

# How Did Legal Aid Come to Be?

## A cross comparison of Canada's and Ukraine's legal aid implementation

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### Abstract

Legal aid is known around the world as a system to help the poor, marginalized, and vulnerable population gain access to justice. Most countries implemented their own unique legal aid systems around the mid-20<sup>th</sup> century. Legal aid has been around longer, as early as the late 19<sup>th</sup> century but it was known as charitable work, where lawyers would volunteer their time. During the 1960's and 1970's most countries started to pass legislation implementing the development of legal aid. This paper explores a western country, Canada, to a European country, Ukraine, on their implementations of legal aid. It gives an in-depth analysis of the similarities and differences in their implementation process and development of their own legal aid systems.

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### Introduction

There has always been a split between the poor and the rich globally. This has affected society in many various ways. For example, the poor, marginalized, and vulnerable population in any country struggle with gaining access to justice. According to the United Nations Development Programme (2005), access to justice is defined as the ability for people to seek and obtain remedy through formal or informal institutions of justice and in conformity with human rights standards. A major obstacle for most countries in accessing justice is the cost of legal advice and representation. Legal aid programs are suppose to help as they are an important component in gaining access to justice.

The United Nations adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems in 2012 (United Nations and the Rule of Law [UNRL], 2019). This was the first international instrument on the right to legal aid. The UN Principles and Guidelines form minimum standards for the right to legal aid in criminal justice systems. It provides

practical guidance on how to ensure access to effective criminal legal aid services. The United Nations system supports the provision of legal aid by developing and reforming national policies and frameworks on legal aid, as well as strengthening the capacities of rights holders (UNRL, 2019). The UN believes legal aid should be provided at no cost as it protects those who cannot afford legal advice and representation.

In order for the poor, marginalized, and vulnerable population to gain access to equal justice, firstly, they must gain access to legal aid. Legal aid is not only suppose to help with legal representation but also helps people navigate the justice system. Having access to legal aid, helps with protecting human rights. Most countries all have some type of legal aid program and have implemented them throughout the years. This paper will take a closer look at how Canada and Ukraine implemented its legal aid system by doing a comparative historical analysis.

## Literature Review

The UN implemented an international guideline in 2012 but most countries worldwide had already implemented their own legal aid systems. In western countries legal aid emerged in the last quarter of the 19<sup>th</sup> century. In the United States in 1911, the National Alliance of Legal Aid Societies was organized and later became the National Legal Aid and Defender Association. The National Legal Aid and Defender Association has served as a catalyst for the implementation of America's legal aid system (National Legal Aid and Defender Association [NLADA], 2017). The expansion of the modern American legal aid system began in 1964. During this time America was facing the 'War on Poverty', due to this the creation of the national Legal Services Program was developed. This shifted the perspective of the pursuit of legal aid from individual representation to considering how lawyers could use their skills to attack the root causes of poverty (NLADA, 2017). Their aim was to not only provide access to justice but also to combat the causes of poverty (Armstrong, 2001). During this time the American's federal government started to invest in legal aid systems, as the private legal profession has never had anything to do with legal aid (NLADA, 2017; Armstrong, 2001). Over the course of 40 years, America has passed legislation to help create the independent Legal Services Corporation, which is what they have today.

Overseas, Britain first introduced legal aid in 1949 as a principal pillar of the welfare state. Originally 80 percent of British people were eligible but as the years went by cuts were made, such as fixed fees for certain cases, that Britain was in need of a new system (Legal Aid Cuts and Reforms [LACR], 2013). In 2013 the Legal Aid Sentencing and Punishment of Offenders Act came to be. This act recommended hefty cuts to the system as Britain's legal aid system is one of the most expensive ones in the world. This is partly due to the fact that other European countries use an inquisitorial system instead of the UK's common law. This means that their outlay is skewed towards courts and prosecutors with fewer cases going to trial (LACR, 2013). The Legal Aid Agency began in 2013 as a way for legal aid to be administered. The Legal Aid Agency replaces the Legal Services Commission, which had more independence; this agency forms part of the

Ministry of Justice which makes it under close government control. Britain's private legal profession controls legal aid (Armstrong, 2001).

In India legal aid was first introduced under the Legal Aid Committee in 1971. Their Legal Aid Committee provides legal services to persons who cannot afford legal representation, as well as accessing the legal and court system in India (Deepali, n.d.). They believe that free legal aid is necessary in providing equal access to justice so that everyone is equal before law, has the right to a fair trial, and the right to legal advice and representation. India considers legal aid not as a charity but a constitutional duty of the state, as it is a right to the citizens of India. The Legal Services Authorities Act came to be in 1987, which gives a uniform statutory framework to the legal aid schemes in India (Deepali, n.d.). This Act constitutes legal services authorities to provide free and competent legal services to the vulnerable population of India's society. It is to ensure that they are given the opportunity for securing justice and thus justice is not denied to any citizen by reason of economic or other disabilities (Deepali, n.d.).

