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Justice for the Poor in the Hands of the Lawyers? Some Remarks on Access to Courts and Legal Aid Models *

«Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible", says the doorkeeper, "but not at the moment". Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him". These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone»

(Franz Kafka) [1]

«Legal Aid is regarded as a deus ex machina, which, if only correctly assembled, restores equality to the legal system»

(P. C. Alcock) [2]

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1 Franz Kafka: «Before the Law», in T*he Penal Colony: Stories and Short Pieces*, Schocken, New York, 1961.

1. INTRODUCTION

The complex question of *access to justice*, henceforth used in the narrower sense of *access to courts,* [3] may be examined from different points of view, destined to assume particular characteristics when considered in the light of the economic and social disadvantages that typify the poor, or as they are often termed by legislators, *the non affluent people*. [4]

A possible approach to the question is to consider access to justice in terms of a constitutional guarantee granted to all individuals and as (at least) a condition for the effectiveness of rights. The reciprocal implications between the themes of *access to courts* (understood as access to judicial protection) and *fundamental rights* are apparent at the institutional level, given that in the majority of modern legal systems, the possibility of applying [5] to a court to have rights protected is included among the so-called fundamental rights, sometimes by express constitutional provision (a case in point being article 24 of the Spanish Constitution) but more often by means of judicial interpretation. But they are also apparent at the theoretical-general level, where in the context of discussion on the relationship between rights and their guarantees, [6] the feasibility of jurisdictional remedy (as an instrument typical of, but not exclusive to, the protection of rights) is often viewed

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2 P. C. Alcock: «Legal Aid: Whose Problem?», *British Journal of Law and Society* No. 4 (1976), p. 165.

3 Therefore falling outside the range of analysis is the broad theme of extra-judicial instruments for access to justice. I refer to the wide array of *alternative* solutions extraneous to the institutional context of the courts and today high on the agenda of the theoretical and political debate.

4 Throughout this paper, by «poor» is meant a person defined as such by the various national legislatures (albeit using less pejorative synonyms) and therefore as eligible for free or partly free access to legal aid services. To be noted is that the legislative definition of «poor» and «poverty» is generally based on two alternative criteria. Either the definition of «poverty» is based on an objectively fixed criterion concerning income alone, without account being taken of other variables (and this is the solution generally adopted by Italian legislation), or it assumes a relative character by considering as relevant to the definition, besides the person's economic circumstances, also the cost of the trial and other possible variables. Partly free access to legal aid services, where provided for (in France, England, Sweden and Germany), and the power conferred on the judge (for example, in France) to grant exceptional access to legal assistance (free or partly so) also to those whose incomes exceed the legislatively established threshold, act as correctives to the two above-mentioned criteria, while also serving to rationalize overall demand for legal assistance.

5 Interpreted not only *in negative* as the absence of external impediments but also *in* positive as the availability of means.

6 At least as regards Italy, in the last ten years this discussion has been the subject of deep interest, thanks also to the seminal contribution by Luigi Ferrajoli and his essay «Diritti fondamentali», *Teoria politica* No. 2 (1998), pp. 3-33, which gave rise to animated debate. See in this regard the papers collected in Ermanno Vitale: *Luigi Ferrajoli. Diritti fondamentali,* La Terza, Roma-Bari, 2001.

not only as a condition for the effectiveness of rights but also as the premise for their legal (not merely moral) existence (*ubi remedium, ibi ius*). [7]

However, this paper takes a different point of view: my purpose is in fact to call attention to the evolution and main features of the political models developed in response to the problem of providing access to courts for the poor. The expression «models», with its deliberate ambivalence, refers both to the concrete institutional solutions adopted to implement a certain policy, and to the normative proposals on which those solutions are based. An analysis of the kind conducted in this paper, whose main referents are the Western legal systems, is conditioned by an underlying assumption which is difficult to confute empirically: namely that the strategies adopted at the levels of both principles and legislative policy to facilitate access by the poor to courts have tended to rely less on *intrasystemic* measures (in order to simplify legislative language and court procedures and to reduce court fees), than on *external* remedies based on the provision of expert help.

Accordingly, in the next section I shall examine, albeit inevitably in outline, the main models (in the sense indicated above) in which these strategies have found historical expression. To this end, I shall use a quite well-known classification which, by distinguishing among charitable, «*judicare*», and combined systems, is based on the manner in which expert help for the poor is funded and staffed. Among the various issues –normative (for example, issues of political legitimacy and the role of the State) and more strictly sociological (the development of *welfarism* and the impact of cultural traditions in different societies)– that an analysis of this kind usually addresses, I shall concentrate on one in particular, for I believe it to be paramount for understanding the models analysed and their most recent evolution. I refer to the role performed (or which should be performed) by the professional figure of the lawyer in solving the problem of access to courts by the poor. [8]

2. THE EVOLUTION OF LEGAL AID MODELS: SOME SOLUTIONS AND THEIR PROBLEMS

Awareness that one of the main obstacles separating the citizen from «justice» is economic in nature (although a substantial role is obviously played by

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7 Thus, according to a realist approach: cf. for instance Riccardo Guastini: «Diritti», in Paolo Comanducci and Riccardo Guastini (eds.): *Analisi e diritto 1994,* Giappichelli, Turin, 1994, pp. 163–174; as well as *Distinguendo. Studi di teoria e metateoria del diritto,* Giappichelli, Turin, 1996.

8 Here and henceforth I use the term «lawyer» in a broad and generic sense which comprises all three roles traditionally associated with the figure of the lawyer: that of mere «representative» or interest advocate (well exemplified by the old French *avoué* or the British solicitor), that of the technical expert or consultant, and that of the defence counsel (the British barrister, or the French *avocat* before the reform of 1971).

other barriers as well) [9] is not a historically recent perception. On the contrary, it has accompanied the organization and administration of justice since their rudimentary beginnings. Equally long-standing is the idea that the justice administered by courts –with its expressive forms so difficult to construe (for both rich and poor)– requires some intermediary able to manoeuvre among the intricate ramifications of legal jargon and to act as a linkage between the organs of justice (judges in particular) and the recipients of their decisions. And because this so-to-speak *intermediative* activity has its costs, the main problem of the poor in search of justice –or conversely of those who are pursued by it– has always been identified in, and encapsulated by (according to some in a reductively biased manner) the expression «legal aid».

As I shall try to show, «legal aid» is a vague expression which, in the course of time, has become typically associated with a specific legal institution. The term is used in a restricted sense to refer almost exclusively to the free provision of legal assistance or defence in proceedings by professionals (lawyers). But it is also employed in a broader sense to allude –especially in normative discourse (in some cases translated into legislative terms: this being, as we shall see, the case of England)– to that wide array of free legal aid services for the needy which comprises legal education, advice, assistance, representation, and defence before courts. [10] Whatever the case may be, it is a key reference which despite its ambiguity, or perhaps precisely because of it, has enabled the focus to be trained on the ways in which the Western legal systems have traditionally addressed the issue of access to justice by the poor, while at the same time endeavouring to solve it, given that, without excessive contrivance, the different meanings of «legal aid» can be used to trace the evolution of institutional responses to that problem.

