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## In Re Marriage of King: Amicus Curiae Brief of International Law Scholars in Support of Appellant

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No. 79978-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re the Marriage of:  
MICHAEL STEVEN KING, Respondent,  
v.  
BRENDA LEONE KING, Appellant,  
and  
STATE OF WASHINGTON, involved party

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**Amicus Curiae Brief of International Law Scholars  
in Support of Appellant**

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

*Amici curiae* are law professors, international law scholars, and legal clinics that focus professionally on international human rights law. There is growing recognition across the world that access to justice and a fair trial require parties to have counsel, and governments must provide lawyers to indigent people who could not otherwise be represented. *Amici* have special familiarity with this strongly persuasive body of authority and urge the court to consider it to determine that Ms. King has a right to a publicly provided lawyer in her dissolution case under the constitutions of Washington and the United States. The interests of *amici curiae* are described in greater detail in the motion for leave to file.

## SUMMARY OF ARGUMENT

The status of the right to counsel under transnational law<sup>1</sup> is highly relevant to this Court's consideration of the scope of the right to counsel in Washington. The persuasive value of such law has been accepted by U.S. courts at all levels. These legal authorities are particularly relevant to state court jurisprudence, since our federal system accords states the primary responsibility for fulfilling many of our international human rights obligations.

In this instance, the value of looking to foreign and international law is especially relevant. It was a family law case in which the European Court of Human Rights (ECtHR) made the landmark decision that a "fair trial" often may require the assistance of counsel. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979).<sup>2</sup> That decision reflected the jurisprudence of two-thirds of the then member states of the Council of Europe (COE).<sup>3</sup> The right to publicly provided civil legal counsel extends back centuries in some countries and across diverse legal, cultural, and political traditions. Forty-nine member countries of the COE are implementing *Airey* and its progeny.<sup>4</sup> *Amici* commend to this court the respect accorded the right to

civil counsel within our common law tradition and within other legal systems.

#### ARGUMENT

##### *I. The Persuasive Value of International and Foreign Law is Well-Established, and U.S. Courts have Frequently Looked to it When Adjudicating Domestic Rights*

Both federal and state courts frequently draw on principles of transnational law to inform and illuminate domestic legal issues. Indeed, the Declaration of Independence explicitly notes the new nation's desire to pay "decent respect to the opinions of mankind." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).<sup>5</sup> By examining relevant law from other jurisdictions in the course of resolving domestic legal issues, courts in the United States continue to pay this "decent respect," while at the same time enriching and strengthening our domestic jurisprudence.

Judicial recognition of transnational law's role in informing American jurisprudence is especially clear in areas that touch on due process rights. For example, in *Roper v. Simmons*, the U.S. Supreme Court examined the juvenile death penalty. Writing for the majority, Justice Kennedy looked to the opinions of other nations as persuasive authority. Responding to the dissenters who questioned this approach, Justice Kennedy opined that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *Roper* was not an aberration; the Supreme Court has frequently looked to the laws and opinions of other nations in determining issues pertaining to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution.<sup>6</sup> As the Supreme Court has

found in these opinions, international and foreign law rulings help illuminate the ramifications of different solutions to similar legal problems.

In addition to the U.S. Supreme Court's majority opinions exhorting the value of comparative legal analysis, individual justices have also embraced transnational approaches in their judicial opinions and public statements. For example, Justice Ginsburg has noted the value of judicial decision making that takes into account the decisions and opinions of international law and foreign jurisdictions. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 344, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (Ginsburg, J., concurring).<sup>7</sup> Likewise, Justices Breyer and Stevens have found both comparative and international law materials to be valuable aids to constitutional interpretation.<sup>8</sup>

State appellate courts, including Washington courts, have demonstrated a similar interest in looking to transnational sources to illuminate domestic legal questions. For example, in 1973, the Washington Supreme Court in *Eggert v. Seattle*, 81 Wn.2d 840, 505 P.2d 801 (1973), examined Seattle's one-year durational residency requirement on applicants for civil service positions. In addition to citing the Universal Declaration of Human Rights (UDHR) to support its holding that this requirement violated the state constitution, the decision also cited the role of the right to travel under the law of England as a tool to assessing its significance under Washington state law. *Id.* at 841.<sup>9</sup>

Sister courts in nearby jurisdictions have also been active in developing comparative approaches to aid in resolving domestic legal issues. California courts have repeatedly cited transnational law. For example, the UDHR was cited by the California Court of Appeals in *In re Barbara White*, 97 Cal. App. 3d 141 (1979), in support of its determination that the California Constitution guaranteed freedom of movement within the state. Similarly, in *Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 n.2, 610 P.2d 436 (1980), the California Supreme Court invoked the UDHR to interpret a state law protecting privacy.<sup>10</sup>

The Oregon Supreme Court's decision in *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), is one of the most cited exemplars of state courts' use of transnational law to provide interpretive guidance for state constitutional protections. See, e.g., Ann I. Park, *Comment, Human Rights and Basic Needs: Using International Human Rights to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1261 (1987). In that case, the Oregon court dealt with a suit brought by male inmates of the Oregon State Penitentiary to enjoin prison officials from assigning female guards to duties that involved frisking male prisoners or supervising them in showers. The prisoners relied on a provision of the Oregon Constitution which prohibits treatment of prisoners with "unnecessary rigor." To ascertain the meaning of "unnecessary rigor," the Oregon Supreme Court examined pertinent international standards, crediting the relevance and usefulness of these "contemporary expressions of the same concern" regarding prisoner treatment. *Id.* See also *Humphers v. First Interstate Bank of Oregon*, 298 Or. 706, 710, 696 P.2d 527 (1985) (citing case law from Northern Ireland, Scotland, and New Zealand in discussing a physician's liability for disclosing confidential information about a patient).

