



Guide to legal aid for
trans people in Europe

Mari-Liis Sepper

Claim Your Rights!

Guide to legal aid for trans people in Europe

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While this guide aims to provide information regarding access to legal aid within different European frameworks, it is strongly recommended that you seek professional legal advice in your country before taking legal action in specific cases.

The sample cases and names used in this guide are fictitious. No identification with actual people or cases is intended or should be inferred.

This guide has been created with the greatest care, but it does not claim to be complete. Please send feedback and suggestions for amendments to tgeu@tgeu.org.

Transgender Europe, November 2017

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Contents

Summary	5
Legal aid in criminal cases	7
Sample Case: police roundups of trans women	9
Legal aid in civil cases	14
Sample Case: gender identity discrimination in insurance	15
Legal aid in administrative cases	18
Sample Case: non-binary person seeking asylum	19
Example Country Information	22
Italy	22
Turkey	26
Further reading	29
Legal terms explained	31

Summary

What is legal aid?

Legal aid allows people who have little income to meet the costs of hiring a lawyer or of a court case. It facilitates access to basic rights, either to defend oneself in court against the accusation of a crime (**criminal proceeding**) or to bring a claim against another person (**civil proceeding**). It may also help to challenge a decision of a public authority (**administrative proceeding**).

Legal aid can take various forms, including support for the costs of a lawyer, providing access to legal documentation, or free legal counselling.

In the most recent European Union law, legal aid is defined as a state support enabling people to exercise the right of access to a lawyer.



Do I have a right to legal aid?

The right to legal aid is provided in Article 6 of the European Convention on Human Rights (“ECHR”), Article 47 of the Charter of Fundamental Rights of the European Union (“the Charter”), in a number of European Union (“EU”) directives, such as Directive 2016/1919, and in various other European law documents.

In addition, each European country has its own laws on how and under which circumstances legal aid is provided. These laws may vary significantly from one country to another.

How is legal aid provided?

Every country has its own procedures and rules regarding how legal aid is provided. Usually, a person seeking legal aid must file an application at the court or the Bar (Lawyers) Association.

What is a financial test?

Also known as **means test**, refers to income levels used to determine whether a person’s circumstances justify granting legal aid. Usually, the person seeking legal aid must prove they have insufficient income to qualify for legal aid.

Legal aid in criminal cases

The European Convention on Human Rights and EU law both have standards for legal aid in criminal cases. EU Member States must ensure that all suspects and accused people, regardless of whether they are detained or not, have the right to access a lawyer without delay (Directive 2013/48/EU). Access to a lawyer must be provided, at minimum, before police questioning and evidence gathering. According to Directive 2016/1919, which must be transposed to national legal systems by May 2019, Member States must provide legal aid to people who lack sufficient resources to pay for the assistance of a lawyer when the **interests of justice** so require. States can use **the merits test** and the means test when deciding whether they will cover the lawyer fees. Applying the merits test means looking at three aspects of the criminal case and determining whether the interests of justice require the provision of legal aid. These are:

- the **seriousness** of the criminal offence;
- the **complexity** of the case; and
- the **severity of the punishment** at stake.

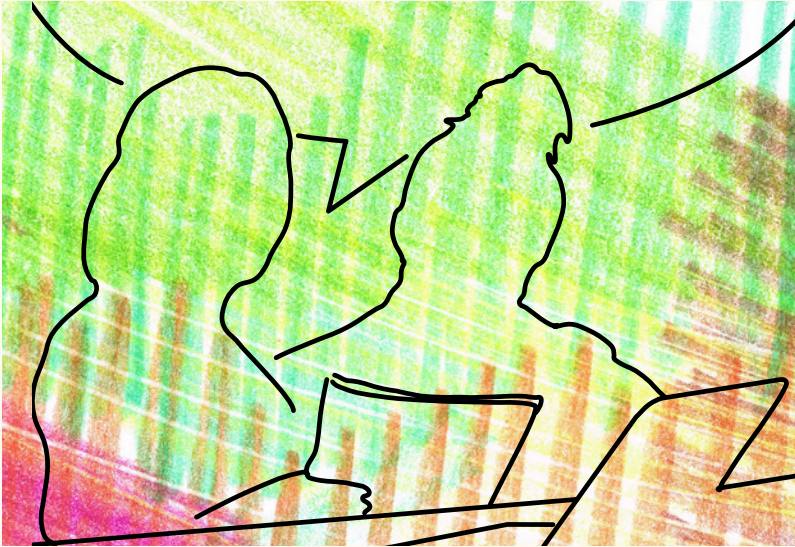


In any case, the merits test is met where a suspect or an accused person is brought before a court to decide on their detention and during detention.

