ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS

Response to the Seventh to Ninth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination

June 2014

Endorsed By:
National Legal Aid & Defender Association
Sargent Shriver National Center on Poverty Law
Detention Watch Network
National Center for Access to Justice
Make the Road New York
Northern Manhattan Coalition for Immigrant Rights
American University Washington College of Law Center for Human Rights & Humanitarian
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I. Title

Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Including Immigration Proceedings

II. Reporting Organizations

- Columbia Law School Human Rights Institute
- Northeastern University School of Law Program on Human Rights and the Global Economy
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III. Issue Summary

1. Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system. Yet, in the U.S., millions of people who are poor or low-income are unable to obtain legal representation when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination, termination of subsistence income or medical assistance, loss of child custody, or deportation. Indeed, in the U.S., only a small fraction of the legal problems experienced by low-income people—less than one in five—are addressed with the assistance of legal representation.\(^1\) This is despite the fact that studies consistently show that representation leads to significantly better—and presumably fairer—outcomes for litigants.\(^2\)

2. Available evidence consistently indicates that this civil justice gap has a disparate, and devastating, impact on racial, ethnic and national minorities.\(^3\) Because poverty disproportionately impacts people of color in the United States,\(^4\) the access to justice gap, too, disproportionately impacts racial and ethnic minorities.\(^5\) For example, housing evictions disproportionately impact people of color, and particularly women of color.\(^6\) In the majority of housing court proceedings, the tenants facing loss of housing are unrepresented by legal counsel.\(^7\) In family courts, most low-income litigants, who include a disproportionate number of racial minorities and women, lack representation.\(^8\) The same is true of foreclosure cases, which disproportionately impact African-American and Latino borrowers,\(^9\) and in which representation rates are low.\(^10\) Similarly, racial minorities are more likely than white litigants to be unrepresented in employment discrimination suits.\(^11\) In immigration cases, Latin American immigrants are disproportionately targeted for removal proceedings.\(^12\) They are also significantly more likely to be poor\(^13\) and therefore unable to afford counsel.

3. Lack of access to counsel in civil cases not only results in less favorable outcomes for low-income litigants in the context of an individual lawsuit, but has widespread economic
repercussions that serve to keep families poor.\textsuperscript{14} Thus, the civil justice gap contributes to systems that lock low-income people of color in poverty.\textsuperscript{15}

4. A categorical right to counsel in civil cases, including in immigration removal proceedings, is not recognized under the federal Constitution.\textsuperscript{16} And federal programs to provide civil counsel are under-funded and severely restricted. The result is a crisis in unmet legal needs which disproportionately harms racial minorities, women, and those living in poverty, and which particularly impacts those in immigration proceedings.

IV. Concluding Observations

5. In its 2008 review of the United States, the CERD Committee “note[d] with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5(a)).”\textsuperscript{17} The Committee recommended that the U.S. allocate sufficient resources to ensure legal representation of racial, ethnic and national minorities, especially where basic human needs are at stake.\textsuperscript{18}

6. The CERD Committee has also repeatedly called for the provision of civil legal aid in its review of other countries. For example, the Committee’s Concluding Observations on Sweden in 2008 and 2013 call for the provision of legal aid to indigenous Sami villages in court disputes concerning land and grazing rights, and for discrimination cases under the country’s Anti-Discrimination Act, respectively.\textsuperscript{19} In 2010, the Committee called for increased Aboriginal legal aid in Australia.\textsuperscript{20} And in 2011, it urged increased access to free legal aid for discrimination cases in Norway.\textsuperscript{21}

V. U.S. Government Report

7. In its report, the U.S. government notes that “there is no right to counsel at government expense for civil matters.”\textsuperscript{22} Under U.S. law, the same is true for immigration proceedings.\textsuperscript{23} Against this backdrop, the government acknowledges that it “faces challenges in . . . its provision of free and affordable civil legal services to the poor and middle class” and “recognize[s] that these challenges are felt acutely by members of racial and ethnic minorities.”\textsuperscript{24} The government identifies several mechanisms it employs to mitigate the justice gap. Chief among those mentioned are the Legal Services Corporation (“LSC”) and the Department of Justice’s Access to Justice Initiative (“ATJ”).\textsuperscript{25} However, these measures are insufficient to address the serious justice gap in the United States.

