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THE NATURE OF LEGAL AID RIGHTS: CIVIL OR SOCIAL/WELFARE RIGHT? POSSIBLE IMPLICATIONS UNDER THE 'RATCHET EFFECT' DOCTRINE

A NATUREZA DO DIREITO À ASSISTÊNCIA JURÍDICA: DIREITO CIVIL OU SOCIAL? POSSÍVEIS IMPLICAÇÕES SOB O PRINCÍPIO DA VEDAÇÃO DO RETROCESSO*

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Resumo: Este texto é a transcrição de palestra proferida pelo autor no IALS – *Institute of Advanced Legal Studies* – da Universidade de Londres, como parte das atividades do estágio pós-doutoral realizado naquela instituição. Discute-se a questão da natureza jurídica do direito de assistência jurídica gratuita, reconhecido no cenário internacional como um direito humano, focando-se a controvérsia em considerá-lo como direito de natureza civil/política ou direito de natureza social/econômica. Argumenta-se que a definição quanto a tal classificação é relevante pois pode ter consequências práticas importantes, especialmente no que se refere à natureza progressiva – e eventualmente a eventuais retrocessos – a que poderia estar sujeita sua implementação.

Palavras-chave: Assistência Jurídica Gratuita. Acesso à Justiça. Vedação do Retrocesso

Abstract: This text is the transcription of a lecture delivered on January, 13th 2015, at the IALS - Institute of Advanced Legal Studies of the University of London, as part of the Postdoctoral Program held there. The issue of the legal nature of the right to free legal assistance, recognized on the international stage as a human right, is discussed, focusing on the controversy regarding it as a civil / political right or a social / economic right. It is argued that the definition of such a classification is relevant because it can have important practical consequences, especially with regard to the progressive nature - and possibly eventual setbacks - to which its implementation could be subject.

Keywords: Legal Aid. Access to Justice. Ratchet Effect

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1. Introduction

First I would like to thank everyone attending this seminar. It is a great honor for me to talk again in such an important place for the legal culture of this country and I thank the I.A.L.S. for the opportunity given to me, by offering me this "visiting fellowship".

I believe it is appropriate to start by introducing myself, because maybe some of the people did not attend the previous seminar. I am a university professor in Brazil: I have been teaching in Law Schools since 1993. I am also a "legal aid lawyer", working as a "public defender" since 1994. It is important to highlight, as I did last time, that, in Brazil, unlike in England/Wales, Public Defenders operate not only delivering "legal aid" in criminal cases; we also provide legal assistance (I mean legal advice, and representation when needed) in civil matters in general, including family law cases, consumers rights, judicial review, social rights, class actions, etc. I myself am a public defender acting before a civil court in Petropolis, the town where I live, which is located 60 km from the city of Rio de Janeiro.

In October 2015, when I presented the lecture at the Lunchtime Seminar here, in IALS, I had the opportunity to speak on the subject: Contemporary challenges to legal aid in Brazil and in England: comparative perspectives on access to justice. This topic matches the postdoctoral research project I am conducting during my "visiting fellowship" term at the Institute. Indeed, over the past few years I have dedicated myself specifically to research on issues related to state funded legal aid. My current research aims to study the history of the English/Welsh model of legal aid and learn from the contemporary crisis context faced by this jurisdiction, in order to undertake a comparative analysis with the Brazilian reality and perspectives.

The choice of the topic for the presentation tonight, at this Evening Seminar, is a result of readings and reflections that I have been doing since July, when I started my activities here at IALS. The dramatic and progressive regression in the extension of legal aid services provided by the state in England / Wales, due to severe financial restrictions that resulted in budgetary cuts that have been made over the last decade, which have deepened further in recent years, after the 2012 LASPO Bill (Legal Aid, Sentencing and Punishment of Offenders Law) , with the total exclusion of legal aid in most subjects related to civil cases (especially in family law) has led to a reflection on the possible existence of limits to the actions of governments, under the rules of human rights international Law, that could prevent the occurrence, or lead to the reversion, of such setbacks.

