Lawyers**<sup>8</sup> state that any person who do not have a lawyer shall be entitled to have one of experience and competence commensurate with the nature of the offence assigned to them to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

Specifically, the **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**<sup>9</sup> outline the specific elements required for an **effective and sustainable national legal aid system**. Thus, the provision of legal aid is a responsibility of States<sup>10</sup> that should ensure that:

- anyone, be it an adult or a child, who is detained, arrested, suspected of or charged with a criminal offence is **entitled to legal aid at all stages of the criminal justice process**,<sup>11</sup>
- effective legal aid is provided **promptly** and in a **non-discriminatory manner**,<sup>12</sup>
- arrested persons are **informed of their right to legal aid**,<sup>13</sup>
- legal aid providers perform their functions **effectively, freely and independently**,<sup>14</sup>
- legal aid providers possess **adequate education, training, skills and experience** and are hold **accountable** in case of malpractice.<sup>15</sup>

6. United Nations International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976 (CCPR), art 14.

7. United Nations General Assembly resolution 43/173; Principle 11.

8. Adopted 7 September 1990, by the Eighty United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba.; Principle 6

9. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly resolution 67/187. See also, Model Law on Legal Aid in Criminal Justice Systems with Commentaries, UNODC 2017.

10. Ibid, Principle 2.

11. Ibid, Principle 3.

12. Ibid, Principles 6 and 7.

13. Ibid, Principle 8.

14. Ibid, Principle 12.

15. Ibid, Principle 13.

In regard to legal assistance for **children**, the prime consideration should be the **best interests of the child**. Legal assistance should be “accessible, age appropriate, multidisciplinary and effective, and [...] responsive to the range of legal and social needs faced by children and youth” to prevent stigmatisation and adverse effects of being involved in the criminal justice system.<sup>16</sup>

**In the European Union**, to ensure that suspects and accused persons have access to a lawyer regardless of their financial means, **Directive (EU) 2016/1919 on legal aid**<sup>17</sup> (Directive on legal aid) provides that suspects and accused persons who have a right to a lawyer under the Directive on the right of access to a lawyer<sup>18</sup> must be entitled to legal aid. This right applies to persons who are:

- deprived of their liberty;
- required to be assisted by a lawyer in accordance with EU law or national law;
- required or permitted to attend an investigative or evidence-gathering act.

**Directive (EU) 2016/800 on procedural safeguards for children** provides for the right to legal aid (Article 18) whenever the child has the right to a lawyer (Article 6). These rights apply to children “(a) before they are questioned by the police or by another law enforcement or judicial authority; (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 4; (c) without undue delay after deprivation of liberty; (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court”.<sup>19</sup>

16. Relevant standards for legal aid for children are contained in the following instruments: Guidelines 10 and 11 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013), UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990, the Havana Rules), Guidelines for Action on Children in the Criminal Justice System (The “Vienna Guidelines”), General Comment No. 24 (2019) of the Committee on the Rights of the Child (children’s rights in the child justice system), UNICEF Guidelines on Child-friendly legal aid (2018), the Council of Europe Guidelines on Child-Friendly Justice (Nov. 2010), Legal aid for children in criminal proceedings: developing and sharing best practices (LA CHILD project) 2020-2021.

17. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrants proceedings, OJ L 297, 4.11.2016, 1.

18. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, 1.

19. EU Directive 2016/800/EU, art. 6.

# Regional challenges

Inadequate implementation of the Directive on legal aid, the lack of effective legal aid systems and access procedures,<sup>20</sup> result in the right of access to a lawyer being limited in practice in some Member States. In spite of the Directive's transposition due date (May 2019), some countries were still not in compliance with the Directive's requirements.<sup>21</sup> As a result, "a relatively small proportion of arrested and/or detained suspects or accused persons actually have a lawyer during their initial detention"<sup>22</sup> due to systemic issues in appointing lawyers in due time (legal aid lawyers in particular), non-effective duty schemes or lack of clarity about eligibility to legal aid.<sup>23</sup> This section mentions only some of the remaining regional challenges relating to legal aid.

