

DRAFT EXPLANATORY MEMORANDUM

I. General remarks

1. The Recommendation complies with the objective - contained in the Third Medium-Term Plan (1987-1991) - of facilitating access by the poor to human rights systems at national and European level. It follows on from the suggestion made by the Steering Committee for Human Rights (CDDH) in its reply to the Committee of Ministers concerning action to combat poverty and marginalisation in the field of legal aid and/or advice machinery devised specifically for the poor. At their 414th meeting, the Ministers' Deputies invited the CDDH and the European Committee on Legal Co-operation (CDCJ) to keep these suggestions in mind when formulating proposals for their 1989 programmes of activities.

2. As a result, Activity I.13 - "Accessibility at national and European level of human rights systems to the poor" - was included in the Intergovernmental Programme of Activities for 1989 and 1990. With a view to the implementation of this activity, the CDDH commissioned a study from the International Movement ATD-Fourth World [H(92)2] and subsequently entrusted to a working party the task of preparing a draft recommendation on effective access to the law and to justice for the very poor. After revising the working party's text, the CDDH adopted the text of the draft Recommendation and transmitted it to the Committee of Ministers on 16 October 1992.

3. In drawing up this Recommendation, the CDDH and its working party took account of the work of the CDCJ in the field of legal aid, legal advice and access to justice, in particular Resolution (76) 5 on legal aid in civil, commercial and administrative matters, Resolution (78) 8 on legal aid and advice and Recommendation No. R (81) 7 of the Committee of Ministers to member States on measures facilitating access to justice.

The CDDH also took account of the United Nations resolutions on human rights and extreme poverty, particularly Resolution 46/121 of 17 December 1991 of the General Assembly and Resolution 1992/11 of 18 February 1992 of the Commission of Human Rights. The study by the Movement ATD-Fourth World entitled "Towards justice accessible to all: Legal aid machinery and certain local initiatives as seen by families affected by severe poverty", prepared at the CDDH's request, contributed substantially to the committee's work.

4. By "the very poor" the CDDH means particularly all persons who are deprived, marginalised or excluded from society both in economic and in social and cultural terms (see paragraph 3 of the preamble to the draft Recommendation) which suffer most often accumulation of handicaps in this field (insufficient resources, long-term unemployment, low level of education, even illiteracy, etc.).

5. These persons are confronted with the problem of the effective enjoyment of their rights and their right of access to the system of justice. If these rights are to have any real and practical significance for them, they must effectively be in a position to determine what their rights and obligations are and, if appropriate, to assert or defend their interests in proceedings before the competent authorities.

6. Legal advice and legal aid systems perform a vital function in this respect for all members of the public, not only the very poor. It is clear, however, that the very poor are in a particularly precarious - and hence disadvantageous - position. The inadequacies of the existing systems with regard to this section of the population have been highlighted by the 7th International Colloquy on the European Convention on Human Rights and the International Movement ATD-Fourth World.

7. The problems of effective access to the law and to justice for the very poor are not only a matter of social justice or national policy, but also fall within the sphere of human rights and fundamental freedoms, which arise from the recognition of the inherent dignity of human beings. However, in most of the member States, these problems do not seem to have been considered from the standpoint of human rights. Legal advice and legal aid systems must be viewed as part of the effective protection of the human rights of all persons without distinction, based on the principle of the indivisibility of those rights. In addition to the right of access to the law and to justice provided for in Article 6 of the European Convention on Human Rights, the other provisions of the Convention, including Articles 2, 3, 8, 13 and 14, also apply to the very poor.

8. Furthermore, non-governmental organisations or voluntary organisations providing support to the very poor have an essential part to play in efforts to bring the very poor into closer touch with the legal system, in as much as they can facilitate the achievement of the objectives set out in this Recommendation, namely effective access to the law, effective access to quasi-judicial methods of conflict resolution and effective access to the courts.