Roger Smith pointed out that, in the case of England, the recent proposed cuts would have brought "renewed emphasis on legal aid´s role in supporting human right as the government

has been overtly careful not to remove entitlement in human rights cases”[1]. It is true that the new piece of legislation (I mean, the LASPO Bill) has retained legal aid for criminal cases and has established a reserve clause to grant legal aid in "special cases" (the so-called “exceptional funding scheme”). This was done, certainly, to avoid problems before the European human rights protection system, which although does not impose a general obligation on States to provide legal aid for civil cases, establishes that there should be mechanisms for the allocation of free legal aid (advice and representation) based on particularities of concrete cases. However, the controversial situation experienced currently in England/Wales, which once had a legal aid system worldwide recognized as paradigmatic (in terms of scope/universe of cases contemplated as well as in terms of the proportion of population that could benefit from it), seems to allow further reflection on the possible existence of restrictions / limits - in the light of international standards of human rights protection – to the adoption of such regressive measures on the right to legal aid. And I consider that, if the existence of these limits is confirmed, it may raise considerations on the mechanisms that could be used to ensure such compliance.

In the European system of human rights protection, there is an unremovable reference to be observed, which is the paradigm established in "Airey v. Ireland "[2] case, which, from what is known of the historical/factual context, was a relatively simple case in the family law area. From the perspective of the information gathered in “field work”, following and observing the day-to-day functioning of some "Family Courts" here in London, it seems that - due to the current restrictions for granting legal aid in family cases - in many individual law suits brought to the Judiciary, in which the parties were not entitled to the assistance of counsel under the current legal aid scheme (and possibly, in many other cases that, because of the lack of legal aid, do not even manage to be brought to the courts) the paradigm established by the European Court of Human Rights in the case “Airey” is not being respected. Moreover, even in cases that are still covered by the legal aid scheme, for example in cases of alleged domestic violence, we know that only one of the parties (the woman) is entitled to free representation by a lawyer. This situation causes an obvious imbalance in procedural relationships, compromising the “equality of arms”, which is essential for a fair trial in an adversarial legal procedure.

[1] SMITH, Roger. Legal Aid in England and Wales: Entering the Endgame. Available at: http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/papers/Legal_Aid_in_England_and_Wales_-_Entering_the_Endgame.pdf. Last visited in 26 May 2013.

[2] See: ALVES, Cleber Francisco. Estudo de Caso: a decisão ´Airey v. Ireland´ e sua importância na afirmação do direito de acesso à justiça no continente europeu. In: Revista de Direito da Defensoria Pública, Rio de Janeiro, n. 20, 2006.

In this kind of situation fit many fathers who are accused - sometimes unfairly - of domestic violence or of negligence in caring for their children: since they are not entitled to the assistance of a legal aid lawyer, they run the risk of losing contact with the children (and sometimes even of losing parental rights), as a result of not being able to present an effective defense of their rights.

2. What is the "right to legal aid"?

The term "legal aid" includes legal advice, legal assistance and legal representation before a court or a tribunal, when needed, delivered free of charge, for people who do not have financial resources to pay for it. This kind of legal service can be provided free of charge on a charitable basis (pro bono), by private lawyers or may be partially or fully_funded_by the state. Furthermore, "legal aid" is intended to include the notion of legal education, access to legal information and other services provided for the citizens through alternative dispute resolution mechanisms.

Legal aid is fully recognized as a foundation for the enjoyment of other rights, not only the procedural/instrumental right to a fair trial but mainly any other "substantive" rights that are established by law and whose exercise is being denied or contested in a given/concrete situation of life. According to Professor Alan Paterson, "substantive legal rights are of little value to citizens if the latter lack the awareness, capacity, facilities or wherewithal to recognise, or enforce, these rights or to participate effectively in the justice system"[3].

At international level, the right to legal aid is directly linked to the right of access_to justice (access to courts) required to ensure a fair trial.

3. Is legal aid itself a human right? If so, what is its coverage?

Most of the international and regional human rights instruments and the respective jurisprudence confirm that, in the absence of access to justice, of access to legal representation of the poor and disadvantaged through publicly funded legal aid, there are no human rights, only privileges.