Appellate decisions in many other states—including Missouri,<sup>11</sup> New Hampshire,<sup>12</sup> Montana,<sup>13</sup> and West Virginia<sup>14</sup>—have also cited transnational law favorably in cases involving domestic legal issues. Further, sitting chief judges of state high courts have written approvingly of using transnational law in state court adjudication. See Margaret H. Marshall, *Wise Parents Do Not Hesitate to Learn from Their Children: Interpreting State Constitutions in the Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004) (Chief Justice, Massachusetts Supreme Judicial Court); Shirley S. Abrahamson & Michael Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997) (Chief Justice, Wisconsin Supreme Court).

There are practical as well as historic reasons for the U.S. courts' embrace of transnational approaches. Experience has a longstanding role in

the development and evolution of American jurisprudence. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881) (“[T]he life of the law has not been logic, it has been experience”). Other courts’ experiences dealing with the right to counsel are highly relevant to resolving whether this state’s constitution should be construed to guarantee a right to counsel in cases involving child custody. Taking into account transnational resolutions of similar legal issues will only enhance this Court’s reasoning.

*II. Publicly Provided Lawyers for Low-Income People in Noncriminal Matters is a Robust Concept Elsewhere in the World*

**A. International Human Rights Treaty Law in Europe Requires Signatory States to Provide Low-Income Persons Representation Through a Lawyer in Civil Matters**

Looking beyond our national borders to canvas the experience of other nations, this Court will quickly find that the principle of a right to counsel in civil matters is widely accepted. Europe provides a particularly compelling example with clear relevance to the case at bar.

The Council of Europe (COE) was formed in 1949, in the aftermath of WWII, to protect human rights and the rule of law.<sup>15</sup> The Council drafted the European Convention of Human Rights and Fundamental Freedoms<sup>16</sup> (Convention) to which all members must become signatories. Cases brought under the Convention are interpreted by the European Court of Human Rights (ECtHR).

Article 6(1) of the Convention reads:

In the determination of his *civil rights and obligations* or of any criminal charge against him, everyone is entitled to a *fair* and public *hearing* within a reasonable time by an independent and impartial tribunal established by law.<sup>17</sup> (emphasis added)

Interpreting this clause, the ECtHR ruled that, “Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.”<sup>18</sup>



Then, in 1979, the ECtHR decided that access to a court may necessitate legal representation for the proceeding to be “fair.” The case *Airey v. Ireland* involved a woman seeking a legal separation, combined with attendant issues regarding child custody, support, and protection from domestic violence. She lacked funds to hire a lawyer to represent her in the appropriate Irish court.<sup>19</sup> Mrs. Airey filed a petition in the ECtHR,<sup>20</sup> claiming access to the court was denied.

In *Airey*, the court stated:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.<sup>21</sup>

The court then determined that in a proceeding for separation, potentially involving expert witnesses, complex legal issues, and “often entail[ing] an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court,”<sup>22</sup> it was improbable that she could do so. Additionally, the court took note of the disparity if her husband were to be represented by counsel.<sup>23</sup>

Ireland argued that not having attorney representation had not put positive barriers in her way, that she could petition for a separation in a pro se capacity, and that it would have some assistance by the judge. While the ECtHR determined that there had been no unrepresented petitioners for separation in the Irish High Court, and thus, it was not a proceeding for lay people, the reasoning of the result turned on the sophistication of the legal issues and the individual’s capacity to act in that setting:

Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation

is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.<sup>24</sup>

Ireland also predictably objected to the decision in that the state would be required to pay funds to secure Mrs. Airey a lawyer. The ECtHR's responded that the:

[f]ulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive. . . . The obligation to secure an effective right of access to the courts falls into this category of duty.<sup>25</sup>

The *Airey* decision has become the foundation of a broad right to legal representation for low-income people. Even at its narrowest, almost all member countries provide the right in family law matters.<sup>26</sup>

#### **B. The Right to a Publicly-Funded Civil Lawyer Has a Long History in Europe**

The court's decision in *Airey* is not an isolated example. In fact, many of the nations making up the COE have reached similar conclusions regarding the right to civil counsel under their own national laws.