9. The extent of the above-mentioned objectives demands that "legal aid" should be very broad in scope. It should cover not only legal aid in the sense of complete or partial exemption from payment of the cost of court proceedings and the assistance of a lawyer at little or no cost, but also any free legal assistance provided in the form of information, advice, mediation, etc. whether as part of judicial or quasi-judicial proceedings.

II. Specific observations

10. Generally speaking, it should be specified that the three chapters of the Recommendation are not alternatives but steps all directed at achieving the desired objective, namely full access to the law and to justice for the very poor.

Section I

sub-paragraph a:

11. In this recommendation "legal profession" denotes not only judges and lawyers, but all the professions connected with the judicial system.

sub-paragraph b:

12. This recommendation is intended to encourage the development and financing of legal advice services organised in particular by voluntary organisations providing support to the very poor or by other bodies, (local authorities, bar associations, lawyers, social workers, etc.).

sub-paragraph c:

13. This recommendation concerns the defrayal of all the costs of legal advice, but does not rule out the possibility of requesting a modest contribution from the persons benefiting from such advice, as is currently done in some member States. A modest contribution of this kind is accepted in cases where it is currently provided for, but the text does not recommend introducing it. The reference to domestic law should be understood in the broad sense of the term, covering not only legislation but also all other forms of legal provision.

Section II

14. The aim is not to establish quasi-judicial methods of conflict resolution specifically for the very poor, but to ensure that they gain effective access to the quasi-judicial services available to everybody.

Sub-paragraph b:

15. This aim may also be achieved by payment of subsidies to the relevant organisations. By using the words "legal aid or any other form of assistance" the committee wished to take into account the variety and specificity of legal aid or assistance schemes operation in each country.

Section III

sub-paragraph a:

16. Effective access to justice presupposes the extension of legal aid to all courts, including the criminal courts. In criminal matters the term "legal aid" also covers the official appointment of defence counsel. The capacity of the persons concerned may be that of accused, plaintiff claiming damages, etc.

sub-paragraph b:

17. The Recommendation leaves open the question of whether legal aid may ne granted to stateless persons and aliens who are not habitually resident in the territory of the member state in which the proceedings are to be conducted.

sub-paragraph c:

18. In the CDDH's opinion, the right, as far as possible, to choose one's own counsel must be exercised freely on the basis of respect for the rules of territorial jurisdiction and other rules applicable to the counsel so chosen. Any exception to this right must comply with Article 6 paragraph 3 c ECHR and with the case-law of the ECHR supervisory organs on the subject. The payment of "adequate" remuneration to counsel is a prerequisite for effective freedom of choice. The level of remuneration should not be an obstacle to the exercise of this right and should be based on an objective assessment of the actual costs and of the counsel's intellectual performance.

sub-paragraph d:

19. Depending on the circumstances, the term "competent authorities" means the courts or any other competent authority. Furthermore, the word "manifestly" has been included to cover cases in which legal aid is not granted by a court. The expression "where the granting of legal aid is not necessary in the interests of justice" covers in particular circumstances in which the case is so simple that the person concerned can conduct his/her own defence.

sub-paragraph e:

20. In view of the particularly precarious situation of the very poor, the immediate granting of provisional legal aid might be advisable even before the procedure for granting aid is completed.

sub-paragraph f:

21. In this provision, the committee recommends considering the possibility for the NGOs concerned to provide legal assistance to the very poor without this affecting the possibility for NGOs, in states where it exists, to bring civil actions in criminal proceedings. The NGOs' assistance to the very poor may take many forms (eg collecting information, preparing files and applications, drawing up memorials). The governments may consider the possibility of granting non-profit-making NGOs or voluntary organisations legal aid for the provision of such assistance.

22. The CDDH considered the problem of legal aid systems for the very poor in proceedings before the European Commission and Court of Human Rights. It is of the opinion that the present system is inadequate and that an amendment to the ECHR may prove necessary.