Rights are illusory in the absence of the state providing adequately for the legal assistance and representation of poor litigants in disputes involving the determination of rights. Simply put,

[3] PATERSON, Alan. Lawyers and the Public Good – democracy in action? Cambridge: Cambridge University Press, 2012, p.69.

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in order to guarantee protected rights, the government must maintain adequate funding for legal aid.

Although there is no explicit right to legal assistance in the text of the Universal Declaration of Human Rights, equal access to legal representation is recognized as very important, sometimes even indispensable, to the enforcement of fundamental freedoms, to ensure true equality before the law and, especially, to ensure fair trials in the determination of rights. This, according to Article 10 of the Universal Declaration of Human Rights, is explicit in reference to criminal trials and implicit in relation to civil trials.

> *Article 10 of the UDHR:*
> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

According to Martha Davis, "The rights articulated in the Universal Declaration span procedural and substantive rights, including a basic right to a fair trial. Importantly, without dictating specific requirements beyond equality of treatment and an impartial tribunal, Article 10 of the Universal Declaration extends its statement of procedural fairness to civil as well as criminal matters." Yet, according to the same author, "Earlier drafts of the Universal Declaration went further and explicitly stated that everyone in both civil and criminal matters "shall have the right to consult with and to be represented by counsel"[4]. However, because the national delegations on the drafting committee agreed that such detailed language belonged in a treaty rather than in the Universal Declaration, the General Assembly of the United Nations ultimately adopted the more general, final version of Article 10.

The right to legal aid, in a more comprehensive notion, without any distinction on the civil or criminal nature of the rights to be safeguarded, is assured in another international/regional document, contemporary to the Universal Declaration of Human Rights which is the Charter of the Organization of American States, approved in 1948, that says:

> Art. 45 (i) of the Charter of the OAS:
> The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
> (…)
> i) Adequate provision for all persons to have due legal aid in order to secure their rights.

[4] DAVIS, Martha. In the interest of Justice: human rights and the right to counsel in civil cases. In: Touro Law Review, Vol. 25, N. 1, 2013, p. 149-150.

The European Convention on Human Rights, admittedly the most important regional human rights treaty, also recognizes the right to legal aid as a fundamental human right. With regard to the defense in criminal matters, such right is explicitly set out in Art. 6, which provides for the right to fair trial. In what refers to non-criminal cases, the recognition of the right to legal aid stems from the jurisprudence of the European Court of Human Rights in interpreting the meaning and the extent of the right to fair trial.

In turn, Art. 47 of the Charter of Fundamental Rights and Freedoms of the European Union expressly establishes the right to legal aid for all people "who lack sufficient resources in so far that such aid is necessary to ensure effective access to justice". Similarly as in the Charter of the Organization of American States, there is no differentiation due to the civil or criminal nature of the process.

4. What is the nature of the right to legal aid as a human right?

Although many scholars claim the reduced importance (or lack of meaning) of the controversy over the distinction (in philosophical terms and in practical-political dimension) of human rights into civil / political and social / economic rights, we believe it is still important to reflect on how to frame or classify the nature of the right to legal aid.

Indeed, according to Felipe Isa, "the affirmation of the indivisibility and interdependence of all human rights, as expressed in most international human rights instruments[5], is often a mere rhetorical affirmation that conceals the fact that the satisfaction of civil and political rights normally prevails over the so-called second-generation rights. One reason adduced to justify the shortfalls in Economic, Social and Cultural Rights is the different nature of the obligations arising from the two categories of rights. Whereas Civil and Political Rights (CPR) imply immediate obligations, Economic, Social and Cultural Rights (ESCR) obligations are, on the contrary, progressive."[6]

As we all know, the historical conjuncture that followed the Second World War led the United Nations to draw up and issue two separate documents, which are configured in international

[5] In the preamble common to the two international human rights international covenants of 1996, it is stated that "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights".