By at least 1495, England required courts to appoint lawyers for indigent civil plaintiffs.<sup>27</sup> There are indications from the ninth century onward that the English courts sometimes provided publicly paid counsel. Over the centuries, coverage for defendants in civil matters was added, and the range of substantive law matters broadened.<sup>28</sup>

Other European countries have programs extending back centuries. Norway's program can be traced to the 1600s; Austria's since 1781; and France, Germany, Italy, Portugal, and Spain since the 1800s.<sup>29</sup>

Thus, for hundreds of years, numerous countries with diverse political, cultural, and judicial systems have understood the necessity for parties in legal proceedings to have the benefit of counsel.

### **C. Differing Legal Traditions and Rationales All Lead to the Same Right to a Publicly-Funded Civil Lawyer for the Indigent**

The European countries that have adopted a right to civil counsel embrace at least two distinct legal traditions: the civil law and the common law. These legal systems place very different emphasis on the role of the judicial branch in the political process. Court procedures and the kinds of matters which are justiciable vary enormously.<sup>30</sup> Despite these differences, many countries have concluded that low-income civil parties should have lawyers.

The rationales underlying this requirement are as diverse as the countries. These rationales include confidence in courts as the state-proffered dispute resolution mechanism, in addition to principles of equality, access to justice, legitimacy of the state, the rule of law, social policy goals of poverty eradication, preservation of other human rights, and the idea that providing lawyers for low-income civil parties is foundational for democracy. The ECtHR clearly focused on access to justice as an essential element of fulfilling democracy's promise of, and reliance on, a fair trial. The English right to counsel derived from both a strong sense of equality and a desire to endow legitimacy on the King's courts.<sup>31</sup> Switzerland's supreme court in 1937 found principles of equality between the rich and poor as the grounds for such a right.<sup>32</sup> In 1973, the German Constitutional Court based the right on an access to justice rationale.<sup>33</sup>

### **D. The Scope of the Right Under the European Convention of Human Rights is Comprehensive for Low-Income Individuals**

Substantively, the right to counsel covers a wide spectrum of civil matters including family law, housing, consumer and debt cases, and the right to public benefits.<sup>34</sup> Approximately fifteen countries use language suggesting coverage of all civil disputes. Most identify specific exclusions rather than listing extensive inclusions. Typical exclusions are assigned

claims, small claims, matters involving the running of a business or profession, and defamation cases.<sup>35</sup>

Notwithstanding the traditional exclusion of defamation cases,<sup>36</sup> in *Steel and Morris v. United Kingdom* in 2005, the ECtHR found in favor of a right to counsel for individual defamation defendants sued by McDonald's Corporation.<sup>37</sup> Here, the court looked beyond the label of defamation to the fairness of the underlying procedure. The court determined that the case was factually, legally, and procedurally complex, and the lack of a lawyer familiar with the case throughout made the procedure unfair. The court specifically noted "the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonalds."<sup>38</sup> While the full impact of this opinion has yet to be felt, it appears to extend the right to free civil counsel where there is an inequality of arms.

Almost all of the countries of Europe<sup>39</sup> provide free legal advice, often in areas outside of the scope of matters covered for further representation. Also, all these countries provide lawyers for litigation in the first instance and on appeal. Roughly one-third include mediation and transactional matters. Two-thirds cover representation in administrative hearings.<sup>40</sup> Most of the countries have some type of standard for determining if the case has merit prior to appointment of counsel.<sup>41</sup> Some countries have a "likelihood of success" test, the continuing viability of which is in doubt. In *Aerts v. Belgium*, the ECtHR reversed a determination by Belgium that the claim was not "well-founded," holding that "it was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue."<sup>42</sup>

Financial need standards are in place in all countries with a right to a lawyer. In a few countries, such as Sweden and the Netherlands, the income standards go well into the middle class. At the lowest income level, the services are completely free, with a sliding scale for those earning more.<sup>43</sup>

Financial need may not be the sole determinant for a right to a free lawyer. Often the aged, disabled, veterans, people on social security, and

immigrants are automatically eligible for free counsel. In some countries, such as France, Denmark, and Iceland, financial eligibility is waived if the issue is of significant public interest.<sup>44</sup>

In sum, far from moving into new, untested waters, a decision extending the right to counsel here would follow upon the sound logic and experience of many jurisdictions that have reached a similar conclusion about the importance of providing counsel in civil matters, especially in family law cases.

### *III. States Have a Special Role in Implementing the Nation's International Human Rights Obligations*

In addition to the persuasive value of foreign law, international law has special status in U.S. jurisprudence. The U.S. Supreme Court has long recognized that U.S. laws should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43, 2 L. Ed. 15 (1801) (“the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”). Similar principles govern adjudication in state courts, since the Supremacy Clause of the U.S. Constitution provides that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.<sup>45</sup> The Supreme Court of Washington confirmed this status accorded treaties in *Broad v. Mannesmann Anlagenbau, A.G.*, where the court found that the Hague Convention on the Service Abroad of Extrajudicial Documents in Civil or Commercial Matters preempts inconsistent state laws. 141 Wn.2d 670, 674–75, 10 P.3d 371 (2000).