When examined through the lens of «legal aid», the problem of access to courts by the less well-off raises, at both the practical and justificatory levels, at least three kinds of questions:

- Who should pay for the costs of legal aid (and why)?
- In what form and with what instruments should they do so?
- And, who should be the users of the service, and on the basis of what criteria should they be identified (in short, who are *the poor*)?

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9 Besides «economic poverty», in fact, there is also the «organizational poverty», i.e. the obstacles of organizational nature impeding protection of subjective juridical situations in certain respects atypical with respect to the individualist scheme that shapes the traditional rules and institutions of trial law (one thinks in this regard of so-called «collective» or «diffuse» interests). There is, furthermore, the specifically procedural obstacle whereby certain traditional types of procedure are unable to provide protection, thereby creating space for *alternative* solutions. For obvious reasons, here I am concerned with the first type of obstacle, the economic one, to which only contingently do the organizational and procedural ones add themselves and overlap.

10 See for instance Legal Action Group: «The Scope of Legal Service» (1982), now in Alan Paterson & Tamara Goriely (eds.): *Resourcing Civil Justice,* Oxford University Press, Oxford, 1996, pp. 74-81.

2.1 The charitable model

With regard to the first kind of questions (the discussion of which involves the other two as well), it is generally believed that access to justice pertains to the public sphere. Hence, it is the State that should assume the costs of justice for those with insufficient means to provide for themselves. However, this belief is historically and ideologically conditioned, and today is severely tested by policies to restrict the Welfare State.

In reality, the first historical manifestations of legal protection received by the poor came from the spontaneous charity of private individuals. During the Middle Ages, for example, legal aid, like other assistance to the *miserabiles personae* of Christendom, was a form of charity furnished mainly by the Church and by the Christian faithful as a pious duty. There was no lack even then of signs of the *institutionalization* of such protection into more secular form, but they concerned temporary measures resulting from the somewhat sporadic personal charitable impulses of lords and kings motivated by a paternalistic duty to support the oppressed. [11] They were far removed from the modern idea of State aid, an idea that would not even have been intelligible before the advent of the modern State.

Rather surprisingly, however, the charitable connotation that initially attached to legal aid tenaciously survived the passage of time and was able to resist the political and social upheavals that marked the eighteenth and nineteenth centuries.

The principle of the *gratuité de la justice* proclaimed by revolutionary France in 1790 soon proved illusory, and in the second half of the nineteenth century legal assistance to the poor was subject to specific legislation which established under the aegis of the Rule of Law the benefit to be given, and the class that was to receive it. This at least was what happened in the Western world, and in particular in the United States after the Civil War, in France after the revolutionary movements of 1848, in England after the Reform Bills, and in Germany and in Italy after national unification. [12] In substance, however, these legislative measures were all based on the same mechanism as adopted in the Middle Ages: namely, the assignment to the needy of private lawyers who should plead without receiving recompense from either their clients or the State.

Thus, despite the innovation of giving juridical formalization to the problem of legal aid, so that access to legal services was guaranteed by the force of positive law for all members of a defined class of the poor, the nineteenth-century

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11 See Mauro Cappelletti, James Gordley & Earl Johnson, Jr. (eds.): *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies,* Giuffré, Milan, 1975. See also Lawrence M. Friedman: «Access to Justice: Social an Historical Context», in Mauro Cappelletti & John Weisner (eds.): *Access to Justice. The Florence Access to Justice Project,* Sijthoff and Noordhoff/Giuffrè, Alphen aan den Rijn/Milan, 1975, pp. 3-36.

12 For deeper historical details see Mauro Cappelletti, James Gordley & Earl Johnson, Jr. (eds.): *Toward Equal Justice,* cit., p. 16 ss.

legislators did not substantially diverge from the conception of legal aid as charity which had typified the Middle Ages. An explanation for this may be that a decisive role was played by the influence exerted on the political thought of the time by the doctrine of natural rights, and by the conception of justice that it subsumed. As is well known, this doctrine viewed justice as the preservation of the natural rights of man from encroachment by the State or by fellow citizens, and thus demanded that all men should have access to courts where their rights would be protected. But as the French discovered after a failed attempt to abolish their bar, and as the Americans found from similar colonial experiments before their revolution, access to courts hardly meant that the service of lawyers could be dispensed with. Yet for the State to provide these lawyers –by paying either public or private attorneys to serve the poor– would have set it at odds with the contemporary conception of how rights are to be protected. According to this conception, *natural rights* do not require affirmative State action for their protection; on the contrary, they are *natural rights* because they are prior to the State itself and are preserved when the State does not act to infringe them and refuses to allow encroachments by the actions of others. We may consequently conclude that the markedly *charitable* component of the legal aid solution in the nineteenth century, with its reliance on the gratuitous services of the legal profession, was in a certain sense instrumental to the principle of excluding the State as far as possible from the lives of citizens.

2.2 The *judicare* model

In the century that followed, the superseding of the purely formal conception of equality embraced by nineteenth-century liberal thought, together with the rise of the welfarist impulses incorporated into modern constitutionalism, gave rise to the opposite tendency. The emphasis was now on the role of the State in accomplishing *substantial equalities* through measures to remedy economic and social disparities. This change of perspective also affected the problem of how to provide the poor with access to justice by means of legal aid. After the Second World War, in fact, the legal aid system underwent a period of intense legislative revision. Although the underlying rationale was left unaffected (it remained substantially that of furnishing the services of a lawyer to those unable to afford one), there was a tendency to transfer the financial onus of remunerating the *lawyers of the poor* to the State, which in some cases employed them on a par with civil servants (the so-called «salaried staff attorney» model adopted in the United States and later in France), or in others utilized them as a private professional corps (the «compensated private attorney» model adopted in England). This new model of legal aid (widely known as the «judicare system») was introduced almost everywhere, first in the UK, the Netherlands, the USA, Canada, Sweden, and

Australia, and then in the rest of Europe. [13] It also brought with it an endeavour to extend the compass of legal aid beyond the traditional boundaries of criminal and matrimonial cases, and also, from the subjective standpoint, to expand the class of *the poor* that were eligible for legal aid.

The exception to this wave of institutional reforms was Italy, which indeed continued to be an anachronistic example of a typically nineteenth-century conception of legal aid. [14] Yet, paradoxically, it was precisely in Italy that there began in the 1970s the broad movement of thought of international reach which, under the impetus of a group of leading exponents of Italian legal culture, [15] undertook an ambitious project for the study and reform of access to justice. [16] The inspiration for the undertaking was the idea that if «rights were to be made effective, that is, accessible to all», [17] the active intervention of the State was indispensable. At the institutional level, however, after animated debate in the Constituent Assembly on what formulation should be given to the future article 24, clause 3 of the Constitution [18] –and therefore to the possible model of legal aid compatible with it– [19] the decision was taken to maintain the view adopted by the Fascist legislature in 1923 (which in its turn reached back to the so-called *Legge Cortese* of 1865). The latter conceived the provision of legal aid (*gratuito patrocinio*) as an «honorary and obligatory duty» of the legal profession and stipulated that lawyers must act for the poor if called upon to do so and without receiving fees

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13 See the collection of essays edited by Francis Regan *et al.* (eds.): *The Transformation of Legal Aid. Comparative and Historical Studies,* Oxford University Press, Oxford, 1999.