[6] GÓMEZ ISA, Felipe: The Reversibility of economic, social and cultural rights in crisis context. In: MUNIATEGI, E. and KLEMKAITE, L. (Coords.): Local Initiatives to the Global Financial Crisis, Bilbao: University of Deusto, 2012.

treaties, to address human rights: the ICCPR (International Covenant of Civil and Political Rights) and the ICESCR (International Covenant of Economic, Social and Cultural Rights).

The ICCPR's Article 14 directly addresses fairness before domestic courts and tribunals in both civil and criminal matters, providing that:

> Article 14(1) of the ICCPR:
> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

Although the text of the above rule indicates that everyone should be "equal" in the exercise of their rights before the courts, and having in mind that in the face of technical sophistication inherent in judicial proceedings, the material/substantive inequalities among people, especially the economic and cultural ones, almost always prevent effective equality in obtaining fair results, the Covenant on Civil and Political Rights only explicitly ensures the right to free legal assistance in criminal cases.

> Article 14(3) of the ICCPR:
> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (…)
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.

In 2007, the main interpretative body of this Covenant, the Human Rights Committee, issued the General Comment No. 32, related to the interpretation of Article 14, "focusing on the rights to equality before courts and tribunals and to a fair trial. In discussing the right to counsel, the Comment specifically notes that "states are encouraged to provide free legal aid in [noncriminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so"[7]. Further, the new General Comment includes a discussion of the concept of "equality of arms," clarifying that the procedures for handling criminal and civil matters must be fundamentally fair.[8]

[7] United Nations, Human Rights Committee—General Comment No. 32 (90th sess. 2007) CCPR/C/GC/32, para. 10, available at http://www2.ohchr.org/english/bodies/hrc/docs/gcart14.doc. Last visited in 12 Jan 2015.
[8] DAVIS, Martha. In the interest of Justice: human rights and the right to counsel in civil cases. In: Touro Law Review, Vol. 25, N. 1, 2013, p. 162.

Anyhow, despite the absence of explicit treatment of the right to legal aid for civil cases in the International Covenant on Civil and Political Rights, it is clear that there is an "identity of nature" in this right, whether it relates to civil or criminal cases, and, since this right is enshrined in the Covenant on Civil and Political Rights (and not in the International Covenant of Economic, Social and Cultural Rights), it seems unequivocal the conclusion that the nature of this right is of a "civil / political one".

Roger Smith understands that "the right to legal aid is a 'hybrid' right in the sense that it imposes a positive obligation of funding on the state, akin to an economic right, although it is an integral part of civil and political right to a fair trial"[9].

However, we must recognize that, both in legal doctrine or in political discourse, the right to legal aid is usually almost always associated with "welfare rights", underscoring its dimension of economic/social right. In this sense we could mention one example, that happened in the year 2002, and comes from British Columbia Province, in Canada. In a letter to the UN Committee on Economic, Social and Cultural Rights, British Columbian poverty advocates, Gwen Brodsky and Shelagh Day, reported the B.C. government's planned legal aid cutbacks as a violation of the ICESCR. They´ve written: "Changes to legal aid violate Article 2(2) [of the ICESCR]. …the targeted elimination of legal aid for most family law matters and for poverty law, as well as the elimination of funding to community advocates for women and low-income people, and the cut to the budget of the BC Human Rights Commission, deprives members of the most disadvantaged groups of the means to seek remedies for social rights violations. …If members of the most socially and economically disadvantaged groups cannot effectively exercise their rights before human rights…because there is no legal representation available to them, the central obligation to give effect to the rights is contravened." [10]

Four years later the Committee agreed. In May 2006, the Committee on Economic, Social and Cultural Rights, reviewing Canada's fulfillment of rights enshrined in Covenant, noted "inadequate availability of civil legal aid" particularly for economic and social rights as a contributing factor to lack of redress available to individuals. The Committee expressed particular concern about cuts to civil legal aid in British Columbia concluding, "This leads to a situation where poor people, in particular poor single women, who are denied benefits and services to which they

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[9] SMITH, Roger. Human rights and access to justice. In: International Journal of the Legal Profession. Vol. 14, N. 3, November 2007, p. 261.