Also, under the ECHR, in addition to the financial test, states may apply the merits test to decide whether a person should have legal aid at the cost of the state. Similarly, this takes three factors into account, any of which alone can require the provision of free legal aid:

- the seriousness of the offence and the severity of the potential sentence;
- the complexity of the case; and
- the defendant's social and personal situation.

Sample Case: police roundups of trans women



Eleni, a Greek trans woman, is on holiday in Turkey. She is walking down the street when two police officers approach her for an ID check. She is taken to a police station for further questioning for alleged loitering in a public place. It is known that in Turkey public nuisance laws are used by police as an excuse to target trans women and sex workers.

What are Eleni's options to access legal aid in the early stages of a possible criminal procedure?

Which laws apply?

Although Greece is an EU Member State, Turkey is not. Because Eleni is currently on holiday in Turkey, Turkish law will apply.

Turkey is a signatory to the European Convention on Human Rights. Therefore, it is required to provide free legal aid. Because this is a criminal case, Turkey must provide Eleni with legal aid under Article 6(3)(c) of the Convention, subject to two conditions:

- Eleni does not have sufficient means to pay for legal assistance, and
- it is in the “interests of justice” to provide Eleni with free legal aid.

If national law offers legal aid in more generous terms than the Convention, then legal aid must be provided according to domestic law.

How to apply for free legal aid?

Usually, the application is filed with the court or the Bar (Lawyers) Association, depending on the country. In Turkey, Eleni must file an application with one of the regional Bar (Lawyers) Associations or the court where the case will be heard.

What income level allows a right to free legal aid?

Eleni must prove she has insufficient income to pay for a lawyer. The national authorities will decide on providing aid according to the set income levels.

What does “interests of justice” mean in Eleni’s case?

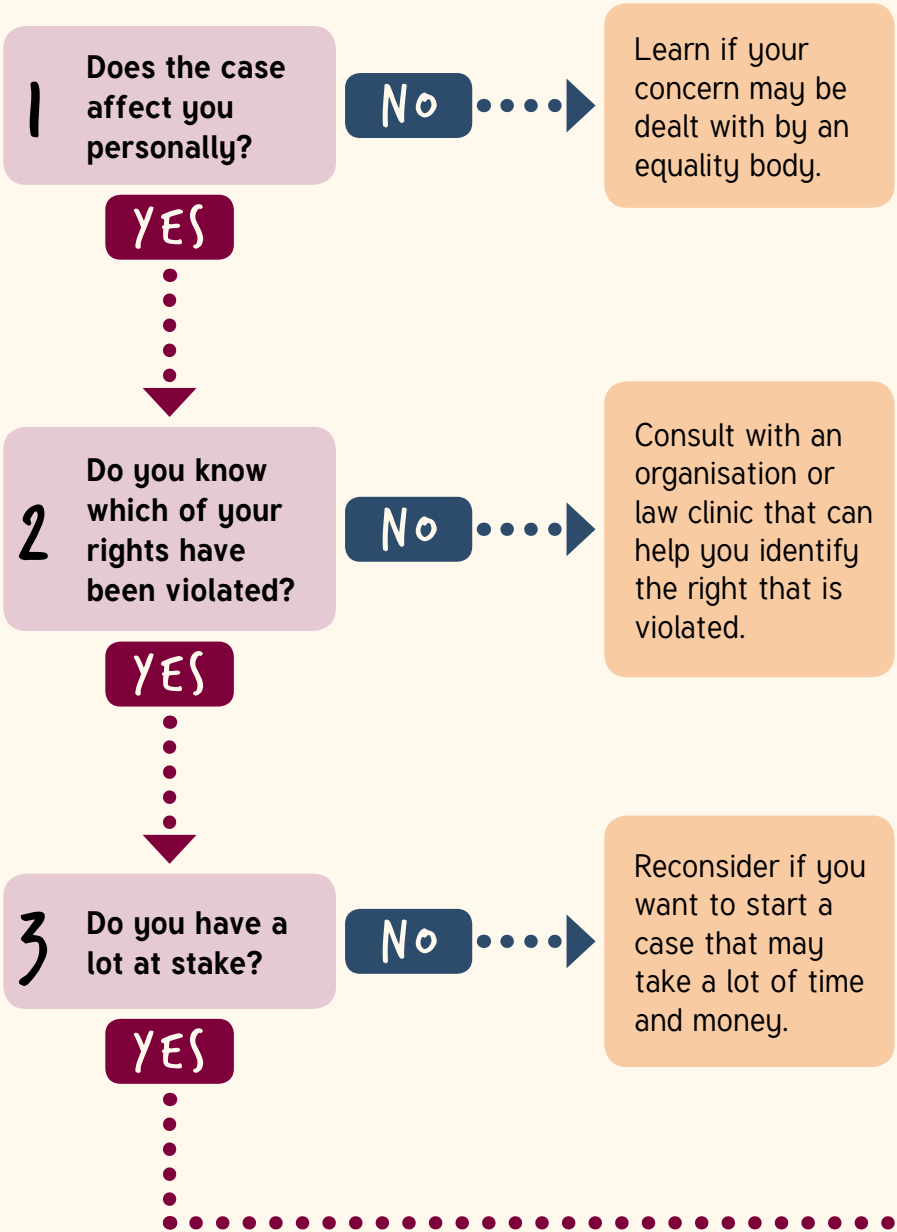
If Eleni may face a prison sentence, if convicted, the punishment may be considered serious. She is also in a foreign country, not knowing local laws or speaking the language. Therefore, she should have access to a lawyer from the very start of the criminal proceedings.