14 See, in a critical perspective, Vittorio Denti: «Assistenza giudiziaria ai non abbienti. II) Diritto processuale civile», *Enciclopedia giuridica* Vol. 3 (1988), pp. 1 ss.; Mauro Cappelletti: *Giustizia e società,* Ed. di Comunità, Milano, 1977; Sergio Chiarloni: «Patrocinio dello Stato e patrocinio gratuito: violazione del principio di uguaglianza…tra avvocati?», *Giurisprudenza italiana* (2001), pp. 249 ss.

15 Most notably Mauro Cappelletti.

16 The results of this study and research, also with a view to reform of access to justice, were set out in a monumental six-volume work edited by Mauro Cappelletti and published in 1978-79. Around one hundred jurists, sociologists, economists, political scientists, and psychologists from the five continents contributed to the work, generally known as the *Florence Access to Justice Project* (See the review by Vittorio Denti: «Accesso alla giustizia e Welfare State», *Rivista trimestrale di diritto e procedura civile* (1982), pp. 618 ss. and the partial French translation by Mauro Cappelletti & René David: *Accès a la justice et état-providence,* Economica, Paris, 1984).

17 See Mauro Cappelletti & Bryant Garth: «Access to Justice: The Worldwide Movement to Make Rights Effective» (1978), now in Alan Paterson & Tamara Goriely (eds.): *Resourcing Civil Justice,* cit., pp. 91–106.

18 Article 24, clause III of the Italian Constitution establishes that the poor are entitled by law to proper means for action or defence in all courts. On the genesis of this provision see Alessandro Pizzorusso: «L'art. 24, co. 3° comma, della Costituzione e le vigenti disposizioni sul gratuito patrocinio», *Foro italiano*, V (1967), pp. 1 ss.; Franco Cipriani: *Avvocatura e diritto alla difesa,* E. S. I., Naples, 1999.

19 See Luigi Paolo Comoglio: *La garanzia costituzionale ed il processo civile,* Cedam, Padova, 1970; Raffaelle G. Rodio: *Difesa giudiziaria e ordinamento costituzionale,* Cedam, Padova, 1990.

for the service rendered (unless, and only in civil cases, their client prevailed and costs were recovered from his opponent).

This legislative solution survived exemplary censure of Italy by the European Court of Human Rights (*Artico v. Italy*, 1980), [20] and it was strenuously defended by a Constitutional Court very fearful of the normative vacuum. As a consequence, it remained in force –at least in civil proceedings apart from some minor adjustments– until a few years ago. [21]

However, the *judicare* legal aid model, which in Italy too (albeit belatedly) has led to the dismantling of the previous charity-based system, is the same model that elsewhere has caused much dissatisfaction, and has disappointed the perhaps overly optimistic hopes of its supporters. Like its rise, also the decline of the publicly-funded legal aid system in the advanced capitalist countries is amply documented in the literature with analyses and statistics. Various explanations have been put forward for this decline, all of them relating to a greater or lesser extent to the much-discussed crisis of the Welfare State, from which not even the justice system has been immune.

Anyway, there is one aspect that seems difficult to dispute: the rhetoric of equal justice embodied in the model of State-funded legal aid has been forced to reckon with the shortage of available resources. To simplify, the concrete cases that have arisen are almost always one or the other of the following: either the public funds invested have not been sufficient *ab origine* to ensure the functioning of the system (which sadly seems invariably to have been the fate of the Italian system); or «no expense has been spared», so to speak, but in this case the excessive burden on the State –mainly due to the growth of demand– has compelled national governments to drastically reduce expenditure, with a consequent reduction in funding for lawyers for the poor, the curtailment of services, and, above all, the restriction of eligibility for free legal assistance.

This last case is well illustrated by England, which in the 1950s introduced a legal aid system that won praise both for the large sums of money allocated by the government, [22] and for the wide range of services delivered. However, a combination of factors –most notably, increased demand for the service and exponential growth of legal expenditure with respect to the inflation rate– has gradually brought the system to the point of breakdown. Its funding requires levels

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20 European Court of Human Rights, 13-5-1980; Series A, No. 37. On this cf. Alessandro Pizzorusso: «Commento a Corte europea dei diritti dell'uomo», *Foro italiano* No. 4 (1980), p. 150.

21 See Giuliano Scarselli: *Il nuovo patrocinio a spese dello Stato nei processi civili e amministrativi,* Cedam, Padova, 2003.

22 Estimates in 1998 put the figure at proportionally seventeen times more than ever spent on legal aid in the United States, and around eight times more than expenditure in France and Germany. For a reasoned comparison among funding provisions for legal aid programmes for the poor in the main Western democracies see Justice Earl Johnson: «Equal Access to Justice: Comparing Access to Justice in the USA and Other Industrial Democracies», *Fordham International Law Journal* No. 24 (2000), pp. 83 ss.

of spending judged excessive by the tax authorities, and the service is only available to an increasingly smaller segment of the population. In England as elsewhere, in fact, one of the most evident signs of the crisis of the judicare system (or perhaps the one with the greatest repercussions at the social level), besides being the outcome of *restrictionist* policies, has been the gradual shrinking of the system's range of application. [23] Close restrictions set on eligibility have excluded from the service the so-called «forgotten class»: that large section of the middle class too affluent to qualify for legal aid but too poor to afford a trial and a lawyer (especially in countries like England where the latter are very expensive).

2.3 Towards a combined model

In the more *advanced* systems, where publicly-funded legal aid has already come to terms with its difficulties, the strategy to resolve the crisis –adopted in several countries of both civil and common law traditions– has been to resort to what is today termed an «articulated» and «pluralistic» response. A response, that is to say, which, with a view to rationalizing demand for legal aid on the one hand, and to curbing public expenditure on the other, [24] seeks institutionally to involve a broad array of actors (although in the majority of cases these are still lawyers) in the delivery of legal aid services to the needy –and also externally to the courts–. Predominant in this involvement strategy is the use of *private* instruments, which, for that matter, is entirely consistent with the ideology of «integrated welfare» and its intent to give private actors a socially active role. [25]

Increasing use is thus made of private insurance arrangements for legal defence. Indeed, insurance schemes were tried as early as the first decades of the last century in a number of continental European systems (including Italy's, with its traditional suspicion of insurance schemes) as a solution that was less integrative than anticipatory of the *judicare* system. [26]

This tendency is also apparent in the recent and widespread legalization of the speculative and conditional fee agreements that belong to the broader category of «no win, no fee contracts». [27] Under these arrangements the lawyer

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23 See Guido Calabresi: «Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class», in Mauro Cappelletti & Bryant Garth (eds.): *Access to Justice: Emerging Issues and Perspectives,* III vol. of the *Florence Access to Justice Project,* Sijthoff and Noordhoff/Giuffrè, Alphen aan den Rijn/Milan, 1979, pp. 169 ss.