**Underfunded legal aid systems.** The European Commission for the Efficiency of Justice (CEPEJ) has indicated that between 2016 and 2018, although there was an average tendency for increase in the budget allocated to judicial systems, 13 Council of Europe (CoE) Member States had reduced the implemented budget for legal aid (including EU Member States).<sup>24</sup> During that period, on average, CoE Member States allocated 11% of judicial system budget to legal aid (65% to courts and 24% to prosecution services).<sup>25</sup>

**Ineffective legal aid systems.** In some Member States inefficiencies in their systems result in legal aid not being provided in practice for persons that are detained by the police. In Bulgaria, detainees must reimburse legal aid costs later in the proceedings if convicted.<sup>26</sup> Authorities emphasising the potential financial burden dissuade suspects and accused persons from seeking legal aid.<sup>27</sup> According to official statistics, in 2016, of the 48.588 suspects and accused persons detained by the police in Bulgaria, only 25 persons were appointed an ex officio lawyer.<sup>28</sup> The same problem arises in Greece where, despite suspects and accused persons having the right to receive legal assistance prior to and during police interviews, the practical unavailability of legal aid at this stage makes it ineffective for most people.<sup>29</sup> Belgium and Spain, where legal aid is provided prior to police questioning, stand out as good practice examples. In Austria, all suspects and accused persons can receive free preliminary information over the phone through an arrest hotline, but not in person.

20. Justicia Network, *Inside Police Custody 2*, 2018, p.54.

21. In July 2019, the European Commission decided to open an infringement procedure against Greece for failing to communicate on the measures taken to implement the Directive.

22. Justicia Network, *Inside Police Custody 2*, op.cit., p.47.

23. Fair Trials, *Practioners' tool on EU Law, Legal aid Directive*, 2020, p.38. See also Justicia Network, *Inside Police Custody 2*, ibid.

24. Belgium, Bulgaria, Cyprus, Denmark, Germany, the Netherlands, Latvia and Portugal. *European judicial systems – Efficiency and quality of justice - 2018 Edition*, CEPEJ STUDIES No.26, 2020 (2018 data), p. 38.

25. The CEPEJ also noted that "[l]ess wealthy countries spend proportionally more on prosecution services, while States and entities with higher GDP per capita invest relatively more in legal aid." Ibid., p.42.

26. Fair Trials, *Where's my lawyer - making legal assistance in pre-trial detention effective*, 2019, p.18.

27. European Union Agency for fundamental rights (FRA), *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, p.43.

28. Bulgarian Helsinki Committee, Hungarian Helsinki Committee, Human Rights Monitoring Institute, Helsinki Foundation for Human Rights, The Peace Institute, *Right to a lawyer in criminal proceedings in five European jurisdictions: comparative report*, 2018, p.30

29. Open Society Justice Initiative, *Factsheet – legal aid in Greece*.

**Insufficient coverage.** Pursuant to the Directive, EU Member States are permitted to make legal aid conditional on the satisfaction of a means test, a merits test, or both (Article 4.2). In European countries that apply a means test, there is often a gap between the income threshold and the costs of paying a lawyer privately, whereby persons whose income is just above the applicable threshold do not qualify for legal aid but they cannot afford to pay for a lawyer either.<sup>30</sup>

**Difficulties in proving eligibility.** The Directive does not specify who bears the burden of proving that the suspect or accused person has insufficient means. According to the European Court of Human Rights (ECtHR), the suspect or accused person has to prove that they have insufficient means.<sup>31</sup> In practice, having to collect numerous documents to justify one's financial situation, the lack of sufficient information, and difficulties in carrying out administrative procedures, are aspects that can be particularly cumbersome and discouraging for persons in a situation of vulnerability.<sup>32</sup>