[10] Gwen Brodsky and Shelagh Day ("Poverty and Human Rights Project"), in a February 11, 2002 letter to the Chairperson Virginia Dandan of the U.N. Committee on Economic, Social and Cultural Rights. Quoted at: http://www.lrwc.org/international-right-to-legal-aid-in-relation-to-the-british-columbia-missing-women-commission-of-inquiry-report/. Last visited in 12 Jan 2015.

are entitled to under domestic law, cannot access domestic remedies." The Committee recommended that [Canada] ensures that civil legal aid with regard to economic, social and cultural rights is provided to poor people in the provinces and territories, and that it be adequate with respect to coverage, eligibility and services provided[11].

5. What are the consequences arising from this classification of the right to legal aid?

We have already emphasized the principle of international law that proclaims that human rights are interdependent, interconnected and indivisible. As Article 5 of the Vienna Declaration on Human Rights states: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

Even so, the traditional human rights discourse is very well known, whereby civil and political rights impose negative duties upon states and are justiciable, whereas socio-economic rights impose positive duties and are mere aspirations.

Despite being labeled as outdated by most contemporary scholars, this discourse is still present in the interpretation of rights by courts and even by international organizations.

The indisputable fact is that, having been regulated in different legal instruments, there are rules on the implementation of the rights classified as economic, social and cultural that are not applicable to civil and political rights. Among these rules there is the Art. 2.1. of the International Covenant on Economic, Social and Cultural Rights which underscores the "progressive nature" of these rights.

> Article 2.1 of the ICESCR:
> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.

[11] Consideration Of Reports Submitted By States Parties Under Articles 16 And 17 Of The Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights CANADA, E/C.12/CAN/C0/4, E/C.12/CAN/C0/5, 22 May 2006, page 3. Available at: http://repository.un.org/bitstream/handle/11176/261022/E_C.12_CAN_CO_4%3bE_C.12_CAN_CO_5-EN.pdf?sequence=3&isAllowed=y Last visited in 12 Jan 2015.

There is no similar provision applicable to social / political rights, which indicates that such rights do not admit any kind of progressiveness: they imply immediate obligations.

So, if we recognize that the right to legal aid has a "civil/political right" nature, this means that its effectiveness is not subject to "progressive realization" nor does it admit "retrogressive measures": the States have immediate obligation to ensure its effectiveness, even though this obligation will result in the need for resources expenditure (positive obligation).

In some cases, it is quite remarkable the difference between these categories of rights (e.g. right to housing or the right to prevent diseases/ or to ensure recovery of health x right to freedom of expression, and freedom of movement). But in others, such as the right to a fair trial and access to justice, the picture changes dramatically: not enough to have access to an "impartial" judge/court; it is necessary that the judicial activity (under state monopoly) ensures effective usefulness to the right holder, regardless of his/her social/economic/financial conditions.

Some other examples could be considered regarding typical "civil rights", other than the case of the right to fair trial[12]. First, the political right to participate in elections sometimes implies a very high cost for the state (imagine the case of voters living in remote places, such as the Brazilian Amazon): in this case, could the state, to save resources, install polling stations only in the capital and major cities, or occasionally, charge electoral fees to be paid by people residing in those remote places, for the purpose of funding the installation of polling stations in such inaccessible areas?

The same considerations fit in relation to public security: could the state approve a bill saying that it will provide police services only in communities that "pay" a specific fee for this service? And with regard to access to the courts of justice : would it be acceptable that the state refrain from keeping and resourcing the Courts (which are considered the "last resource", with the duty to settle citizens' disputes) under the allegation that they are "anti-economic" or that there are not enough financial resources for it? The answer to these questions would be, obviously, OF COURSE NOT!