8. The Legal Services Corporation, the primary delivery system for federal legal aid for low-income and poor people in the United States, has experienced crushing budget cuts and imposition of onerous restrictions on how legal services providers can conduct their work. Congressional appropriations for LSC have steadily decreased over the past several years, from $420 million in 2010 to $365 million in 2014.\textsuperscript{26} As a result of funding cuts, since 2010, LSC has been forced to eliminate more than 1,000 staff positions and close more than 30 offices.\textsuperscript{27} LSC-funded programs have nowhere near the funding and resources necessary to respond to the need for services.\textsuperscript{28} LSC-funded organizations are also unable to meet the
legal needs of immigrants and low-income and poor clients because of restrictive federal rules governing who may receive their legal services and the types of activities they may engage in. Meanwhile, ATJ is a positive new initiative with strong potential for addressing civil legal needs. However, it requires more funding and staff to fulfill its full potential. And even with more funding, it cannot comprehensively address the dire need for civil legal services in the United States without significant assistance and cooperation from other federal agencies and state and local governments.

VI. Legal Framework

9. Under Article 5 of CERD, “. . . States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone . . . to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice . . . .”

10. Under Article 6 of CERD, “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination . . . .”

VII. The CERD Committee General Comments

11. In General Recommendation No. 29, the Committee recommends that States Parties “[t]ake the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid.”

12. In General Recommendation No. 30, the Committee addresses the rights of non-citizens in particular. It recommends that States Parties “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.” With regard to immigration proceedings, the Committee urges States Parties to ensure “that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.”

VIII. Other U.N. Body Recommendations

13. Human Rights Committee

- Concluding Observations re: United States, 2014:
  - Recommended that the U.S. take steps “to improve the provision of . . . legal representation for women victims of domestic violence.”
  - Explored concern regarding the deportation and mandatory detention of certain categories of immigrants, and recommended that the U.S. “take measures to ensure that affected persons have access to legal representation.”

- General Comment No. 32:
  - Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her
right to claim justice . . . . The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way . . . . States are encouraged to provide free legal aid in [non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.34

- In numerous other Concluding Observations, the Human Rights Committee has expressed concern over states’ failure to provide counsel in various types of civil and immigration cases.35

14. CEDAW Committee
- The CEDAW Committee has similarly expressed repeated concern regarding states’ failure to provide legal aid to women in various civil cases.36

15. U.N. Special Rapporteurs
- The Special Rapporteur on Adequate Housing has noted that legal remedies are an important procedural protection against forced evictions but that such remedies are only effective where provision is made for the supply of civil legal aid.37 The Special Rapporteur has further stated that “[a]ll persons threatened with or subject to forced evictions have the right of access to timely remedy. Appropriate remedies include a fair hearing, access to legal counsel, [and] legal aid . . . .”38
- The Special Rapporteur on Extreme Poverty recently commented in the context of people living in poverty, “[l]ack of legal aid for civil matters can seriously prejudice the rights and interests of persons . . . for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions.”39
- The Special Rapporteur on the Independence of Judges and Lawyers has noted that “legal aid is [not only] an essential component of a fair and efficient justice system founded on the rule of law [but] also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights.”40
- Special Rapporteurs have noted that civil counsel can play a significant role in vindicating and protecting the rights of racial minorities41 and migrants42 in particular.

16. 2010 Universal Periodic Review Process
- Guatemala recommended that the U.S. “[e]nsure that migrants in detention, subject to a process of expulsion are entitled to counsel [and] a fair trial.”43

IX. Recommended Questions

17. We respectfully recommend that the CERD Committee ask the U.S. delegation to:

Please provide information on measures the federal government is taking to address the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities, including those in immigration proceedings. Specifically, what measures is the federal
government taking to fully fund and ease restrictions on the federal Legal Services Corporation, improve and expand its Access to Justice Initiative, and establish a right to counsel in civil cases where basic human needs are at stake, including in immigration proceedings.

X. **Suggested Recommendations**

18. To more effectively address the disparities in access to justice in civil cases and meet its obligations under international law, the United States should:

- support and provide funding for research to assess the disproportionate impact that the lack of a generally-recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities, including those in immigration proceedings;
- provide adequate funding for the federal Legal Services Corporation and lift restrictions that prevent legal services lawyers from providing necessary services;
- intensify the Access to Justice Initiative’s activities with respect to civil legal services, including immigration proceedings, and provide it with necessary leadership, funding and other support to reach its full potential;
- support and coordinate efforts to expand and establish a right to counsel at the state level in civil cases implicating basic needs by: funding state access-to-justice initiatives, developing, evaluating, and disseminating “best practices” for state and local governments, and filing supportive amicus briefs in right-to-counsel litigation in state courts; and
- prioritize establishing a right to legal counsel for immigrants in civil immigration proceedings and indigent litigants in other federal civil cases where liberty interests or basic human needs are at stake.
services.

Plaintiffs the increasing rates of representation serving only to further marginalize the poorest immigrants.