Australia started to implement their first legal aid scheme by the Law Society of Western Australia in the 1960s. This legal aid system relied heavily on private lawyers working for free as there was no coordination of legal aid services. The only legal help available was voluntary work done by private lawyers (Legal Aid Western Australia, 2018). In 1974, the Commonwealth Government set up Australia's first Legal Aid Office which provided legal aid for cases that involved commonwealth laws. Australia followed the US model in adopting a modern legal aid program (Armstrong, 2001).

### Analysis: Cases

For the analysis section of the paper, the causal narrative strategy is utilized for the secondary within-case method. This is an analytic technique that explores the causes of a social phenomenon through a narrative analysis (Lange, 2014). The causal narrative method seems appropriate for this paper for several reasons. Firstly, it takes a narrative form for organizing a series of events chronologically to provide an overview of the characteristics of a social phenomenon (Lange, 2014). This paper explores the events that lead to the implementation of legal aid in both Canada and

Ukraine. Secondary, the causal narrative method takes a holistic analytic approach which helps to unfold the understanding of the social phenomenon. Lastly, by using the causal narrative this paper can analyze on a larger scale the implementation of legal aid involving numerous factors that have occurred over an extended period of time. The primary data this paper will be utilizing comes from both countries' government official websites, as well as data that has been produced by both Ukraine's and Canada's government agencies.

### **Canada**

In Canada, legal aid services developed in the latter half of the 20<sup>th</sup> century. Before legal aid, lawyers would sometimes be willing to provide free assistance to poor clients in meritorious cases or judges would appoint lawyers to act for the poor clients. Legal services to the poor were essentially charitable (Mossman, 2013). Modest arrangements for the poor clients who could not afford a lawyer began in provinces in the 1950's and early 1960's by means of municipal and provincial grants, and with contributions from lawyers. In 1967 Ontario was the first province that enacted legislation that established the first comprehensive provincial legal aid scheme (Mossman, 2013). This legislation represented a major change in Canada's legal service as it was no longer charity but a right.

In the mid 1970's all provinces and territories had adopted legal aid plans. Today there are thirteen recognized legal aid plans in Canada. Legal aid plans are the organizations' responsibility for providing legal aid services to those that cannot afford a lawyer (Department of Justice of Canada [DJC], 2021). Each province and territory are responsible for the delivery of legal aid services based on the province/territory policies and procedures (DJC, 2021). Policies that relate to criminal legal aid are shared federally, provincially and territorially. The federal Department of Justice became involved in these programs through the federal-provincial cost sharing agreements for legal aid services in criminal law (Mossman, 2013). The criminal law is under Canada's federal jurisdiction which is why the federal Department of Justice helps fund criminal legal aid. Another way the federal government supports legal aid services is through the Department of Finance Canada's Canada Social Transfer, which civil legal aid is eligible under (DJC, 2021).

Ontario was the first province that implemented a legal aid plan in Canada in 1967. The Ontario Legal Aid Plan followed the English *judicare* model with private lawyers as the deliverer of legal services in both criminal and civil matters (Zemans, 1978). The England model had lawyers in private practice provide legal aid to clients and receive reimbursement from the government (Mossman, 2013). Since the delivery of legal aid is provincial/territorial there has been some controversy over which is an appropriate delivery model. Several provinces such as Manitoba, Quebec, and Saskatchewan followed the US model of salaried public defenders in storefront offices (Mossman, 2013). British Columbia developed a mixed delivery model by combining salaried lawyers and paralegal workers in storefront clinics with fee-for-service lawyers. By 1980 most provinces adapted the mixed delivery model as well, many provinces implemented duty counsel arrangements (Mossman, 2013).

Duty counsel is legal assistance rendered without charge to those unrepresented who are about to make an appearance in court. This was a way to help ensure access to legal representation. Duty counsel services are services provided by a lawyer at a different location other than a legal aid office, for example, at court or a place of detention (DJC, 2021). These services are often brief, and pertain to provision of summary services, or representation at a first appearance or plea court. All provinces and territories offer temporary access to duty counsel through the phone in the immediate period after someone has been arrested, accused, or detained (DJC, 2021). For criminal matters duty counsel services are available in all provinces and territories, but regarding civil matters only six provinces provide duty counsel services. There is no eligibility criteria for duty counsel service in a majority of provinces and territories as everyone is allowed to have access to this service.