One of the international treaties ratified by the United States is the International Covenant on Civil and Political Rights (ICCPR).<sup>46</sup> The ICCPR has been interpreted by its treaty-monitoring body, the United Nations (U.N.) Human Rights Committee, to encompass procedural fairness in civil adjudication, including the right to counsel in civil matters.<sup>47</sup> The Committee has frequently suggested that legal assistance may be required to ensure fairness in civil cases in legal systems based on both common law and civil law traditions.<sup>48</sup>

In our federal system, both the national government and the states must meet the United States' obligations under international treaties. As the United States stated in its first report to the U.N. Human Rights Committee, the federal government is

a government of limited authority and responsibility . . . [and] state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, *marriage and divorce, the care of children* and exercise of the ordinary policy power. . . . Some areas covered by the Covenant fall into this category.

United States, Initial Report of the United States of America, delivered to the U.N. Human Rights Comm. (HRC), Addendum, para. 3, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (emphasis added). The U.S. government explained that in order to comply with the treaty, "the United States will implement its obligations . . . by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard." *Id.* para. 4. The Human Rights Committee has acknowledged this multilevel responsibility, most recently asking the United States to include additional information on state implementation of the ICCPR in its future compliance reports.<sup>49</sup>

In sum, because the state of Washington is primarily responsible for implementing the ICCPR provisions relating to "marriage and divorce,

[and] the care of children,” this Court should be guided by the principles relating to the right to counsel set out in this international treaty.

#### CONCLUSION

The brief is prepared to assist the Court in deciding this case by providing the Court with a review of the right to counsel in civil cases across the world, with particular emphasis on Europe. Although the jurisdictions identified in this brief have a broad range of legal systems, they all provide a civil right to counsel in family matters. The rationales for requiring counsel for indigent persons are diverse, but the result is the same. *Amici* urge the Court to consider Appellant’s claims in light of these principles.

RESPECTFULLY SUBMITTED March 23, 2007

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**Appendix A**  
**Council of Europe Member Country Specific Information on the Scope of**  
**the Right to Free Lawyers fro Low-Income People in Civil Matters\***

| Country               | Scope of Right                                                |                          |                        |             |                                            | Client Qualifications |                                  |
|-----------------------|---------------------------------------------------------------|--------------------------|------------------------|-------------|--------------------------------------------|-----------------------|----------------------------------|
|                       | <i>Covered Matters</i>                                        | <i>Excluded Matters</i>  | <i>Lawyer Services</i> | <i>Fora</i> | <i>Merits Test</i>                         | <i>Need</i>           | <i>No need</i>                   |
| <i>Armenia</i>        | Alimony, personal injury to breadwinner                       | All others               | A, L, M                | TC, AH App  | Case by case                               | Case by case          |                                  |
| <i>Austria</i>        | All civil                                                     |                          | A, L                   | TC, App     | Not manifestly unfounded, in good faith    | Yes SS                |                                  |
| <i>Azerbaijan</i>     | All                                                           | None                     | A, L                   | TC, AH App  |                                            | Yes SS                |                                  |
| <i>Belgium</i>        | All                                                           | None                     | A, L, M, T             | TC, AH App  | Apparently well-founded                    | Yes SS                | Asylum Disability minors         |
| <i>Bulgaria</i>       | Family, Emp't Pensions, Patent, Social Welfare                | Property disputes        | A, L                   | TC, AH App  |                                            | Yes                   | Disability                       |
| <i>Czech Republic</i> | All civil                                                     |                          | A, L, M, T             | TC, AH App  | Likelihood of success, not capricious      | Yes SS                | Case by case                     |
| <i>Cyprus</i>         | Human rts, family                                             |                          | A, L                   | TC App      |                                            | Yes                   |                                  |
| <i>Denmark</i>        | Broad                                                         | Def., Bus.,              | A, L                   | TC          | Fair chance of winning, Reasonable cause   | Yes LEI               | public interest, Principle, Ess. |
| <i>Estonia</i>        | Broad                                                         | Def., Bus. IP            | A, L, T                | TC, AH App  | Possibility of winning is clearly unlikely | Yes SS NGO            | Equality of power, Complex       |
| <i>Finland</i>        | Estate, Emp't, LL/T, Social Security, Consumer, Wages, Family | Agreed divorce. Taxation | A, L, M, T             | TC, AH App  | C/B                                        | Yes SS                | Victims of DV &, sexual offense  |