Access to Justice

Levels of Poverty from the 2012 American Community Survey

and other administrative appeals than unrepresented plaintiffs); Amy Myrick, Robert L. Nelson & Laura Beth Nielson, Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 705, 710 (2012) (pro se plaintiffs in employment litigation suits were significantly more likely to have their cases dismissed or lose on summary judgment, and were less likely to reach early settlement); Steering Committee of the New York Immigration Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, 33 CARDOZO L. REV. 357 (Dec. 2011) (74% of immigrants represented and non-detained received relief compared to 13% of those unrepresented and non-detained; 18% of those represented and detained received relief compared to 3% of those unrepresented and detained). See generally Rebecca Sandefur, The Impact of Counsel: An Analysis of Empirical Evidence, 9 SEATTLE J. SOC. JUSTICE 51, 51-52 (2010) (concluding that legal representation always increases the average likelihood of prevailing).


In 2012, 35% of African Americans, 36% of American Indians and Alaska Natives, and 33% of Latinos fell below 125% of the federal poverty level, compared to 15% of whites. Selected Characteristics of People at Specified Levels of Poverty from the 2012 American Community Survey, U.S. CENSUS BUREAU, available at http://factfinder2.census.gov/faces/pagedisplay.xhtml?pid=ACS_12_1YR_S1703&prodType=table. 125% of the federal poverty level is the income level at which a family qualifies for federally-funded legal services.


failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

can be a factor in keeping a family poor).

v. Rogers, 112-115 (2013) (finding that Obama administration’s “Securing Communities” program, which claimed to focus on removing “criminal aliens” focused on heavily Hispanic communities, rather than high crime communities).

In 2012 study of evictions in Milwaukee, nearly half the evictions were in black neighborhoods, compared to 20% in white neighborhoods; 60% of the tenants in eviction court were women. Matthew Desmond, Eviction and the Reproduction of Urban Poverty, 118 AM. J. SOCIOLOGY 88, 88, 98 (2012). In a 2007 study of New York housing courts, African Americans accounted for 50% of tenants, but just 25% of the total population. Results From Three Surveys in New York City Housing Courts, Prepared by: Kira Krenichyn, PhD. & Nicole Schaeffer-McDaniel, M.A., Center for Human Environments, Graduate Center of the City University of New York, New York, at 26 (Feb. 2007).

In the 2007 New York study, 70% of tenants appearing in housing court were unrepresented. Id. at 7.

Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Final Report 457 (2003), http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf. Further illustrating the intersection of race and gender, a California study found that about 85% of litigants appearing in family court without an attorney were women, and the majority of them were women of color. California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, Final Report 13 (1997), http://www.courts.ca.gov/documents/rebias.pdf. In another study of women seeking civil protection orders, 81% of the women in the sample were African American. Murphy, supra note 2, at 518.


70% of New York homeowners in a 2009 study, and 93% of New Jersey homeowners in a 2010 study, had no attorney on record in foreclosure cases. Nabanita Pal, Brennan Ctr. for Justice, Facing Foreclosure Alone: The Continuing Crisis of Legal Representation 4 (2011).

21% of African-American plaintiffs, 21% of Hispanic plaintiffs, and 26% of Asian American plaintiffs were unrepresented in such cases, compared to 8% of white plaintiffs. Myrick et al., supra note 2, at 714.


Id. at 213.

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

Access to Justice

18 Id.

23 An “alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.” 8 U.S.C. § 1229a(4)(A).
25 Id. at ¶¶ 61, 63-64.
28 Id.
31 Id. at ¶ 6(25).
33 Id. at ¶ 15.
36 See, e.g., Comm. on the Elimination of All Forms of Discrimination Against Women, Concluding Observations—United Kingdom, ¶¶ 22-23, U.N. Doc. CEDAW/C/GBR/CO/7 (July 30, 2013) (expressing concern that U.K. law “unduly restricts women’s access to legal aid because it removes access to legal aid for litigation concerning, among others, divorce, property disputes, housing and immigration matters,” and urging the U.K. to “ensure effective access by women, in particular women victims of violence, to courts and tribunals,” and to “continuously assess the impact of the reforms of legal aid on the protection of women’s rights”); Comm. on the Elimination of All Forms of Discrimination Against Women, Concluding Observations—Cambodia, ¶ 16, U.N. Doc. CEDAW/C/NZL/CO/7 (Aug. 6, 2012) (urging the State party to “facilitate women’s access to justice, including by providing free legal aid to women without sufficient means”); Comm. on the Elimination of All Forms of Discrimination Against Women, Concluding Observations—Cambodia, ¶¶ 12-13, U.N. Doc. CEDAW/C/KHM/CO/4-5 (Oct. 18, 2013) (expressing concern at the lack of “a comprehensive legal aid system, which negatively affects women’s access to justice” and urging development of a comprehensive legal aid system and provision of adequate funding for free legal counseling).