### **Ukraine**

Ukraine gained its independence in 1991 from the Soviet Union. The Constitution of Ukraine is the fundamental law of Ukraine which was adopted in 1996. Article 59 of the Constitution of Ukraine (1996) states that "everyone has the right to assistance from a professional lawyer [and that this] assistance is provided free of charge in cases envisaged by law". Ukraine had no mechanism in place to exercise these

rights for 15 years. It was not until 2011, when the Law of Ukraine about Free Legal Aid was adopted which laid out a framework that established a free legal aid system (Quality and Accessible Legal Aid in Ukraine Project [QALA], 2015). Article 3 of the Law of Ukraine about Free Legal Aid (2011) states “the right to free legal aid – guaranteed by the Constitution of Ukraine the possibility of a citizen of Ukraine, foreigner, stateless person, including refugee or person in need of additional protection to receive full free primary [and secondary] legal aid”. Free legal aid is the basis for access to justice and exercising the right to a fair trial which is in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Quality and Accessible Legal Aid in Ukraine Project [QALA], 2019).

Ukraine’s mission for its legal aid system is to safeguard human rights by providing equal access to legal information and justice. They wanted to strengthen legal opportunities and the legal empowerment of vulnerable groups and local communities (QALA, 2015). Their legal aid system is a publicly funded organization that is an independent element of their justice system. The Law on Free Legal Aid was implemented in three main phases. First, in 2011 the provision of free primary legal aid was launched. Second, in 2013 the provision of free secondary legal aid in case of detention or arrested and in criminal proceedings was launched. Lastly, in 2015 the full scope of free legal aid services became available to all eligible persons (QALA, 2019). The lawyers that would be providing legal aid would do so with adequate qualifications while acting in compliance with the rules of professional conduct.

Ukraine has two types of legal aid: primary and secondary. Free primary legal aid according to Article 7 of the Law of Ukraine about Free Legal Aid (2011) states it is a “type of state guarantee, which consists in informing a person about [their] rights and freedoms, the procedure for their implementation, recovery in case of violation and the procedure for appealing decisions, actions or inaction of public authorities, local governments, officials and officials persons”. In summary, free primary legal aid provides legal services by providing legal information, consultations, and clarifications on legal issues as well as preparing documents of legal nature, except for procedural

documents. Free primary legal aid gives the public access to legislation. Everyone has the right to free primary legal aid in accordance with the Constitution of Ukraine (Law of Free Legal Aid, 2011). Free primary legal aid is funded in the state budget expenditure for support of relevant government agencies, local budgets, and other sources (QALA, 2019).

Ukraine’s free secondary legal aid according to Article 13 of the Law of Ukraine about Free Legal Aid (2011) states it is a “type of state guarantee, which consists in creating equal opportunities for persons to have access to justice”. It includes services such as protection, representation in courts, and preparation of procedural documents. For someone to be eligible for free secondary legal aid, their average monthly income cannot exceed two times the subsistence level, calculated and approved in accordance with the law for persons belonging to major social and demographic groups (Law of Ukraine, 2011). Free secondary legal aid gives the public access to justice. Ukraine set up centers across the state for the provision of free secondary legal aid. The funding for this comes from exclusively earmarked state budget expenditure (QALA, 2019).

When Ukraine was starting to implement its legal aid system, it reached out to the Canadian Bureau for International Education with the desire to establish a collaboration between Ukraine and Canada for the development of legal aid (Quality and Accessible Legal Aid in Ukraine Project [QALA], 2019). Ukraine chose Canada so that they would gain access to Canada’s history of experience and innovation across all thirteen legal aid systems. Since Canada’s legal aid system is provincial/territorial run, each system has its unique practices, approaches, and mechanisms intended to ensure quality legal service delivery (QALA, 2019). Ukraine launched the Canadian-Ukrainian Quality and Accessible Legal Aid in Ukraine Project that was designed by the Canadian Bureau and funded by the Government of Canada. This project gave Ukraine the opportunity to shape the development of their Legal Aid system. It sought to identify the best practices, innovative ideas, and approaches from Canada’s legal aid systems to inspire the building blocks for Ukraine’s legal aid system (QALA, 2019). The goal of the project was to build a flexible and capable system in

addressing the needs of vulnerable client groups in the best way possible.