If a case similar to Eleni’s would take place in an EU Member State, the detained person without sufficient income would be entitled to access legal aid without undue delay and, at the latest, before questioning by the police.

What if the authorities block Eleni’s access to legal aid?

Usually, countries implement the European Convention on Human Rights according to the domestic law in force. If Eleni believes that Turkey did not fulfil its obligations, she could file a complaint at a Turkish court and eventually bring a claim against Turkey in the European Court of Human Rights in Strasbourg.

Can you get free legal aid?



4 Is your case complicated?
(for example, lawyer's assistance is necessary)

No

You may consider representing yourself.

YES

5 Do you lack the ability to exercise your rights?
(for example, little knowledge of law, language barrier)

No

Consider consulting with a lawyer and/or representing yourself.

YES

6 Do you have enough money to pay a lawyer?

YES

You may have to pay the lawyer's fee yourself.

No

You may have a good chance to get legal aid

Legal aid in civil cases

European legal instruments do not oblige states to make legal aid available in all situations. The European Court of Human Rights has interpreted the right to a fair trial as including the right to free legal assistance where applicants do not have the financial resources to hire their own lawyer. In determining whether the applicant meets the financial criteria for civil legal aid, the Court follows the same approach as the means test for criminal cases described above.

The Court has made clear that the Convention compels the state to provide legal assistance in civil cases where such assistance is **necessary** for an applicant to have **effective access** to court.

To assess if legal assistance is necessary, the Court considers the following factors:

- the **complexity** of the case;
- the importance of **what is at risk** for the applicant;
- the **applicant's ability** to effectively exercise their right of access to court; and
- the existence of a **law** requiring legal representation.



Sample Case: gender identity discrimination in insurance



Klaus is a German trans man. He applied for life insurance with his niece being the beneficiary. In his application, he concealed his trans-related health status (hormonal treatment and mastectomy). He did this because he did not want to reveal his trans identity to his bank adviser, who was also adviser in all other financial matters. After having signed the application, he learned that as he had withheld information regarding his gender identity in the application, the insurance company had the right to decline payment in the case of an incident, even if the incident would be unrelated to him being trans.

He is planning to challenge the discriminatory clause in the insurance contract. Klaus' monthly income is €1000 and he cannot afford a lawyer. What are his possibilities in accessing legal aid?

Which laws apply?

Germany is an EU Member State, and therefore must provide free legal aid under Article 47 of the Charter with regard to rights guaranteed by EU law.