| Country                      | Scope of Right      |                                                                                  |                 |            |                                            | Client Qualifications       |                                                     |
|------------------------------|---------------------|----------------------------------------------------------------------------------|-----------------|------------|--------------------------------------------|-----------------------------|-----------------------------------------------------|
|                              | Covered Matters     | Excluded Matters                                                                 | Lawyer Services | Fora       | Merits Test                                | Need                        | No need                                             |
| <i>France</i>                | All + enforcement   | None                                                                             | A, L, M, T      | TC, AH App | Not manifestly inadmissible                | Yes SS                      | Worthy interest, Imm., Vet. pensions, Minors        |
| <i>Germany LP - Yes</i>      | Broad               | Taxation, Bankruptcy                                                             | A, L            | TC, AH App | Likelihood of success                      | Yes SS LEI                  |                                                     |
| <i>Greece</i>                | All                 | None                                                                             | A, L, M, T      | TC, AH App | Balance of probabilities                   | Yes SS NGO                  | Disability, Unemployed, Refugees, Ethnic minorities |
| <i>Hungary LP - Yes</i>      | Broad               | Bus., Customs, Bank loans, Const'l claims                                        | A, L, M, N      | TC, AH App | None                                       | Yes SS                      | Homeless, Asylum                                    |
| <i>Iceland LP - Yes</i>      | Extensive list      |                                                                                  |                 |            | Sufficient grounds, Important public pol'y | yes                         | Police misconduct, Paternity                        |
| <i>Ireland LP - Yes</i>      | Broad               | Defamation Land disputes, Conveyance, Class actions, Election pet'n, Test cases. | A, L            | TC, App,   | C/B, Likely to succeed                     | Yes SS minimum contribution | Asylum                                              |
| <i>Italy</i>                 | Broad               | Assigned claims                                                                  | L               | TC, A, AH  | Not manifestly groundless                  | Yes NGO                     | Parental rights, Deport'n                           |
| <i>Latvia</i>                |                     |                                                                                  | A, L, T         | TC, AH App |                                            | Yes                         | Age, Disability                                     |
| <i>Liechtenstein LP - No</i> | Broad + enforcement | Car acc., Bus. Profess'l activities                                              | L               | TC, App    | Not frivolous, nor w/o prospect of success | Yes SS                      |                                                     |
| <i>Lithuania</i>             | All                 | None                                                                             | A, L, M, T      | TC, AH App |                                            | Yes SS                      |                                                     |
| <i>Luxembourg</i>            | All                 | None                                                                             | A, L, M, T      | TC, AH App | C/B, unlikely to succeed                   | Yes                         |                                                     |

| Country                   | Scope of Right                                |                                                                            |                 |             |                            | Client Qualifications |                                                                 |
|---------------------------|-----------------------------------------------|----------------------------------------------------------------------------|-----------------|-------------|----------------------------|-----------------------|-----------------------------------------------------------------|
|                           | Covered Matters                               | Excluded Matters                                                           | Lawyer Services | Fora        | Merits Test                | Need                  | No need                                                         |
| <i>Macedonia LP - Yes</i> | All                                           | None                                                                       | L               | TC, App     |                            | Yes<br>SS             |                                                                 |
| <i>Malta LP -Yes</i>      | All                                           | None                                                                       | L               | TC, AH App  | Reasonable grounds         | yes                   |                                                                 |
| <i>Monaco</i>             | All                                           | none                                                                       | L, M, N, T      | TC, AH, App |                            | Yes                   |                                                                 |
| <i>Netherlands</i>        | Broad                                         | Matters of business or professions                                         | A, L, M, N, T   | TC, AH App  | C/B, Manifestly unfounded  | Yes<br>SS             |                                                                 |
| <i>Norway</i>             | All inc'g rule-making or legislative advocacy | Matters of business or professions, Real estate, Property damage, Consumer | A, L, M, N, T   | TC, AH      | Likelihood of success. C/B | Yes<br>SS             | Imm., Involuntary medical treatment custody                     |
| <i>Poland</i>             | All + enforcement                             | None listed                                                                | L               | TC, AH App, | Facts merit legal aid      | Yes, SS<br>NGO        | Age, Disability                                                 |
| <i>Portugal</i>           | All                                           | None                                                                       | L               | TC, AH App  |                            | Yes<br>SS<br>Corps    |                                                                 |
| <i>Romania</i>            | Broad                                         | Def.                                                                       | A, L, M, N, T   | TC, AH App, |                            | Yes                   |                                                                 |
| <i>Russia</i>             | Broad                                         | Bus.                                                                       | A, L,           | TC, AH App  |                            | Yes                   | Age, Emp't, Disability, Political repression Alimony, WWII vets |
| <i>San Marino</i>         |                                               |                                                                            | A, L, M, N, T   | TC, AH App  |                            | Yes<br>FF             |                                                                 |
| <i>Serbia/ Montenegro</i> | All civil                                     | none                                                                       | A, L, T         | TC, App     | C/B                        | Yes<br>SS             |                                                                 |