Ukraine set up Legal Aid Bureaus which are standalone units within the local free secondary legal aid centers. The main tasks for the Bureaus' are to provide access to free secondary legal aid services, also to provide free primary legal aid and free secondary legal aid expert defence services (QALA, 2019). Ukraine established about 429 legal aid bureaus and launched their operations in 2016. These Bureaus were put in place to help address the issues that the local free secondary legal aid centers were having. They were put in towns and villages across Ukraine to serve as an access point for legal aid for the people living in remote communities (QALA, 2015).

### **Comparison**

Both Ukraine and Canada implemented their legal aid system under the same goal which is to help the poor, marginalized, and vulnerable population gain equal access to justice. Canada has had a legal aid system implemented decades before Ukraine's. This was due to the access to justice movement emerging in the western countries during the post-World War II era (Department of Justice, 2004); while Ukraine during this time was still under the rule of the Soviet Union. The contemporary history of legal aid being a legislation in Canada began in 1967 starting with the Ontario Legal Aid Plan (Zemans, 1978) and then it took over close to a decade for the rest of the country to implement legal aid plans in the rest of the provinces and territories. Ukraine implemented their legal aid system in 2011. It took Ukraine three phases over a course of six years to employ their legal aid.

Canada's Charter of Rights and Freedom under section 10 guaranteed that "everyone has the right on arrest or detention – to retain and instruct counsel without delay" (as cited in Government of Canada, 2022). This means that these people have the right to talk to a lawyer to get legal advice about their situation, but this does not include state funded counsel (Government of Canada, 2022; Tsoukala & Roberts, 2002). The Constitution of Ukraine states "everyone has the right to assistance from a professional lawyer [and that this] assistance is provided free of charge in cases envisaged by law" (1996). Canada's Charter of Rights and Freedom has created issues in the respect of access to

criminal justice as it does not guarantee, like Ukraine, free of charge representation. Canada had to implement a service to help with this issue which became the duty counsel services under legal aid. The duty counsel services is made accessible to those who require these services when they are arrested or detention, free of charge.

Ukraine has two types of legal aid which are free primary legal aid, and free secondary legal aid. Ukraine's free secondary legal aid mirrors Canada's criminal legal aid system as both deal with access to justice. Ukraine's free secondary legal aid reflects Canada's criminal legal aid as Ukraine modeled its system under the Canadian-Ukrainian Quality and Accessible Legal Aid in Ukraine Project (QALA, 2019). Ukraine is under a one state government which means only one criminal system. Policies that relate to criminal legal aid in Canada are shared between the federal government and the provincial and territorial governments, as Canada's criminal system is under federal jurisdiction. Both Ukraine and Canada have an eligibility requirement in order to qualify for the criminal side of legal aid. Canada will refuse criminal legal aid applications due to financial ineligibility (DJU, 2021). Ukraine's free secondary legal aid will also refuse applications if they do not meet the financial eligibility (Law of Ukraine about Free Legal Aid, art. 14, 2011)

Ukraine set up its legal aid system so it could be free to the public. According to the Law of Ukraine about Free Legal Aid under Article 3 (2011) articulates, that in Ukraine the right to free legal aid is guaranteed by their Constitution. In Canada the eligibility and coverage varies from one provincial jurisdiction to the next. There is a client contribution where clients are asked to contribute towards their legal costs. Each jurisdiction has set up their own client contribution, for example in British Columbia from 1982 until 1995 the contribution was \$10 Canadian for those on or eligible to receive social assistance and was \$30 Canadian for everyone else. In Alberta legal aid is not free, so when clients can contribute to their legal costs, they will be asked to do so but in Quebec clients do not need to contribute if they meet the required guidelines (Tsoukala & Roberts, 2002). Some legal aid plans in Canada do require an application fee ranging from \$10 to \$50 Canadian which is non-refundable, while others do not.

Canada's legal aid system is under the provincial and territorial jurisdictions rather than the federal jurisdiction, which is why Canada has thirteen different legal aid systems. This can cause some issues as not everyone in Canada will get the same and equal legal aid due to each province and territory having its own unique model. The financial eligibility guidelines in all legal aid systems in Canada fall below the low-income levels as measured by the Statistics Canada Low Income Cut-Off (Tsoukala & Roberts, 2002). The extent to which the financial eligibility guidelines fall below low-income levels varies from one provincial/territorial jurisdiction to the next. The percentage of poor adults ages 18 to 35 who would qualify for legal varies between 21 percent and 88 percent (Tsoukala & Roberts, 2002). Furthermore, an issue that needs to be addressed is the application process. For instance, in Canada in 2019-20, 55 percent were refused for financial ineligibility (DJC, 2021). Ukraine only has one financial eligibility guideline for their free secondary legal aid. This prevents the variation that Canada experiences with their legal aid.