**Lack of information on legal aid.** All suspects and accused persons must be informed of their right to legal aid and of the rules of entitlement to such a right.<sup>33</sup> Children must be adequately informed that they have this right. Such information must also be laid out in the letter of rights provided to suspects and accused persons who are arrested or detained.<sup>34</sup> The European Commission also recommends that "[i]nformation on how and where to apply for such aid, transparent criteria on when a person is eligible for legal aid, as well as information on the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance" is provided.<sup>35</sup> However, evidence demonstrates that such requirements are not necessarily reflected in practice.<sup>36</sup>

**Exclusion of minor offences.** Despite minor offences constituting the majority of criminal cases in most, if not all, EU criminal justice jurisdictions,<sup>37</sup> the Directive excludes the application of the right to legal aid for minor offences in certain circumstances.<sup>38</sup> As a result, legal aid and legal assistance may not be granted irrespective of the consequences that the sentences imposed may have on the lives of individuals prosecuted. This undermines the purpose of the Directive in practice.

30. Council of Europe, study on *The efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law*, 2021. "As a result, many people are in fact denied access to justice" p.23.

31. ECtHR, *Croissant v. Germany*, no. 13611/88, Judgement of 25 September 1992, §37. However, this does not need to be proved beyond all reasonable doubt: ECtHR, *Pakelli v Germany*, no. 8398/78, Judgement of 25 April 1983, §34.

32. See Défenseur des Droits, *Enquête sur l'accès aux droits, vol. 2, Relations des usagers et des usagers avec les services publics : risques de non recours*, 2017.

33. Article 3 (1)(b) of Directive 2012/13/EU on the right to information in criminal proceedings.

34. Article 4(2) and (3) of Directive 2012/13/EU, ibid.

35. European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (OJ C 378), pp. 11–14), Section 2 (5).

36. Justicia Network, *Inside Police Custody 2*, op.cit. pp.31-36.

37. CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition*, ibid.

38. Article 4(2) of the Directive on legal aid.

**Inconsistent free legal aid for children.** The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings requires Member States to provide legal aid where this is necessary to ensure that children are effectively assisted by a lawyer.<sup>39</sup> In some countries, the participation of a lawyer is deemed mandatory for children in criminal proceedings and the financial situation of the child is not a relevant consideration (Belgium and France).<sup>40</sup> However, in some States, there are requirements as to the financial situation of the children's parents (Finland), repayment of legal aid fees might be required from children in the case of a conviction (Czech Republic),<sup>41</sup> or regular conditions have to be met for accessing legal aid (Austria).<sup>42</sup>

**Ineffective legal representation.** According to the Directive on legal aid (art 7), Member States must ensure that there is an effective legal aid system of an adequate quality to safeguard the fairness of the proceedings. However, in practice, there are concerns in many countries that the assistance provided by legal aid lawyers is ineffective and of insufficient quality, due to inadequate remuneration (low fees)<sup>43</sup> and uncertainty of being paid.<sup>44</sup> Generally, legal aid schemes pay lawyers a flat fee per case or procedural act, regardless of the complexity of the case or number of hearings, disincentivizing lawyers from preparing their clients' defence adequately. Although the Directive provides that Member States should facilitate continuity of legal representation throughout the criminal proceedings, the involvement of various lawyers at different stages of the proceedings is often cited as a barrier preventing a relationship of trust from being established, and preventing the lawyer from being sufficiently acquainted with the circumstances of the case to provide an effective legal assistance.<sup>45</sup> This can be particularly damaging for children.

**Lack of training and quality control of lawyers** admitted to duty lawyer or ex officio schemes<sup>46</sup> due to: non-existence of an independent legal aid authority managing or overseeing the provision of legal aid, no mechanisms in place to monitor the quality of legal aid services provided,<sup>47</sup> no specific qualifications or training required to practice as a legal aid lawyer, no accreditation system or homogenous specialisation requirements. Where legal aid lawyers receive specific training, there is a lack of an holistic approach, as training programs often do not cover socio-psychological aspects that can arise when assisting persons in a situation of vulnerability.