| Country                       | Scope of Right    |                                           |                 |                                  |                                                           | Client Qualifications |                                     |
|-------------------------------|-------------------|-------------------------------------------|-----------------|----------------------------------|-----------------------------------------------------------|-----------------------|-------------------------------------|
|                               | Covered Matters   | Excluded Matters                          | Lawyer Services | Fora                             | Merits Test                                               | Need                  | No need                             |
| <i>Slovak Republic</i>        | All + enforcement | None                                      | A,L,            | TC, AH                           | Not manifestly unreason'ble, Importance of claim          | Yes SS                | Minors, Alimony                     |
| <i>Slovenia</i>               | Broad             | Def., Maintenance Debts Property damage   | A, L,           | TC, AH App.                      | C/B, Likely to succeed. Well founded Reasons              | Yes SS NGO            | Advice, Exceptional costs           |
| <i>Spain</i>                  | All + enforcement |                                           | A, L, T         | TC, AH App                       | Likelihood of success,                                    | Yes SS NGO            | If other party represented          |
| <i>Sweden</i>                 | Broad             | Defamation Most family                    | A, L, M, T      | TC, AH App                       |                                                           | YES SS LEI            | Minors                              |
| <i>Switzerland</i>            | All Civil         | None                                      | L               | TC, App                          | C/B, No hope of favorable outcome                         | Yes                   |                                     |
| <i>Turkey</i>                 | All               |                                           | L               | TC, AH App                       | Likely to prevail                                         | Yes                   |                                     |
| <i>Ukraine LP -Yes</i>        | Broad             | Def., bus. Small claims                   | A, L            | TC, AH App                       | No                                                        | Yes                   | Extensive list                      |
| <b>United Kingdom</b>         |                   |                                           |                 |                                  |                                                           |                       |                                     |
| <i>England LP-Yes</i>         | Broad             | Def., Pl, Bus., Wills, Boundary disputes, | A, L            | TC, App, AH-only Imm. and Emp' t | C/B, Reasonable prospect of success, Wide public interest | Yes SS                | Ess., Unable to proceed w/o funding |
| <i>North Ireland LP - Yes</i> | Broad             | Defamation, Elections                     | A, L            | TC, App, AH-only Land tribunals  | Reasonable grounds                                        |                       | Minors                              |

| Country                     | Scope of Right     |                                             |                 |                                                                       |                           | Client Qualifications |         |
|-----------------------------|--------------------|---------------------------------------------|-----------------|-----------------------------------------------------------------------|---------------------------|-----------------------|---------|
|                             | Covered Matters    | Excluded Matters                            | Lawyer Services | Fora                                                                  | Merits Test               | Need                  | No need |
| Scotland<br><i>LP – Yes</i> | Broad              | Defamation,<br>Elections,<br>Simple divorce | A, L            | TC,<br>App,<br>AH-<br>only<br>Land<br>&<br>Emp'<br>t<br>tribun<br>als | C/B,<br>Plausible<br>case | Yes<br>SS             |         |
| Wales                       | Same as<br>England |                                             |                 |                                                                       |                           |                       |         |

\*Unable to find information on Albania, Andorra, Bosnia-Herzegovina, Moldova, and Georgia.

**KEY**

**Scope of right**

All - All civil and Administrative

All Civil - All civil, no Administrative

Broad - Most civil with listed exclusions, see Fora if administrative matters are included.

**Lawyer Services**

A - Advice

L - Litigation

M -Mediation

T – Transactions

**Types of Fora**

TC - Trial Court

AH - Administrative Hearings

App – Appeals

**Merits Tests**

C/B - Cost/benefits, often phrased as a reasonable person with resources would pay a lawyer to pursue

Reasonable Basis - Reasonable grounds for taking, defending, continuing

**Need**

Yes - Means there is an income standard for eligibility

SS – Sliding Scale

NGO – Non-Governmental Organizations: includes non-profits, charitable organizations.

**No Need**

Advice - Advice free to all

Ess. - Essential to Applicant

Imm. - Immigration

Public Interest - If matter of public interest

Prin. – Principle

**Appendix B**  
Council of Europe Members

|                    |                     |
|--------------------|---------------------|
| Albania            | Moldova             |
| Andora             | Monaco              |
| Armenia            | Netherlands         |
| Austria            | Norway              |
| Azerbaijan         | Poland              |
| Belgium            | Portugal            |
| Boznia-Herzegovina | Romania             |
| Bulgaria           | Russia              |
| Czech Republic     | San Marino          |
| Cyprus             | Serbia / Montenegro |
| Denmark            | Slovak Republic     |
| Estonia            | Slovenia            |
| Finland            | Spain               |
| France             | Sweden              |
| Georgia            | Switzerland         |
| Germany            | Turkey              |
| Greece             | Ukraine             |
| Hungary            | United Kingdom      |
| Iceland            |                     |
| Ireland            |                     |
| Italy              |                     |
| Latvia             |                     |
| Liechtenstein      |                     |
| Lithuania          |                     |
| Luxembourg         |                     |
| Macedonia          |                     |
| Malta              |                     |

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<sup>1</sup> In this brief, we use the term “international law” to refer to treaties, covenants, and similar materials that reflect the formal, collective agreement of many nations concerning relevant legal standards. The terms “foreign law” or “comparative law” are used to refer to the domestic law of other nations. The term “transnational law” encompasses both of these sources of law, i.e., both international treaties and domestic foreign law.

<sup>2</sup> Decisions of the European Court of Human Rights are cited according to the Bluebook. The full texts of these cases are readily available through search on the Court’s website at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

<sup>3</sup> See *infra* sec. II.

<sup>4</sup> There are forty-six members of the COE, one of which, the United Kingdom, is comprised of four countries: England, North Ireland, Scotland, and Wales. This brief will focus on the right as it has developed in Europe. See *infra* sec. II; see *infra* Appendix A. There are vibrant programs of civil legal aid in nine other foreign countries: Australia, Canada, India, New Zealand, Hong Kong, Japan, Zambia, South Africa, and Brazil.