### Discussion and Implications

Legal aid was created to help the justice system be fair especially to those that are part of the poor marginalized, and vulnerable population. On an institutional level the importance of legal aid is based on the adversarial nature of the justice system. The justice system cannot function fairly and effectively if only the Crown has the advantage of knowledge, skill, and expertise (Tsoukala & Roberts, 2002). There is an inevitable imbalance in the criminal justice system between the power and resources of the Crown and the individual being accused. Regardless of the type of charges against them, these people cannot effectively advocate for themselves, and often end up in the correctional institutions as a result (Burkley, 2010). Legal aid's intentions are to bring some balance to this issue (Tsoukala & Roberts, 2002). Another issue is the growing length and complexity of litigation as the justice system is too strained and under funded to successfully meet the legal needs of the public (Jenkins, 2017). Court delays and the time it takes to resolve a case have been growing to untenable lengths. Court resources are being diverted towards dealing with backlogged criminal cases and the civil courts are facing increased delays in cases that have already been

prolonged (Jenkins, 2017). This can result in legal aid cases being delayed which could cause strain on the individual. As well legal aid costs could rise court delays puts a burden on government resources to maintain legal aid programs.

In Ukraine the public has had issues trusting their institutions since their independence. In their Constitution it states that everyone has the right to a lawyer free of charge (art. 59, 1996). However, it took Ukraine fifteen years to start implementing free legal aid. During this time many Ukrainians, especially the vulnerable, could not afford the services of a lawyer and had no access to legal aid. This situation created an uneven playing field in the justice system as the public did not have judicial fairness (QALA, 2019). The unfair representation in the justice system did not help the public gain confidence in their government institutions. This lack of trust in the justice system institution created issues for developing an effective democratic system that Ukraine wanted to build. Ukraine implemented its free legal aid system in response to the public's distrust in its government institutions as well as criticisms from the international community (QALA, 2019). The development of their legal system has been significantly influenced by the European norms and standards as Ukraine has been adapting its legislation with the goal to acquire full membership to the European Union (Biryukov & Kryvonos, 2008). The implementation of Ukraine's free legal aid system was a signal of a new and critical approach to address the needs of the vulnerable population.

There have been several issues that have been brought forth when it comes to trying to gain access to legal aid. The gap between the need for and the availability of legal aid programs continues to grow. For Canada, this may be due to the general decline in funding (Buckley, 2010). In Canada one of the main issues is the shortfalls and budgeting problems in recent years. Provincial spending on legal aid programs has increased by 78 percent with Alberta and Nunavut being exceptions as they increased spending by 159 percent and 175 percent (Jenkins, 2017). In Ukraine they have been steadily increasing their state funding from when they first implemented to now (QALA, 2015). The increase in funding is due to their legal aid system gaining new functions that the state increases

the budget every year. In 2018, the amount was 17.3 times greater than in 2013, making it to be \$30.3 million Canadian.

Legal aid was implemented to help those who could not afford legal representation. It has been recognized that members of the poor, marginalized, and vulnerable population are more likely to experience legal problems than the average person. Research shows that having a single legal problem greatly increases the probability of experiencing subsequent legal problems (Jenkins, 2017). It appears that having more than one legal problem can and does have a serious impact on the lives of the vulnerable. This can create a snowball effect in other areas of that person's life such as, potentially compromising that person's ability to function, and possible unnecessary hardships (Jenkins, 2017). It is known that the poorest and most vulnerable experience more frequent and more complex legal problems. Most often, low-income people often go unrepresented, which frequently leaves them vulnerable and at a disadvantage. Ukraine brought in the Law on Free Legal Aid to help the poor, vulnerable population and address the issue of not having fair access to justice. In Canada, due to the high cost of representation and the low-income requirements for legal aid, most low to middle class Canadians have no feasible options for legal representation (Jenkins, 2017).

No legal aid system is perfect as there is no one size fits all for the implementation and development of legal aid. Government institutions are always changing, whether it is new legislation or funding budgets, legal aid will consistently be an ongoing rollercoaster. There are always challenges and barriers that legal aid will face. Even though Canada has had its legal aid system decades longer than Ukraine, there are still obstacles and needs for improvement. Ukraine has a much newer legal aid system, but they still face similar obstacles as Canada, as there is always a need for improvement. While society and the justice institutions keep evolving globally so will legal aid. Therefore, it will always be a constant battle for legal aid to keep up with the changes in the world.

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