39. [Directive \(EU\) 2016/800](#) of 11 May 2016, Article 18.

40. LA CHILD, [Report on current European national frameworks](#), p.56.

41. Ibid, p.58.

42. Unless proven that paying for a lawyer would hinder the further development of the child.

43. Fair Trials, *Where's my lawyer - making legal assistance in pre-trial detention effective*, ibid, p.18. United Nations Human Rights Committee, Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, [Report of 2013](#) on legal aid, 23rd session of the HRC, A/HRC/23/43, §73. Fair Trials, *Practitioners' tool on EU Law, Legal aid Directive*, ibid, p.44.

44. Justicia Network, *Inside Police Custody 2*, ibid, p.55.

45. Fair Trials, *Where's my lawyer - making legal assistance in pre-trial detention effective*, ibid, p.20.

46. Justicia Network, *Inside Police Custody 2*, ibid, p.52.

47. See [Practice Standards for Legal Aid Providers](#) developed in the framework of the project "Enhancing the Quality of Legal Aid: General Standards for Different Countries", 2018, implemented by partners from Lithuania, Germany and The Netherlands, seeking to strengthen the quality of legal aid services in criminal proceedings by developing practice standards, including specialization and continuous training, peer review and evaluation by legal aid users, judges and prosecutors.

# Promising practices on legal aid



## Promising practice from Spain

### Description of the practice

#### Brief overview of the legal framework

The Spanish Constitution states that justice will be free, in the terms provided by the law, for those lacking sufficient resources to litigate.<sup>48</sup> This constitutional provision is implemented through Law 1/1996 on free legal assistance, which was amended in 2018 to transpose the Directive on legal aid. The national legal framework is completed by Regulation 141/2021, which specifies the administrative proceedings to grant legal aid and regulates the respective responsibilities of local Bar associations and the General Council of the Bar Associations in the management of the legal aid system.

Some regions (Comunidades Autónomas) have competences on justice matters and therefore have their own regional implementing norms that regulate regional and local administrative bodies in charge of the proceedings to grant free legal aid within their territories. In addition, Bar Associations issue norms and protocols relating to the management of the duty lawyers schemes for which they are responsible.

Free legal assistance is a public service funded by the State and is provided by private lawyers who apply to be included in the Bars' lists for legal assistance services on a voluntary basis.<sup>49</sup> The Spanish legal aid system is not limited to criminal proceedings, but does also include other areas, such as civil, labour and administrative proceedings.

As far as criminal proceedings are concerned, the Constitution provides the compulsory assistance of a lawyer from the moment of police detention.<sup>50</sup> This right to prompt access to a lawyer in police custody can only be waived in cases of road safety offences.<sup>51</sup> In practice, this results in access to legal aid being granted to any person in police custody.

48. Spanish Constitution, art 119.

49. Enrolment in the duty scheme is voluntary since 1996.

50. Spanish Constitution, art 17.3.

51. See art 520.8 Criminal Procedure Code. Also, only in the event of a child who has not been detained but is summoned to declare by the police or Juvenile Prosecutor's Office for a minor offence (falta) while the file has not been opened, is then possible to waive the right to a lawyer (assisted by his/her legal representatives). Waiving this right is not possible if he/she is accused of a crime (delito) even if it is a road safety crime (which is the general exception of art. 520.5 Criminal Procedure Code of Spain). In addition, lawyer's assistance is imperative once the proceedings have been initiated (even if it is a minor offence). Consulta 4/2005 Fiscalía General del Estado.