The Court of Justice of the European Union has interpreted discrimination on grounds of sex to apply to people who have undergone, are undergoing, or plan to undergo gender reassignment treatment. Therefore, Klaus could bring a claim against the insurance company on the basis that it breached its obligations under Directive 2004/113/EC, implementing the principle of equal treatment between men and women in access to, and the supply of, goods and services.

Germany is also a signatory to the European Convention on Human Rights, with a similar obligation. Because this is a civil case, Germany must provide Klaus with legal aid under Article 6(1) of the ECHR, subject to all three following conditions (financial and merits test):

- Klaus' claim is genuine and serious and he is personally affected as a direct consequence of the violation of the right;
- Klaus does not have sufficient resources to pay for his own legal assistance, because his income is low; and
- the legal assistance is necessary for Klaus to have effective access to the courts.

How to apply for legal aid?

In Germany, the application for legal aid must be submitted to the trial court.

What if the authorities block Klaus' access to legal aid?

Countries implement the European Convention on Human Rights according to their domestic law in force. If Klaus finds that Germany did not fulfil its obligations under the ECHR, he could bring a claim against Germany in the European Court of Human Rights in Strasbourg after exhausting all available domestic legal remedies.

Legal aid in administrative cases

Administrative law defines the organisation and powers of government bodies. Depending on the country, administrative disputes may arise from laws relating to public order, foreign nationals and asylum, registration of civil status, name and family matters, building rules, traffic, municipal administrative organisation, subsidies, access to public institutions and public welfare, protection of the environment, nuisance caused by public facilities, and civil service matters, among others. In these disputes, almost always one of the parties is a public authority.



Sample Case: non-binary person seeking asylum



Atlas is a non-binary person (using pronouns *they* and *them*) from Egypt who seeks asylum in Bulgaria. In the asylum process, the authorities do not recognise their gender identity or believe that they are trans unless they produce evidence of hormonal therapy, having had surgery, or a psychiatric confirmation that they want to do so. The authorities do not support their transitioning while waiting for refugee status.

How could they access legal aid to defend their rights?

Which laws apply?

Bulgaria is an EU Member State and has also ratified the European Convention on Human Rights.

Article 6 of the Convention guarantees free legal assistance only in the determination of civil rights or obligations, or any criminal charge. It does not specifically guarantee a right to legal aid in administrative law cases. This has prevented the application of the ECHR in asylum cases as they do not involve the determination of a civil right or an obligation, but are considered an administrative case. Administrative matters that the Strasbourg Court has specifically excluded from the scope of Article 6(1) include cases concerning granting of asylum. This means Atlas has no right to demand legal aid under the ECHR.

However, under EU law (Article 47 of the Charter of Fundamental Rights), the right to legal aid does apply to asylum and immigration cases and there are other EU legal instruments that specifically provide rights for an asylum seeker, such as the Asylum Procedures Directive (2013/32/EU). This directive requires Member States to ensure free legal assistance and representation when requested in the appeals procedure. The appeals procedure is where the applicant may challenge, among others, the decision that finds their application unfounded in relation to refugee status or which withdraws the international protection granted.

Which conditions apply to granting legal aid in Atlas' case?

According to EU law, Bulgaria may require that certain conditions be fulfilled, such as lack of sufficient resources or that assistance is provided by legal advisers specifically assigned by Bulgarian law to assist and represent applicants. Bulgaria may also require that Atlas is in the country to qualify for legal assistance.

In 2013, the Bulgarian Law on Legal Aid introduced mandatory legal aid for asylum seekers at all stages of the status determination procedure, paid for by the state.

How to apply for legal assistance?

According to Bulgarian law, asylum seekers have the right to request the appointment of a legal aid lawyer from the moment of registration of their asylum application.

What if authorities fail to provide legal assistance?

Public authorities in EU Member States have the main responsibility for the application of EU law. If Atlas wants to challenge the failure of the authorities to provide legal aid, they would have to turn to the local court. Only local courts can solve the issue for Atlas and award compensation for damages.

Atlas can lodge a complaint with the European Commission for the breach of EU law by a Member State. The infringement procedure is set up to hold Member States accountable for their obligations under EU law. The Commission has 12 months to assess the complaint, but has no obligation to start the infringement procedure.