I think that this same conclusion should be reached if the government decide to suppress legal aid services that are necessary to ensure equality before the law, forcing citizens to run the

[12] According to Prof. Sigrun Skogly, "it is not possible to comply with the requirements of fair trial in human rights law, without financial commitements by the State: nor is it cheap to run elections in compliance with article 21 of the Universal Declaration of Human Rights, and Article 25 of the International Covenant on Civil and Political Rights (ICCPR). Training the police to comply with the right to be free from torture, inhuman and degrading treatment will also have an impact on national budgets." See: SKOGLY, Sigrun. The requirement of Using the 'Maximum Available Resources' for Human Rights Realisation: a question of quality as well as quantity? In: Human Rights Law Review. Vol. 12, N. 3, 2012.

risk of "losing" a case for not having the proper ability to postulate their rights and defend their interests in court. What is the difference?

In any case, besides the rule imposing the "progressive" implementation of the rights of economic/social nature, even for those who understand that the right to legal aid has a hybrid nature and is not strictly civil/political, there are certain determinations that require states to ensure a minimum level of effectiveness of these rights, the deprivation of the right on the grounds of lack of resources not being allowed. Also, as an inexorable consequence of the concept of progressivity, states have obligations to not take regressive measures that jeopardizes the effectiveness levels of the rights already achieved[13].

The obligation of the State to ensure the progressive realization and the respective prohibition of "retrogressive measures" related to the social and economic rights raises a difficulty that is exactly that of “monitoring compliance”. A CRITERION THAT COULD BE CONSIDERED FOR THIS WOULD BE THE OBLIGATION TO KEEP THE SAME PERCENTAGE ON BUDGET AS FROM THE PREVIOUS YEAR. ANY SETBACKS COULD ONLY OCCUR IF THE SAME PROPORTION OF REDUCTION VERIFIED IN PUBLIC REVENUE WERE OBSERVED (such reductions rarely occur IN ANY COUNTRY!). Hence, especially in cases where it is necessary to effectively reduce the budget, this implies an obligation for the government (or for the body responsible for managing the legal aid scheme) to optimize the management of resources allocated to the service in order to minimize the regressive measures and ensure compliance with the "minimum core obligation": to get the same or even better results with fewer resources applied.

6. Possible implications under the 'ratchet effect' doctrine?

The so-called "effect cliquet" or "ratchet mechanism" is described in a case ruled by the European Court of Human Rights as follows: the “ratchet mechanism”, preventing a cogwheel from turning back once it has moved forward, is a principle that has been developed, particularly in legal opinion, in connection mainly with acquired social rights. It is the principle whereby the

[13] See: SARLET, Ingo Wolfgang. Proibição de retrocesso, dignidade da pessoa humana e direitos sociais: manifestações de um constitucionalismo dirigente possível. In: Revista Eletrônica sobre a Reforma do Estado. N. 15, set-out-nov/2008. Available at: http://www.direitodoestado.com/revista/RERE-15-SETEMBRO-2008-INGO%20SARLET.pdf Last visited in 12 Jan 2015.

legislature is supposed not to pass laws that would have the effect of lowering a level of social protection already achieved[14].

In other words, it establishes that, once a certain level of enjoyment of an economic, social or cultural right has been achieved for some, the state has a duty of non-regression, meaning that it cannot later reduce the level of enjoyment of the right.

According to Scott and Macklem, "the duty to take steps required in the International Covenant on Economic, Social and Cultural Rights is not limited to a duty to act by all appropriate means. The required steps are cumulative in nature and must be designed to achieve progressively the full realization. (…) The Committee on Economic, Social and Cultural Rights has indicated that the concept of progressive realization does not simply refer to the fact that fulfillment of a right must be pursued as expeditiously and effectively as possible… <u>It also creates a kind of ratchet effect in that lowering the fulfillment level of a right is presumptively prohibited once that level has been achieved</u>."[15]

In my research carried out in preparation for this seminar, I found very few texts in the "legal doctrine", available in English language, with reference to this, so named, "ratchet effect". This perception can be checked through free search on websites, using Google. It seems that such a doctrine (ratchet effect doctrine) is actually very little known in the UK and particularly in England. However, in continental Europe (especially in France, Portugal, Spain and Germany) this doctrine is well known and, in the recent past, it used to be applied very often by the constitutional courts.