With regard to minor offences in criminal proceedings, where legal assistance is not mandatory (oral hearings conducted by a simplified procedure carrying a fine corresponding to less than 6 months as penalty), the right to free legal aid exists.<sup>52</sup> Spanish courts were already applying these criteria before the transposition of the Directive on legal aid took place: if the person requests free legal aid despite legal assistance not being compulsory, they are entitled as far as they lack sufficient resources, given that those simplified criminal procedures fall under the Directive on access to a lawyer.<sup>53</sup>

## Practical implementation

**Eligibility requirements to receive legal aid.** Every suspect or accused person can request a lawyer from the duty scheme. However, the legal assistance provided will not automatically be free of charge. For the service to be free, the applicant must meet the means requirements.<sup>54</sup> When proving eligibility, applicants are exempted from providing documents that are already in possession of the acting responsible administration, or that have been drawn up by any other administrative body. Therefore, applicants can fill a template authorising the local Commission of free legal aid<sup>55</sup> and the local Bar association to consult their economic, patrimonial and social information.<sup>56</sup>

Yet, irrespective of the final results of the means test, all detainees who request legal aid will be assisted by a duty lawyer during their stay in the police station,<sup>57</sup> given that access to legal counselling in detention is mandatory.

In addition, regardless of their financial resources, the following people will always be granted legal aid: victims of gender violence, terrorism, human trafficking, as well as children and persons with mental disabilities who are the victims of abuse or mistreatment.

**Appointment of duty lawyers for suspects or accused.** The duty system for criminal affairs is organized based on a rota scheme, with a number of lawyers being on call for periods of twenty-four hours, every day of the year. The number of lawyers on call varies from one geographical area to another and is determined by each Bar Association.

For suspects or accused in police custody, the police calls the local Bar Association who designates a state-appointed lawyer from the duty scheme, among those who are on call at that moment. The appointed lawyer must arrive at the police station as soon as possible, always within a maximum period of three hours since receiving the assignment.<sup>58</sup> When called, duty lawyers cannot refuse to attend the police station, nor can they refuse to defend a specific client, unless a conflict of interest exists.

52. Minor offences of injury or ill-treatment, “petty theft in flagrante delicto”, threats, coercion and insults. Art. 6.3.b amended LAJG.

53. The assistance could be waived, although opting in would then entitle the person concerned to legal aid, if applicable. Madrid Provincial Court (Audiencia Provincial 768/2016). Vidal Fernández, B. Implementation of the Legal Aid Directive in Spain. Issue 1/2020.

54. The threshold to assess the economic means is the “Indicador Público de Renta a Efectos Múltiples” (IPREM) or public income index (in 2020, based on 12 pays: 6.454,03€, on the basis of 14= 7.519,59€). To be entitled to free legal aid that amount will be multiplied by 1, 2 or 3 depending on the number of members of the family unit (also in the case of a child, the income of the family unit of the applicant will be considered).

55. Responsible body in each capital of province to oversee and coordinate the appointment mechanism, and establish performance standards for the effective delivery of legal aid. It is composed of members of the Bars and of representatives of the Ministry of Justice, prosecutors and court agents.

56. Most Bar Associations use the Sistema integral de gestión de la abogacía (integrated management system among Bar Associations) that connects them with the local Commission of free legal aid, as well as with government agencies (tax office, social security and others).

57. A large majority of assistances are carried out by duty scheme lawyers, not by privately appointed lawyers (even in the case of children).

58. Art 520.5 Criminal Procedure Code.

In the interest of consistency, the same lawyer who assisted the suspect or accused person at the police station should, in principle, follow the entire judicial proceedings. However, the person suspected or accused can request the Bar Association for the appointed lawyer to be replaced. The request will be decided by the Bar within 20 days and can be appealed by the beneficiary.

In the case of suspects or accused who are not in detention, Courts can ask the Bar Association to appoint a lawyer from the duty scheme if the person has not appointed one of their own choosing or if they cannot afford it. Anyone facing a criminal proceeding can also directly contact the local Bar Association and file an application for a duty lawyer to be appointed for their representation.