<sup>5</sup> See generally Harold Hongju Koh, Edward L. Barrett, Jr., *Lecture on Constitutional Law*, 35 U.C. DAVIS L. REV. 1085 (2002).

<sup>6</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 340 (2002); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>7</sup> Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Ruth Bader Ginsburg, “A Descent Respect to the Opinions of [Human]kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 64 CAMBRIDGE L.J. 575 (2005).

<sup>8</sup> See, e.g., *Patterson v. Texas*, 536 U.S. 984, 984, (2002) (Stevens, J., dissenting from denial of *cert.*) (citing international consensus against the execution of a capital sentence imposed upon a juvenile to urge the Court to revisit the issue of the constitutionality of the sentence); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting that other nations’ approaches to campaign finance are consistent with Supreme Court majority’s approach); *Knight v. Florida*, 528 U.S. 990, 995–96 (1999) (Breyer, J., dissenting from denial of *cert.*) (citing Universal Declaration of Human Rights (UDHR) and case law of Canada, India, Great Britain, and Zimbabwe to support the view that a lengthy delay in administering the lawful death penalty may be unusually and impermissibly cruel); *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (discussing experiences of federal systems in Switzerland, Germany, and European Union as aids to deciding question of U.S. federalism).

<sup>9</sup> See also *Brewer v. Fibreboard Corp.*, 901 P.2d 297, 308–09 (Wash. 1995) (citing English case law to establish that “a plaintiff could sue one tortfeasor, obtain partial satisfaction, and then sue another tortfeasor because liability was several as well as joint”); *Bauman by Chapman v. Crawford*, 704 P.2d 1181, 1188 (Wash. 1985) (Canadian case law demonstrating mounting criticism of the negligence per se doctrine cited by the concurrence); *Heidner v. St. Paul & Tacoma Lumber Co.*, 668, 215 P. 1, 6 (Wash. 1923)

(citing English, Indian, and Australian case law in finding an executory contract was annulled by the commencement of war).

<sup>10</sup> See also *People v. Jones*, 949 P.2d 890 (Cal. 1998) (citing English case law in demonstrating the importance of the corpus delicti rule); *Gibson v. Gibson*, 479 P.2d 648, 649 (Cal. 1971) (citing Scottish and Canadian case law in establishing that an unemancipated minor may maintain an action for negligence against his parents); *Follette v. Pacific Light & Power Corp.*, 208 P. 295, 303–04 (Cal. 1922) (citing case law of Australia and New Zealand in discussing property rights in an action for ejectment).

<sup>11</sup> *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003).

<sup>12</sup> *New Hampshire v. Robert H.*, 393 A.2d 1387, 1388 (1978), *overruled by In re Craig T.*, 800 A.2d 819 (N.H. 2002).

<sup>13</sup> *Snetsinger v. Montana Univ.*, 104 P.3d 445, 458 (Mont. 2004) (Nelson, J. concurring).

<sup>14</sup> *Pauley v. Kelley*, 255 S.E.2d 859, 864 (W. Va. 1979).

<sup>15</sup> Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, as well as collaborate sincerely and effectively in the realization of the aim of the Council, as specified in Chapter I. See ETS 1 Ch. II, art. 3 (1949), *available at* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=001> (last visited Oct. 8, 2010).

<sup>16</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222, 228 (1955).

<sup>17</sup> *Id.*, art. 6, para. 1.

<sup>18</sup> See *Golder v. United Kingdom*, 16 Eur. Ct. H.R. (ser. B) at 536 (1975); *Belgian Linguistic Case*, 6 Eur. Ct. H.R. (ser. A) at 278 (1968) (Relating To Certain Aspects of the Laws on the Use of Languages in Education in Belgium); see also *Luedicke v. Federal Republic of Germany*, 29 Eur. Ct. H.R. (ser. A) at 161 (1978). See generally *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1976).

<sup>19</sup> See *Airey v. Ireland*, 305 Eur. Ct. H.R. (ser. A) at 305 (1979). It is unclear from the record if she sought funds for a lawyer from the court. At the time, Ireland did not have a civil legal aid program.

<sup>20</sup> At the time the European system was two-tiered—a commission and a court. In 1998, the commission was abolished, and all matters now go directly to the court. See *Ten years of the “new” Court*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Events+at+the+Court/10+years+of+the+new+Court/> (last visited Oct. 23, 2010).

<sup>21</sup> See *Airey*, 305 Eur. Ct. H.R. at 314–15.

<sup>22</sup> *Id.*

<sup>23</sup> In later opinions “inequality of arms” has become a distinct basis for appointment of a lawyer. See *infra* sec. II. D.

<sup>24</sup> *Airey*, *supra* note 19, at 316.

<sup>25</sup> *Id.* The Eur. Ct. H.R. did not decide that a member state had to provide a lawyer in all civil matters. It declined to define the full scope but did suggest that one solution would be a “simplification of procedure.”