24 See for example Paul Pierson: «La nuova politica del welfare state: un'analisi comparata degli interventi restrittivi», *Stato e mercato* No. 46 (1996), pp. 3-45.

25 See Ota de Leonardis: «I welfare mix. Privatismo e sfera pubblica», *Stato e mercato* No. 46 (1996), pp. 51–76.

26 For a survey of these schemes, see N. Trocker: «Patrocinio gratuito», *Digesto delle discipline privatistiche* No. 13 (1995), pp. 288 ss.

27 «No win no fee contracts» divide among speculative, conditional, and contingent fee contracts. The three institutes revolve around the same rule of *an*, because in all cases the lawyer is paid for his services only if he wins the lawsuit, while they differ in respect to the

agrees with the client (except in certain circumstances) to be paid only if he wins the case, and receives a proportion of the pecuniary sum awarded to the client. These contractual forms are especially common in England where, in emulation of the American example and despite some opposition among scholars, [28] they have exploited *market mechanisms* to offset the risk of losing a lawsuit (this being the counterweight to the lawyer's opportunity for higher profit) and rapidly replaced the legal aid services previously provided by the State. Use of this form of *pacta de quota litis* not only brings conspicuous savings for the State budget but also, according to its supporters, has two advantages: first, it enables also the poor (obviously if they have a good chance of winning) to take legal action or defend themselves by drawing on the technical advice of the best lawyers; second, it enables the State, *de iure condendo*, to concentrate its financial and organizational resources on the creation of a *machine* which provides the poor with extra-judicial services of good quality.

But as well as private arrangements, the combined legal aid system is not loath to reprise typically medieval/nineteenth century means based on «private professional charity». Consider in this regard the services provided –and now formalized in the form of *moral duty* by a code of professional conduct– [29] by the «*pro bono* advocates» of the USA, most of whom belong to medium-to-large law firms and provide free legal assistance to the poor. Or consider the «trainee voluntary work» undertaken by American law students as part of so-called clinical programs [30] intended to provide legal defence for those who otherwise could not afford it. [31]

It therefore seems that the modern and more advanced Western legal aid systems are moving towards a pluralist and flexible solution. Yet the assertion that this is the best remedy for the problem of access to justice by the poor –besides the narrow and therefore unsatisfactory definition of «poor» generally adopted– is

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quantum. For more details, see L. Passanante: «*Conditional fee agreements* e accesso alla giustizia in Inghilterra», in Michele Taruffo & Vincenzo Varano (eds): *Diritti fondamentali* e *giustizia civile in Europa,* Giappichelli, Turin, 2002, pp. 139-162.

28 See for instance M. Zander: «Well Anyway, Conditional Fee Should Be a Bonanza for Lawyer?», *New Law Journal* (1995) pp. 920 ss.; Richard O'Dair: «Legal Ethics and Legal Aid: the Great Divorce?», *Current Legal Problems* (1999), pp. 420 ss.

29 See *Model Rules of Professional Conduct: rule 6.1.,* which states, not that a lawyer *must* but rather that he *should* furnish at least 50 hours of *pro bono* service to persons unable to provide for their own legal assistance because they lack the means or an organization to do so.

30 See Deborah L. Rhode: *Ethics in Practice. Lawyers' Roles, Responsibility and Regulation,* Oxford University Press, Oxford, 2000.

31 Commentators are unanimous that, by providing *pro bono* services, the forensic profession fulfils a crucial function in offsetting the inefficiency of US legal aid, which despite its range and flexibility, is officially estimated as being able to satisfy only 30% of demand for legal aid by the poor (see Deborah L. Rhode: «Symposium: the Constitution of Equal Citizenship for a Good Society: Access to Justice»*, Fordham Law Review* No. 69 [2000], pp. 1785 ss.). And this despite the rhetoric that not infrequently surrounds this deontological *aspiration* of present and future lawyers: see, for instance, Deborah M. Weissman, «Law as Largess: Shifting Paradigms of Law for the Poor», *William & Mary Law Review* No. 44 (2002), pp. 737 ss.

susceptible to criticisms at the level of legal policy. It's quite easy to imagine the tenor of these criticisms. First, they express the dissent of those who maintain that the remedying of social inequalities is a typically *public* task (although it's not always very clear what is meant by «public»). This criticism therefore discerns in the «involvement strategy» the risk that the State will shirk its responsibilities and use the new model of welfare (the «integrated» one, that is) as a pretext to transfer social needs into private structures and actors. The second criticism, which closely connects with the first, maintains that combined solutions to the problem of access to justice make the effectiveness of this access depend on market laws and variables; and these, owing to their volatility, are unable to realize one of the most solemn claims of modern constitutionalism: the guaranteeing of jurisdictional protection.

However, no matter how important they may be, it is not these issues that I intend to examine here. Rather, my concern is to highlight and discuss a more general feature, which far from constituting a trend in contemporary legal systems, has instead long been a feature shared by every definition of legal aid. I refer to the centrally important role of defence, as the minimum guarantee for access to justice, and to the consequent value set on the professional figure embodying that role, namely the lawyer. But I refer also to the ideological assumption on which (somewhat reductively) this view seems to be based: that is, the problem of access to courts by the poor may be largely resolved by flanking them with a good lawyer.

3. THE LAWYERS' ROLES

The foregoing survey, in its attempt to give the most thorough picture possible of the main trends in the Western legal tradition with regard to the problem of the poor's access to the courts, has been unable to take account of the numerous studies about the factors responsible for the diversified development of legal aid in the advanced Western countries.

Some of these factors are political and social in nature: for instance, the level of State welfare provision in its different manifestations; [32] or the impact of religion, and in particular, different attitudes towards assisting divorce by virtue of the fact that «family law dominates all legal aid programmes»; [33] or again, the influence of interest groups and the power of bureaucracy. [34] Others relate to the

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32 For examples see the analyses by Erhard Blankenburg: «Comparing Legal Aid Schemes in Europe», *Civil Justice Quarterly* No.11 (1992), pp. 106 ss; Francis Regan *et al.* (eds.): *The Transformation of Legal Aid. Comparative and Historical Studies,* Oxford University Press, Oxford, 1999.

33 Richard L. Abel: «Law without Politics: Legal Aid under Advanced Capitalism», *UCLA Law Review* No. 32 (1985), pp. 474 ss.

34 See for instance, Mel Cousins: «The Politics of Legal Aid: A Solution in Search of a Problem?», *Civil Justice Quarterly* No. 13 (1994), pp. 111 ss.

different traditions of common and civil law, as well as to different proceedings models. [35] But none of them is able to explain on its own, decisively and coherently, the multiform and complex normative dimension.