**Minimum requirements to join the duty scheme.** These include (i) having an office within the judicial district of the Bar in which the lawyer is inscribed,<sup>59</sup> (ii) having more than three years of effective practice<sup>60</sup>, and (iii) having completed the specific courses and tests for access to the specific duty lawyer scheme in which the lawyer wishes to be included (criminal, civil, labour, administrative). These minimum general training and specialisation requirements are set up in a national regulation, but each Bar association can add additional requirements, such as specific courses to join some of the specialised rota schemes (for instance, counselling gender based violence victims, children, etc.). In addition, some Bars require ongoing training as a compulsory requirement to stay in the duty scheme.

**Disciplinary measures** are regulated and contained in deontological codes, and include temporary removal or exclusion from the duty scheme and/or detainee’s assistance. Courts and Bar Associations have the power to take disciplinary action against lawyers.<sup>61</sup>

The Bars also deal with incidents communicated by duty scheme lawyers reporting any aspects they encountered during the detainee’s assistance or in Court that might be worth addressing (denial of access to information or files, complaints raised by the client, etc.). In addition, some Bars have mechanisms (templates or apps) that lawyers can use to report such incidents to the Bar.

## Benefits

The Spanish legal aid system is deeply rooted in the justice system and culture.<sup>62</sup> Public authorities, legal operators and society in general<sup>63</sup> are aware of its advantages and social benefits beyond its primary beneficiaries, given that it results in greater trust in the judicial and public system in general, it contributes to community rights, playing a part in enabling economic savings for suspects and accused, their families and the overall system, and making justice agencies and operators accountable. Furthermore, it has positive impacts on the rights of individuals.

Among the benefits of this system, the availability of lawyers on call, 24/7 every day of the year, to give in-person legal assistance to suspects in police custody<sup>64</sup> is noteworthy. According to several

59. The previous requirement of having the permanent residence within the judicial district was removed with the last reform.

60. Since 2006, anyone wanting to practice law must, in addition to holding a law degree, complete the M.A. on Access to the Legal Profession, approve a state exam and be registered in one of the eighty-three Bar Associations as a “practising lawyer” (Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de Abogado y Procurador de los Tribunales; Lawyer and Court Agent Professions Act).

61. The Bars processed 5.234 complaints in 2021, of which 3.681 were filed and 297 converted to sanctioning proceedings for duty scheme lawyers.

62. It is composed of 43.696 lawyers, 48% of whom are women. Almost 1 in 3 of Spanish registered lawyers are providing free legal aid service.

63. 97% of Spanish people believe free legal assistance is a fundamental right (Metroscopia survey 2020).

64. According to the XIV Report of the Free Justice Observatory (2020), 38.367 lawyers are ascribed to the rota scheme

experts consulted in the frame of this project, the majority of detainees are grateful for the lawyers' assistance, not only due to the technical assistance, legal information and counselling they provide, but also for their role in offering reassurance, as detainees see lawyers as people they can trust and with whom they will be engaging in a constant dialogue.

The system is in constant evolution. Improvements have been made through the **introduction of technologies that allow a better management**, such as the “Online Legal Aid File: Better solutions for people's rights”, an initiative of the General Council of the Bar Associations which was awarded the Crystal Scales of Justice Prize of the CEPEJ in 2014. This unique entry point to file applications for legal aid enables the necessary documents for filing a request for free legal aid to be collected automatically. It contributes to management reliability and transparency, minimising errors in the administrative filing and reducing the cost and the processing time. This system connects by telematic means eighty Bar Associations with relevant public institutions (tax authorities, social security, etc.).

## How it came about

Safeguards regarding the justice system and legal aid provided for in the Spanish Constitution have to be understood within the **political and social context** in which the constitutional text was approved. Democracy was been restored and therefore efforts were made to incorporate international Human Rights standards into the overall national legal framework.