However, it seems that recently it has been less applied by Courts, even in Continental Europe. Talking about this subject with other researchers from Spain, for example, all specialized in the Constitutional Law area, I was informed that the application of the ratchet effect (as a legal fundament to invalidate laws or administrative measures adopted by governments that cause "regression" in social/economic rights) no longer has the endorsement of European Courts (national or international). The maximum that is being done is to apply a control of "proportionality": in order to justify cuts that can affect a social right it is necessary to demonstrate that the similar/equivalent resource cuts are being made in equally relevant areas or, if it is the case,

[14] (CASE OF GOROU v. GREECE (No. 2) Application no. 12686/03. JUDGMENT, STRASBOURG, 20 March 2009.

[15] See SCOTT, Craig & Patrick Macklem. Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution. In: University of Pensylvania Law Review. Vol. 141, N. 1, November/1992, p. 80. In this same meaning, the authors quote HEIKKI, Karapuu & Allan Rosas, Economic, Social and Cultural Rights in Finland. In: ROSAS, Alan (ed.). International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives. Helsinki : Finnish Lawyers' Pub. Co., 1990.

at a higher intensity in even less relevant areas, but this kind of situation is very difficult to monitor and control by a court be it a Constitutional Court or an International one.

It seems that even some typical state activities (such as the burden of delivering and monopolizing the official judicial service and the public criminal prosecution), hitherto considered "indispensable" to the guarantee and realization of civil and political rights, are being neglected in some European countries (even in some that were recognized as "developed" countries).

In the specific case of "legal aid" it seems correct to recognize that some countries, like England, would be going backwards, at least, to the situation of the 50´s or 60's of the former century: the model that is prevailing is mirrored more in the American paradigm, who never had the right to "legal aid" in civil cases recognized and universalized as a state's duty in favor of poor citizens. This must surely be causing disappointment to many scholars who usually called on Europe, and particularly on Britain, as a reference to "progress" toward the recognition of a right they considered implicit in the spirit of the American Constitution ... as is the case of Professor Earl Johnson, who in several works used to emphasize that the US should have European countries as models in respect to the legal aid rights and services [16]…

The reflection I propose to encourage at the end of this seminar, is upon the possible application of the ratchet doctrine to prevent setbacks in the extension of the right to legal aid. For those who believe that such a right has the nature of an economic / social right, as a "welfare right" and not a "civil right", the ratchet mechanism could be presented as a significant argument.

However, given the above scenario, there follows a certain "emptying" of the hypothesis considered for argument in this seminar.

Anyway, I am convinced that legal aid is a human right that should be framed as a civil / political and not properly social / economical/welfare right! It is directly linked to the right of participation[17] (democratic principle) and to the minimum requirements of the Rule of Law: equality of all before the law and, more precisely, equality of arms in a way that each party should not be disadvantaged in relation to another. Therefore, it must not be subject to any kind of contingency, limitations or setbacks.

[16] JOHNSON Jr., Earl. Equal Access to Justice: comparing access to justice in the United States and other industrial democracies. In: Fordham International Law Journal. Vol. 24, 2000; See also: JOHNSON Jr., Earl. Justice for America´s Poor in the Year 2020: some possibilities based on experience´s here and abroad. In: De Paul Law Review. Vol. 58, Issue 2, 2009. See also JOHNSON Jr., Earl. Lifting American Exceptionalism Curtain: options and lessons from abroad. In: Hasting Law Journal. V. 67, June/2016.

[17] DAVIS, Martha. Participation, Equality and the Civil Right to Counsel: lessons from domestic and International Law. In: The Yale Law Journal, Vol. 122, N. 8, June/2013.

Once more, thank you very much for attending this seminar! I will be available to answer any questions about my presentation.

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ALVES, Cleber Francisco. THE NATURE OF LEGAL AID RIGHTS: CIVIL OR SOCIAL/WELFARE RIGHT? POSSIBLE IMPLICATIONS UNDER THE 'RATCHET EFFECT' DOCTRINE. **Lex Humana**, v. 12, n. 2, p. 83-96, ago. 2020. ISSN 2175-0947. Disponível em: <http://seer.ucp.br/seer/index.php/LexHumana/article/view/2012>