Yet abstracting from this variety and complexity is the prime purpose of the legal assistance and technical defense provided (for free or otherwise) to the poor by professionals; and as just pointed out, it is a feature shared since its beginnings by all forms of legal aid, in both its contents and purposes. As a consequence of its legal formalization, the institution of legal aid for the poor is apparently so closely conditioned by the presence of the legal profession that, since the 1970s, some Anglo-Saxon sociologists of Law of Marxist orientation have been induced to claim that it is nothing but «a solution in search of a problem» [36] or a «demand-creation» exercised and pressured by private legal professions attempting to stimulate new legal markets in a period of an oversupply of lawyers. It is evident that these opinions reflect a broader critique of modern legal systems that alleges that they reduce *social* problems to *legal* ones, claiming to solve them by recourse to legislation (*per se* «never an impartial forum in the capitalist societies»). But, according to this perspective, legislation, far from producing redistributive effects, inhibits rather than facilitates access to justice for those who don't belong to the ruling class. [37]

Nevertheless, the fact remains that both the institutional debate on reform of the legal aid system and theoretical discussion on the latter's justification have

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35 Hence, in this respect, the particularly close attention paid in England to the problem of access to justice (to which the reform project that gave rise to the *Civil Procedure Rules* 1998, published with the title *Access to Justice. Final Report to the Lord Chancellor on the Civil Justice System in England and Wales,* HMSO, London, 1996, was devoted) could, at least in part, be motivated by the exigency to counteract, by means of the *corrective* instrument of legal aid, certain degenerative aspects of the adversary system on which the English (and North American) civil trial is traditionally founded. This model, in fact, because it functions on the assumption of formal equality between the parties, seems structurally unsuited to take account of the substantial differences between the parties. As stressed, among others, by Taruffo [Michele Taruffo: «Il processo civile di 'civil law' e di 'common law': aspetti fondamentali», *Foro italiano* (2001), pp. 346–360], however, the traditional adversarial/inquisitorial dichotomy should today be revised, also in light of the institutional changes that in the course of the last few decades have attributed to both English and North American judges numerous and decisive powers to regulate and direct the proceeding which undermine the traditional image of the judge as «passive umpire». For an analysis of these changes see, among others, J. A. Jolowicz: «The Woolf Report and the Adversary System», *Civil Journal Quarterly* No. 15 (1996), pp. 198 and for the English context Vicenzo Varano «Verso un nuovo ruolo del giudice in Inghilterra», *Rivista di diritto civile* (2002), pp. 763 ss.

36 For example Abel argued that «legal aid is a social reform that begins with a solution – lawyers– and then looks for a problem it might solve, rather than beginning with the problem – poverty, or oppression, or discrimination, or capitalism– and exploring a solution» (Richard Abel: «The Paradoxes of Legal Aid», in Jeremy Cooper & Rajeev Dhavan [eds.]: *Public Interest Law,* Basil Blackwell, Oxford, 1986).

37 For a critique of this position see Alan Paterson & David Nelken: «Evolution in Legal Services: Practice without Theory», in *Civil Justice Quarterly* No. 3 (1984), pp. 229 ss.

revitalized the figure of the lawyer; and they have done so after centuries of indifference or even outright suspicion shown towards that figure by Western legal, philosophical, and literary culture. [38]

This has not occurred only in the legal systems traditionally oriented to a paternalistic conception to the right to defense, so that the inviolability of the right as enshrined in the constitution also entails that it cannot be renounced (and consequently that a lawyer's professional services are not relinquishable either). [39] Matters do not seem significantly different in those systems (I refer mainly to those belonging to the common law tradition) where this form of institutional dependence on lawyers does not exist, and where predominant instead is an individualistic perspective which, at least in principle, views self-defense as the expression of an individual autonomy intolerant of constraints even when other fundamental rights and guarantees are at stake. [40] At the same time, this trend

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38 An ample and well-documented survey which starts with Plato, passes through Hobbes, and continues until *postmodern* theories of law, testifying to this indifference towards, or distrust in, the professional figure of the lawyer, is provided by Massimo La Torre: *Il giudice, l'avvocato* e *il concetto di diritto,* Rubbettino, Soveria Manelli, 2002.

39 Exemplary in this regard is the Italian legal system, where, moreover, the question of the obligatory nature of defence at least in criminal trials was the subject of animated debate in the 1970s following cases of contestation in trials with a political background (see on this regard Isabel Fanlo Cortés: «Difesa e ruolo del difensore nel processo penale: modelli e ideologie a confronto», in Vincenzo Omaggio (ed.): *Diritto in trasformazione. Questioni di filosofia giuridica,* E.S.I., Naples, 2005, pp. 371-410). When called upon to pronounce on the matter, the Constitutional Court reiterated the inalienable nature of the right to defence (see Corte Cost. 10 ottobre 1979, n. 125, in *Foro italiano*, 1979, I, pp. 2513–2517), thereby confirming a stance widely taken in legal culture. A similar solution was also upheld for civil cases, although in this case the obligation of legal representation may be waived in particular types of litigation: see Luigi Paolo Comoglio: «Procura (diritto processuale civile)», *Enciclopedia del diritto* No. 6 (2000), pp. 1043 ss.; F. Rota: «Il giudice di pace», in Michele Taruffo (ed.), *Le riforme della giustizia civile,* Giappichelli, Torino, 2000, pp. 93 ss.

40 In England, for example, at least in the civil proceedings, the principle obtains that every citizen has an almost unrestricted right to self-representation, without assistance or defence by a lawyer. Until 1999, the *Right to Sue in Person*, indeed, was foreseen by the O. 5 r. 6 of the Rules of Supreme Court then in force. Despite repeal of this provision when the new *Civil Procedure Rules* entered into force, it continued to operate on a par with the principle implicit in the interpretation of a broad series of provisions, most notably those on trial costs (for details see L. Passanante: «La giustizia e il cittadino: processo civile e difesa personale delle parti in Italia e in Inghilterra», in Antonino D'Angelo [ed.]: *Good Morning America,* Giuffrè, Milan, 2003, pp. 307-343 and Richard Clayton, «Public Interest Litigation, Costs and the Role of Legal Aid», *Public Law* [2006], pp. 429 ss.). In certain respects, this explains the widespread phenomenon of so-called «litigants in person», although in many cases this originates less from considered personal choice than from *necessity*, in that the parties do not have access to legal aid and cannot afford a lawyer and are therefore forced to conduct their own defence: see on this the treatment in Joyce Plotnikoff & Richard Woolfson: *The Study of the Services Provided under the Otton Project to Litigants in Person at Citizens Advice Bureau at the Royal Courts of Justice,* 1998 (available online at *www.lcd.gov.uk/research/1998/798es.htm*), and for similar considerations on the disadvantage at which *unrepresented* parties are placed in the USA, Russell Engler: «And Justice for All: Revisiting the Roles of the Judges, Mediators and Clerks», *Fordham Law Review* (1999), pp. 67 ss. Similarly, in the US system, the idea that parties are masters of their own trial strategy and can therefore

towards a *lawyerized* legal aid system hasn't been belied by recent policies introduced in England (not coincidentally in concomitance with cutbacks in the *judicare* legal aid system) in order, it seems, to discourage recourse to lawyers. I refer for example to the providing of on-line resources for *do-it-yourself* legal aid; [41] or to the facilitating of legal action by *litigants in person*; [42] or again to the permission for the parties to adopt bizarre forms of legal representation instead of those usually furnished by a lawyer. [43] The combined system, in fact, is unable to