As far as the legal aid system is concerned, a first set of reforms were undertaken to **make a system that had been set up in the nineteenth century compliant with constitutional provisions**. The regulation was scattered in different norms, so in 1984 a law was approved to modify the Civil Procedure Code and **unify the regulation on legal aid**. However, such regulation maintained the competence of judges and courts to decide on the granting of legal aid to litigators.

In the 90's, further reforms were undertaken that (i) established a unique simpler procedure for all the areas of law, regardless of the type of proceedings for which legal aid is requested (criminal, civil, labour, administrative), (ii) unified the eligibility criteria, (ii) removed the procedure to grant legal aid from the courts and turned it into a purely administrative procedure, with newly created bodies responsible for granting or denying legal aid, whose decisions can be appealed before administrative courts. This regulation dating 1996 is still in force, although it has been modified in several occasions, the latest in 2018 to transpose the Directive on legal aid.

The courts, including the Constitutional Court, have played a significant role in the interpretation of the scope of the right to legal aid. These judicial interpretations have then found their way into legislation through successive reforms of the legal aid act and its implementing regulations.

Other authorities have influenced changes, such as the national Ombudsperson who, for instance, filed in 2003 an appeal before the Constitutional Court against the exclusion of non-nationals from the legal aid system, as a consequence of which now every person who faces a judicial proceeding in the country, regardless of their nationality or administrative status, can apply for legal aid.

Also, Bar associations and the General Council of the Bar associations have been instrumental in the improvement of the system, through their advocacy efforts with both regional and state authorities.

for assistance in police custody and 34% of issues dealt with by lawyers from the duty scheme correspond to legal assistance to detainees (more than 658.000).

## Remaining challenges

The Spanish legal aid system is, as explained in the previous sections, fairly consistent with the Directive on Legal Aid as well as with international standards on this matter. However, there is still room for improvement.



**Means test.** The current thresholds above which legal aid is denied are too low, with the risk that a large portion of society be left outside the system. As of January 2023, an applicant for legal aid living in a household with four members might be denied legal aid if they have a monthly income above approximately 1.500€. For an applicant who lives alone, the threshold would go down to approximately 1.200€ per month.<sup>65</sup>



**Insufficient quality controls.** The current minimum requirements to join the duty scheme guarantee that lawyers who enrol in the system have experience and knowledge. However, introducing methods such as those applied in The Netherlands (peer review, supervision by mentors, etc.) would help ensure homogeneity in the quality of the service provided by legal aid lawyers. Some Spanish Bar associations already request, in order to remain in the duty scheme, that lawyers attend ongoing training. This requirement should be made compulsory for every Bar association.



**Insufficient public funding.** In 2021, the different public administrations invested more than 284,3 million euros in legal aid,<sup>66</sup> which represents an average investment per citizen of 6 € per year and 0,025% of Gross Domestic Product.<sup>67</sup> However, this figures imply that only 7% of the total judicial system budget was spent on legal aid. A greater public investment effort would be necessary to ensure the sustainability of the system.



**Insufficient remuneration of lawyers.** The system relies very much on the good will of the professionals who are part of the duty scheme. Lawyers are obliged by the legal aid norms to carry out certain tasks (for instance, representing their clients in the procedure for the enforcement of judgements) for which no remuneration is foreseen in the regulation. In addition, the allowance received per proceeding vary from one region to another, leading to significant differences on the sums perceived for performing identical tasks. In any case, the average compensation of lawyers from the duty scheme for each criminal proceeding dealt with is 147,87 €, <sup>68</sup> which is clearly insufficient.

65. For more information, see <https://www.abogacia.es/actualidad/noticias/el-iprem-subc-un-36-y-eleva-el-umbral-para-acceder-a-la-justicia-gratuita/>

66. CEPEJ Evaluation Report - 2020 evaluation cycle.

67. Within the duty scheme, the criminal jurisdiction holds a larger budget: 108,8 million euros in 2019, of which 52,7 million euros are allocated to assistance to detainees.