<sup>26</sup> See *infra* sec. II.D; see *infra* Appendix A.

<sup>27</sup> An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, 1494, 11 Hen. 7, c. 12 (Eng.).

<sup>28</sup> See Luther M. Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel*, 39 WASH. & LEE L. REV. 1267 (1982); John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923).

<sup>29</sup> See, e.g., MAURO CAPPELLETI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975) [Justice Earl Johnson, Jr., Associate Justice of the California Court of Appeals]; Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, 24 FORDHAM INT'L L.J. S83 (2000).

<sup>30</sup> JOHN MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, & EAST ASIA (1994).

<sup>31</sup> See SETON POLLOCK, LEGAL AID—THE FIRST 25 YEARS 12 (1975); Joan Mahoney, *Symposium: Legal Services: Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223, 226 (1998) (A new system of legal assistance was created by statute in 1929).

<sup>32</sup> Francis W. O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967) (citing judgment of Tribunal federal Suisse 1937, 63 Arrêts du Tribunal Federal Suisse [ATF] I, 209 (Switz)).

<sup>33</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 17, 1953, 26 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 2, 336 (F.R.G.).

<sup>34</sup> For a summary of the programs in the COE countries, see *infra* Appendix A. For an extensive review of the right to counsel up to 1975, see CAPPELLETI, *supra* note 29. For a current look at the right to civil legal counsel in 58 countries, see Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 760 (2006). For detailed information see questionnaires answered by each country on COE and European Union websites, and conference papers collected at the International Legal Aid Group, Open Society and Public Interest Law Initiative websites. *Council of Europe, Legal Aid—How to Benefit From It*, [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Operation\\_of\\_justice/Access\\_to\\_justice\\_and\\_legal\\_aid/](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/); *European Union, Legal Assistance, Legal Aid*, <http://ec.europa.eu/civiljustice/> (last visited Mar. 15, 2007). For an in depth look at the programs in specific countries, see *Public Interest Law Initiative, Country Reports*, <http://www.pili.org/en/content/view/51/53> (last visited March 15, 2007) (presenting New Developments in Legal Aid in Central and Eastern Europe and updates since the first Forum on Access to Justice held in Dec. 2002, compiled by Open Society Justice Initiative and Public Interest Law Initiative, Second Forum on Access to Justice, 2005); *National Reports*, INT'L LEGAL AID GROUP <http://ilagnet.org/> (last visited Mar. 5, 2007).

<sup>35</sup> See generally website cited in *supra* note 34; see *infra* Appendix A.

<sup>36</sup> *Munro v. United Kingdom*, App. No. 10594/83, 52 Eur. Comm'n H.R. Dec. & Rep. 158, para. 54 (1988).

<sup>37</sup> *Steel v. United Kingdom*, 22 Eur. Ct. H.R. 403 (2005).

<sup>38</sup> *Id.* at 430.



<sup>39</sup> As can be seen in Appendix A, there are five member countries for which there is no information on their programs.

<sup>40</sup> See sources cited *supra* note 34; see *infra* Appendix A.

<sup>41</sup> *Id.*

<sup>42</sup> Aerts v. Belgium, 29 Eur. Ct. H.R. 50, para. 60 (1998).

<sup>43</sup> See sources cited *supra* note 34; see *infra* Appendix A.

<sup>44</sup> *Id.*

<sup>45</sup> United States, Initial Report to Comm. on Elim. of Racial Discrimin. (CERD), addendum, I.N. DOC. CERD/C/351/Add. 1 at para. 50 (Sept. 21, 2000) [hereinafter U.S. CERD Report] (This gives duly ratified treaties “a legal status equivalent to enacted federal statutes. As such, they prevail over previously enacted federal law (to the extent of any conflict) and over any inconsistent state or local law.”).

<sup>46</sup> International Covenant on Civil and Political Rights, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976, art. 2.) [hereinafter ICCPR].

<sup>47</sup> Article 14 of the ICCPR generally addresses fairness before domestic tribunals in both civil and criminal matters and has been applied to issues of civil counsel. See, e.g., Comm. Human Rights, 21st sess., General Comment 13, art. 14, para. 8 (1984); Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. DOC. HRI/GEN/1/Rev.1, at 14 (1994) (noting that art. 14 of the ICCPR applies to civil as well as criminal proceedings); Comm. Human Rights, Annual Report to the General Assembly: 9th Report, Spain, U.N. DOC. A/40/40, para. 419 (1985) (Human Rights Committee requesting information on availability of legal aid in civil cases); List of Issues: Trinidad and Tobago, 70th Sess., U.N.Doc. CCPR/C/SR. 1879 (2000); see generally Northeastern Law School Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (Dec. 2006), available at <http://www.slaw.neu.edu/clinics/RightToCounsel.pdf>.

<sup>48</sup> State ex rel. Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003).

<sup>49</sup> See Human Rights Comm., Consideration of Reports Submitted by the State Parties Under article 40 of the Covenant, 87th Sess., U.N. DOC. CCPR/C/USA/CO/3 at ¶ 39 (2006).