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dispense with counsel is affirmed in Title 28 of the *Judiciary and Judicial Procedure* USC, § 1654, which expressly states that parties may avail themselves of counsel or conduct their own cases «personally»: for details see Francesca Cuomo Ulloa: «Autodifesa o assenza di difesa? La difesa personale nel processo americano», in Antonino D'Angelo (ed.): *Good Morning America,* cit., pp. 269-288. It should be pointed out, however, that in the USA the right to defense is constitutionally guaranteed only for defendants in criminal prosecutions (Sixth Amendment), and that in the landmark *Gideon* Case of 1963 the Supreme Court ruled that all defendants in criminal trials whose freedom was therefore at stake and could not afford a lawyer had a right to counsel paid by the State. In civil proceedings, however, the right to defense is subject to only negative guarantee in that it is not possible to preclude the party's right to legal representation; apart from in exceptional circumstances, however, corresponding to this right is no positive guarantee in favor of a party unable to afford a lawyer. This at least is the established jurisprudential opinion on the matter since the case of *Lassiter v. Department of Social Service* decided by the Supreme Court 1981, despite the openness shown by the same Court in 1971 (*Boddie v. Connecticut*, 401 U.S. 371) and the lively dissent expressed by legal scholars (see, for instance Geoffrey C. Hazard, Jr.: «Legal Ethics: After Legal Aid is Abolished», *Journal of the Institute for the Study of Legal Ethics* No. 2 [1999], pp. 375 ss.; Deborah L. Rhode: «Symposium: the Constitution of Equal Citizenship for a Good Society: Access to Justice»*, Fordham Law Review* No. 69 [2000], pp. 1785 ss.).

41 Consider for example the experimental on-line service set up by the British government for the settlement of monetary claims whereby claimants and defendants can begin proceedings via Internet without the services of lawyers (see *www.courtservice.gov.uk*). Initiatives of this kind replicate in spirit those introduced by the courts in the United States through the creation of legal aid offices, call centers, and legal forms downloadable on-line (for further details see Margaret B. Flaherty: «How Courts Help you Help Yourself: The Internet and Pro Se Divorce Litigant»*, Family Court Review* No. 40 (2002), pp. 91 ss.

42 The intent of the British legislator to encourage the phenomenon of litigants in person*,* while at the same time attenuating the side effects, is manifest in various ways. Firstly, the judicial reforms of 1999 further simplified the procedure for small claims and raised the value limit (see Michael Zander: *Cases and Materials on the English Legal System,* VIII ed., Cambridge University Press, London, 1999). Pursuing the same purposes are the granting of greater powers to the judge (which in the «small claims track» is most evident in the informality of the procedure: see John Baldwin: «Small Claims Hearings: The Interventionist Role Played by District Judges», *Civil Justice Quarterly* No. 17 [1998], pp. 20 ss.) and the introduction of specific rules on trial costs for the parties who decide to represent themselves personally. Also to be mentioned are the *tribunals* conceived as alternatives to the ordinary courts, especially in disputes between citizens and the public administration, although their inadequacy to the needs of litigants in person has been recognized by government sources themselves (see *Tribunals for Users One System, One Service. Report of the Review of Tribunals by Sir Andrew Legatt,* March 2001, available online at *www.tribunals-review.org.uk*).

43 Consider the two English institutes of the *McKenzie Friend* and the *Lay Representative*, which are inspired by the same rationale of providing the party with an instrument of

do without the technical services of the lawyer. Although its principal concern is to relieve the State of the costs of legal aid, it does not hesitate, as we have seen, to devise alternative sources of technical support for the poor which ultimately depend on the generosity and entrepreneurial spirit of lawyers. Oddly enough, the dictum «*One who is his own lawyer has a fool for a client*» was coined precisely in the United States (and, moreover, by judges of the Supreme Court), [44] and it is in the English-speaking countries that it enjoys wide currency.

It is also quite curious that it is in the cultural context of the 'coordinated' systems, to use the ideal types proposed by Mirjan Damaška [45] (i.e. those systems where the trial machinery is a means for resolving conflicts rather than implementing government policy, and where lawyers may not even appear, and if they do so must rigidly comply with the interests and wishes of the parties), that expression is given to *ethicist* or *perfectionist* conceptions of the lawyer's role. [46]

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representation other than personal defense. The former originated from a jurisprudential case of the 1970s (*McKenzie v. MacKenzie* [1970] 3 All ER 1034, [1970] 3 WLR 472) and is based on the principle that a party who appears personally may ask the judge to permit a relative, friend, or neighbor to assist him or her in court. Under the «lay representative» system, which was instituted by the *Lay Representative (Right of Audience) Order* of 1992, the party may be represented by a trusted person in all small claims cases, transferring to the latter the right to appear in his or her interest. However, this right is restricted to the so-called «right of audience» and does not extend to the so-called «right to conduct litigation»: the *lay representative*, that is to say, may address the judge, call and question witnesses, but does not possess all the powers pertaining to a lawyer (e.g. initiate proceedings or sign documents on behalf of the party).

44 See the decision handed down in *Faretta v. California*, 422 U. S. 806 [1975], p. 852, whereby the Supreme Court declared illegitimate the imposition of defense counsel on the defendant in a criminal prosecution.

45 In his well-known comparative analysis of 1986 (Mirjan Damaška: *The Faces of Justice and State Authority,* Yale University Press, New Haven, 1986), the scholar identified two fundamental types of legal system: «hierarchical» and «coordinated». Whilst the former type largely coincides with the legal systems of continental Europe, the latter share many features with the common law ones. After identifying the main distinction between the two models as the different powers given to the judicial organs, Damaška links these two types of legal system to ideal-typical forms of the State, which in their turn correspond to two types of purpose pursued by the trial. Whereas in the hierarchical systems the role of government (the so-called «active» State) is «to manage the lives of people and steer society» (p. 11) and the function of the trial is to implement a certain policy, in the coordinated systems, where the government (the so-called «reactive» or «liberal» State) seeks to «maintain the social equilibrium and merely provide a framework for social self-management and individual self-definition», the purpose of the trial is to resolve conflicts and to promote individual rights (to tell the truth, Damaška does not draw a complete identification among adversarial system, reactive State, and the «conflict-solving» function of the trial, looking instead for intersections among these ideal-typical categories: Mirjan Damaška: *The Faces of Justice…,* cit., chap. 6). Distinctions such as these obviously also concern the role performed by the lawyer. According to Damaška, whilst in the «policy-implementing» trial the lawyer operates on a par with a functionary in the administration of justice, in the coordinated systems, far from performing «public functions», the lawyer is a mere auxiliary to the party, who is the protagonist of the trial.

46 However, it is possible precisely where, according to Damaška, the lawyer's role is solely to «advance his client's interests only as the latter defines them […] even if [he] himself is not

Such conceptions, that is to say, tend to endorse the idea that the lawyer should not restrict himself to zealously advancing his client's interests alone. He should also, as the incumbent of a *munus publicus*, contribute, like the judge, to fulfillment of *substantial* justice in the case at hand, performing a *public* role which is not necessarily confined to the courtroom.