68. XVI Informe del Observatorio de la Justicia Gratuita, 2022.



## Promising practice examples from other EU countries

### Promising practices from Luxembourg

If the applicant is a child, entitlement to legal aid is granted independently of the parents' financial situation or other members of the household, without prejudice to the right of the State to request the reimbursement of the expenses incurred for legal aid for the child from a father or mother possessing sufficient means. In emergency cases, temporary allowance of legal aid may be assigned without further formality by the Chairman of the Bar.

### Promising practices from Netherlands

Anyone who is assigned legal aid must pay a contribution in proportion to their income. Legal aid lawyers have to obtain a minimum of 20 training points per year to maintain professional competence (10 of which must be obtained for the registered legal area), in addition to initial entry training requirements.

There are three quality assessment forms of structured feedback that lawyers have to attend (8 hours per year), namely: intervision (periodic discussion in a group of lawyers practising the same legal area under the supervision of an expert to deal with dilemmas about their own functioning, daily practice or legal practice), peer review (structured assessment of a lawyer's files by a reviewer with expertise on the same field of law), and structured inter-collegial consultation to exchange ideas on day-to-day practice related to legal and non-legal aspects of the work under the guidance of a supervisor.

### Promising practices from Finland

The legal aid system in Finland is known as a mixed model in which legal aid services are provided by both public and private service providers. A person entitled to state-funded legal aid can thus choose between being represented by a private lawyer or by a public legal aid lawyer who is employed by a public legal aid office. The Ministry of Justice is responsible for the overall management and supervision of the legal aid offices.

Legal aid is granted in this dual system on the basis of the applicant's available means. Legal aid lawyers' hourly fee is 110 €. The legal aid national chat service provides general advice on legal matters. It is available in Finnish, as well as in Swedish and English one day per week.

Legal aid offices offer more holistic legal services. The emphasis is put on developing e-services and remote services, and on people being proactive in identifying their legal problems at an earlier stage.<sup>69</sup> In addition, they have financial and debt counsellors in house, who can review the person's overall financial situation, assist them in planning finances and drawing up debt settlement proposals for creditors.<sup>70</sup> Public legal aid offices also tend to cooperate with other professionals and services so that the person gets all the help they need.

69. Antti Rissanen, Legal Aid in Finland, in *Legal Aid in the Nordic Countries Flaws in the Welfare States and Challenging Power*, 2017.

70. The Ministry of Justice, Finland, National Report Template, ILAG Sydney 2021, 21 May 2021.



## Key takeaways

The above mentioned examples of promising practices existing in different EU countries show that, in order to set up functioning and effective legal aid systems, it is essential that public authorities and relevant stakeholders do not perceive legal aid as a mere cost or burden for the State, but as a right that has to be protected in order for the rest of the procedural guarantees to be effective.

Sensitive legislators can achieve to make national legal frameworks compliant with EU and international standards. In this sense, the role of national courts in the interpretation of the scope of the right to legal aid is indispensable in fostering its protection, including their possibility to submit questions for a preliminary ruling from the EU Court of Justice on the interpretation of the Directive on legal aid.

Lawyers are also crucial in the development of effective legal aid systems that necessarily build on motivated and trained professionals, aware of the importance of the role they play in ensuring the procedural safeguards to which suspects and accused persons are entitled to. Bar associations are well placed to engage in advocacy efforts with public authorities, given that their members have the knowledge of the needs of the suspects and accused persons they assist, as well as the awareness of the obstacles they face when providing their professional services. Thus, they should be in a position to give thorough indications on what specific aspects of the system need to be improved and how.

Advocacy efforts and legal reforms on legal aid must in any case take into consideration how all procedural rights are interlinked. Isolated strategies cannot achieve the goal to ensure fair, equal and effective criminal justice systems based on the rule of law, as demanded by international and European standards.