As already said, it is precisely the debate on the problem of access to justice by the poor, addressed from the standpoint of legal aid, that has provided fertile terrain for the development of these conceptions, especially in the Anglo-Saxon countries (and in the United States in the wake of studies on *Legal Ethics*). [47]

Thus, one of the main criticisms brought against the English reform of the legal aid system (towards the superseding of the *judicare* system) is that it tends to «damage the *political* lawyer's project of empowering the underprivileged client and countering social injustice», [48] thereby annulling one of the main prerogatives of the legal profession. Likewise imbued with ideologies that emphasize the political and social role performed by lawyers is the older, but still current, sociological doctrine of «legal needs». [49] This doctrine attributes the problem of justice for the

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convinced that these arguments constitute the best interpretation of the law» (Mirjan Damaška: *The Faces of Justice…,* cit., p. 142), namely in the cultural and institutional of the «coordinated» system (which closely corresponds to the US trial), that the elaboration of idealizing models of the lawyer's role is accompanied by a critical stance towards the *status quo.*

47 For an early survey of these studies and the theses defended in them see David Luban: *Lawyers and Justice. An Ethical Study,* Princeton University Press, Princeton, NJ, 1988; Deborah L. Rhodes: *Ethics in Practice. Lawyers' Roles, Responsibility and Regulation,* Oxford University Press, Oxford, 2000; Richard O'Dair: *Legal Ethics. Text and Materials,* London, 2001. In a comparative prospective see Angelo Dondi & Geoffrey C. Hazard (eds.): *Legal Ethics: A Comparative Study,* Stanford University Press, Stanford, 2004.

48 Hilary Sommerlad: «"I've lost the plot". An Everyday Story of the "Political" Legal Aid Lawyer», *Journal of Law and Society* (2001), p. 335.

49 The legal needs literature is vast. Among the early, well-known studies were for instance, from the UK, Brian Abel-Smith, Michael Zander & Rosalind Brooke Ross: *Legal Problems and the Citizen,* Heinemann, London, 1973, and from USA, Barbara A. Curran: *The Legal Needs of the Public,* American Bar Foundation, Chicago, 1977. Among recent studies are the Comprehensive Legal Needs Study (CLNS), conducted by the American Bar Association and from the UK, Alexy Buck, Pascoe Pleasence, and Nigel J. Balmer: «Do Citizens Know How to Deal with Legal Issues?», *Journal of Social Policy* No. 37 (2008). As well as for its ideological conditionings, the doctrine of legal needs has often been criticized for its methodological and conceptual weakness. In particular, as regards the latter, the notion itself of «legal need» seems vague and unsuited to achieving the goal which the studies on legal needs pursue, namely that of improving our general understanding of how law actually functions in a society (J. Griffiths: «A Comment on Research into "Legal Needs"», in Erhard Blankenburg (ed.): *Innovations in the Legal Services,* Gunn & Hain, Cambridge, 1980). As emphasized by various authors, in fact, on the one hand the (normative) concept of «need» involves value judgements rather than empirical assessments, while on the other the adjective «legal» tends to ignore the fact that, as Pauline Morris *et al.* (eds.): *Social Needs and Legal Action,* Martin Robertson, London, 1973 put it, «need is socially defined […] and legal need cannot be viewed in any absolute sense, nor can it be isolated from a more general idea of social need». For an important contribution to the theme, in the sense that despite its theoretical limitations the doctrine of legal needs can nevertheless provide a foundation for

poor largely to the fact that they are unaware of their legal needs (as in «unmet legal needs») and proposes as a solution that lawyers should be invested with the twofold task (almost *missionary* in nature) of satisfying those needs and *enlightenedly* encouraging the poor to «mobilize the law» in a *reconciliatory*, so to speak, relationship with the institutions. [50]

In more general terms, the *ethicist* conceptions as defined above, which echo the figure of the «lawyer-Statesman» theorized by Anthony Kronman, [51] today serve to legitimate a certain model of legal aid, and in particular the *judicare* or State-funded system. Especially those who, by adopting a consequentialist approach rather than making appeal to the principles of equal justice (the so-called «access argument»), [52] have sought to argue that the State should invest in legal aid rather than in other benefits (health care, for example, or housing for the poor) have been forced to demonstrate that providing legal services to the poor is a cost-effective way to improve their situation. Performing a major rhetorical-argument function in the proof of this assertion has been, in many cases, the important political, social, and broadly moral task undertaken (or which should be undertaken) by lawyers, both within and outside the courts. [53]

Thus, not only have conceptions of this kind served to legitimate a normative model which, as we have seen, largely relies (and not only in the *judicare* version) on the legal profession, but in their endeavor to show that legal aid is important because it provides the poor with material and psychological benefits (in large part due to the action of lawyers), [54] they have also furnished a response to

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future legal aid policy development, see Jon Johnsen: «Studies of Legal Needs and Legal Aid in a Market Context», in Francis Regan *et al.* (eds): *The Transformation of Legal Aid*…, cit.

50 Not by chance, the doctrine in question is closely connected with the so-called «neighborhood law firms (NLF) for the poor». Specialized legal assistance centers located in lower-class neighborhoods and formed of publicly-salaried lawyers, these organizations arose first in the USA during the War on Poverty Program of 1965 and then spread mainly to Australia, Belgium, Canada, England, and the Netherlands on the initiative of *activist* lawyers. If, as the proponents of the doctrine of legal needs maintain, «the lack of economic resources –the unequal opportunity to retain a lawyer– is not the principal barrier to access to justice for poor» (Jerome Carlin & Jan Howard: *Civil Justice and the Poor,* Russell Sage Foundation, New York, 1965) but a decisive role is also played by a lack of information and the difficulty of the poor in contacting a private lawyer, then the NFL represent an excellent solution.

51 See Anthony T. Kronman: *The Lost Lawyer,* Harvard University Press, Cambridge, Ma., 1993.

52 Cf. for example, Mauro Cappelletti & Bryant Garth: «Access to Justice: The Worldwide Movement to Make Rights Effective», now in Alan Paterson & Tamara Goriely (eds.): *Resourcing Civil Justice,* cit., pp. 91-106; Legal Action Group: «The Scope of Legal Service» (1982), now in Alan Paterson & Tamara Goriely (eds.): *Resourcing Civil Justice,* cit., pp. 74-81.

53 See for instance Edgar S. Cahn & Jean C. Cahn: «The War on Poverty: A Civilian Perspective», *Yale Law Journal* No. 73 (1964), p. 1317.

54 The Cahns (*vid supra*) argue for example that lawyers working in the «neighborhood law firms». (see note 52) could play a crucial role in championing the views of the poor. People could take their problems to lawyers without the fear of stigma. Furthermore, using their legal knowledge and skills in advocacy, the lawyers could express the opinions of their clients to a wide range of institutions in a wide variety of ways.

those who, although they may endorse the idea that the State should concern itself with legal assistance for the poor, have contested the instruments normally used, asking «Why lawyers rather than cash?». [55]

However, as we have seen in the case of England, the model which *moralizing* proposals with regard to the lawyer's role tend to advocate –namely the one based on State-funded legal aid– has not stood up to the facts. Moreover, aside from any value judgements on this model, the *ethicist* conceptions *in re ipsa* considered –besides imposing roles and responsibilities on lawyers which should instead pertain to other actors– tend to undermine that *partiality* instrumental to the principle of defense which, as also Giovanni Tarello reminds us, is the distinctive feature of the lawyer's function (mainly, but not only, the criminal lawyer). [56] Stated otherwise, this is the «moral immorality» (the oxymoron with which St. Peppert has efficaciously summed up the essentially ambiguous role of counsel) [57] which makes zealous partisan advocacy essential for accomplishment of what the trial claims to represent: to wit, as Fuller and Randall put it, «a public trial of the facts and issues». [58]

Above all, however, when considered in the light of the debate on the problem of access to justice, there is a risk that the political and social role of the «lawyers of the poor» may distract that debate's attention from an important consideration: access to defense is, to use an apt Kafkaesque image, only «the first door» through which the poor in search of justice must pass; it is certainly not the only one, nor is it always the most narrow of them.

First and foremost, it appears rather illusory, if not mystifying, the idea that the presence of lawyers in the proceedings is sufficient to guarantee equality among the parties. Such an idea, which Auerbach critically traces back to the «morality» of the adversary system, [59] seems in fact to ignore the market rules which dominate the lawyer-client relationship and the fact that lawyers can be, and are in fact, unequal in preparation and ability in the conduct of defense, with the

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55 See Richard L. Abel: «Law without Politics: Legal Aid under Advanced Capitalism», *UCLA Law Review* No. 32 (1985), pp. 474 ss.

56 See Giovanni Tarello: «Due interventi in tema di deontologia», in *Materiali per una storia della cultura giuridica*, No. 12 (1982), pp. 207-218. Again with regard to the Italian legal-philosophical literature, a position rather different from Tarello's has been taken up by Luigi Lombardi Vallauri: *Corso di filosofia del diritto,* Cedam, Padova 1981, p. 625, who invests the lawyer with pedagogical and *therapeutic* functions by dint of which, rather than acting as defense in the trial stage (pathological), he should perform the role of *peace-maker*, as a sort of *pre-judge* concerned to prevent rather than encourage conflict between the parties. A highly moralizing conception of the lawyer as a *pacifier* and *reconciler* is also put forward by Lombardi Vallauri's pupil, Giovanni Cosi (see Giovanni Cosi: *La responsabilità del giurista. Etica e professione legale,* Giappichelli, Turin, 1998).

57 See Stephen L. Peppert: «The Lawyer's Amoral Ethical Role: A Defence, a Problem and Some Possibilities», *American Bar Foundation Research Journal* (1986), pp. 613 ss.

58 See Lon L. Fuller & John D. Randall: «Professional Responsibility: Report of the Joint Conference of the ABA AALS», *American Bar Association Journal* No. 44 (1958), p. 161.

59 Jerold S. Auerbach: *Unequal Justice. Lawyers on Social Change,* New York, 1976, p. 280.

obvious consequence that it is the *stronger* party on the economic level that assures itself of the ablest lawyers, while the weaker party is forced, in general, to content itself with professional services of a lower level.

Last but not least, the shortcoming of the normative solution offered in the form of legal aid is that it has concentrated (at least to date and with some important exceptions) almost exclusively on assistance and technical defence [60] without being concerned to explore alternative or integrative forms of *access to justice* [61] –ones which are not only practicable for those in straitened economic circumstances but also do not entail, in the name of «deformalization» of justice and its efficiency, any diminishment in the guarantees afforded to the underprivileged. [62]

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60 And mostly limited to technical assistance and defense in court cases, given that in many continental legal systems the problem of legal advice and extra-judicial assistance for the poor has remained not only unsolved but also largely neglected. See the essays collected by Adrian A. S. Zuckerman (ed.): *Civil Justice in Crisis,* Oxford University Press, Oxford, 1999.

61 It should be pointed out, however, that alternative or integrative forms of access to justice (above all simplified, rapid, and cheap procedures for small claims cases and the creation of non-judicial conciliation mechanisms for civil cases or reparatory mechanisms in criminal ones) correspond to a need that has been perceived for a long time and had their first applicatory experience in the United States where, already in 1924, the Conference of Delegates of the American Bar Association greeted the informal method of resolution of controversies practised in the Small Claims Courts as one of the solutions more suitable to the problem of access to justice by the poor: cf. R. H. Smith: «Report of the Committee on Small Claims and Conciliation of the ABA», *New York Legal Aid Review* No. 22 (1924). Beginning in the 1970s, and closely related to the idea of a *crisis* in the legal-official judicial system, the expansion of methods of *informal justice* became the declared objective of the movement for the access to justice headed by Cappelletti. To this subject, almost the entire volume II of the already-cited *Florence Access to Justice Project* (see note 17) is in fact dedicated. Along the same lines, on the level of practical experimentation, a conception of the protection of rights less exasperatingly *procedural*, both in the criminal sphere and in the civil one, seems to gain ground, along the path of the Anglo-Saxon example, in different countries, with results often questionable, in particular on the level of the guarantees afforded to the weaker subjects.

62 As is well known, the risk inherent in alternative forms of access to justice is that they may give rise to situations in which the deciding body, in the absence of the guarantees typical of courts, is more vulnerable to pressures and interference, especially in the case of economic-social disparity between the parties. Similarly, as already noted by Robert H. Mnookin & Lewis Kornhauser: «Bargaining in the Shadow of the Law: the Case of Divorce», *The Yale Law Journal* No. 88 (1979), pp. 950-997, in relation to familiar cases, it is not said that for the sole fact of coming to an *informal* agreement social inequalities, personally and economically existing between the parties, do not influence the determination of such an agreement, which ends in favoring the *stronger*. It is really regarding such aspects, moreover, that conspicuous criticisms point to the acclaimed methods of informal justice and to the ideology it is tinged with.

For a general picture of such criticisms cfr. the two volumes edited by Richard L. Abel (ed.): *The Politics of Informal Justice,* Academic Press, New York, 1982. It is evident, however, that the inadequacy of the outcomes often obtained by the movement towards a greater *informality* and the inconveniences tied to it are not a sufficient argument to disparage the search for mechanisms which, in the words of Abel (by the way, one of the more passionate detractors of informal justice), tend «to offer equal access to the many rather than unequal access to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather

than limiting authority to professionals, that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form» (see Richard L. Abel: *The Politics of Informal Justice,* cit., p. 310 and also on this point Giovanni Cosi: *La responsabilità del giurista…*, cit., pp. 335-372. For a comparative view on mechanisms of alternative dispute resolution see Vincenzo Varano [ed.]: *L'altra giustizia. I metodi alternativi di soluzione delle controversie nel diritto comparato,* Giuffrè, Milan, 2007).