Example Country Information

ITALY



Is legal aid available?

In Italy, legal aid is called “advocacy in court paid by the state” (*patrocinio a spese dello Stato*).

Who is eligible for it?

Anyone who has insufficient income is entitled to legal aid. An estimate of more than half of the legal gender recognition cases in Italy are decided with legal aid. Legal aid is available to Italian citizens, but also to foreign nationals residing in Italy and stateless people (*apolidi*), as well as to non-profit organisations or associations not involved in commercial activities.

What is the criteria to be eligible for legal aid?

If living alone, the person must have a yearly taxable income of not more than approximately € 11,500, in their latest tax return (this was updated in August 2015 and is adjusted regularly by the Ministry of Justice, taking into account variations in the Italian National Statistics (*ISTAT*) consumer price index).

Where can you file the application for legal aid?

In a case before a criminal court:

- § to the Justice's Record office;
- § to the judge of the hearing;
- § to the prison's director (if the applicant is in prison); or
- § to a police officer (if the applicant is under detention at home or in hospital).

In a case before other courts, to the competent Bar (Lawyers) Association.

In Italy, the legal aid request is often drafted by a lawyer.

What expenses are covered?

When someone is entitled to legal aid, the state pays for:

1. lawyer fees and expenses;
2. costs related to medical experts appointed by the judge and those chosen by the beneficiary;
3. travel costs and expenses incurred by judges, officials, and judicial officers for performing their duties outside the court;
4. travel costs and expenses incurred by witnesses, court officials, and expert witnesses when performing their duties;
5. costs of publishing any notice regarding the judge's ruling; and
6. costs of official notification.

Is there freedom to choose a lawyer?

There is limited freedom to choose a lawyer. Once the applicant has been granted legal aid, they will be able to choose their attorney from a special list of legal aid lawyers, prepared by, and available at the competent Bar (Lawyers) Association (where the trial is taking place).

Further information (in Italian)

Italian Ministry of Justice:
https://www.giustizia.it/giustizia/it/mg_3_7_2.page

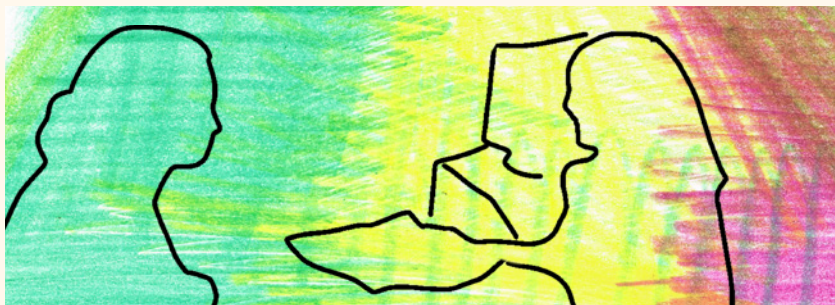
Italian National Council of the Bar (Consiglio Nazionale Forense):

<http://www.consiglionazionaleforense.it/patrocinio-a-spese-dello-stato>

Presidential Decree No. 115, 30 May 2002 (Testo Unico in materia di spese di giustizia):

<http://www.altalex.com/documents/news/2014/09/10/patrocinio-a-spese-dello-stato>

TURKEY



Is legal aid available?

People who are unable to pay financial costs of filing a legal case are entitled to legal aid (*Adli Yardım*) in all civil matters, including the legal gender recognition procedure. This means that the person who has been granted legal aid does not have to pay for legal advice or the legal representation fee.

Who is eligible for it?

The Civil Procedure Law and the Legal Representative Law ensure that an eligible person shall receive legal aid for all court costs (*Dava Harcları*) and legal fees (*Vekalet Ucreti*) without paying anything extra to the lawyer assigned by the local Bar (Lawyers) Association.

What is the criteria to be eligible for legal aid?

The applicant is requested to provide a document (*Fakirlik Belgesi*) issued by the head of their neighbourhood (*Muhtar*) proving that they lack financial resources to pay for legal assistance. They are also requested to sign a document confirming that the information provided on their financial status is correct (Article 334 of the Civil Procedure Law).

Where can you file the application for legal aid?

The application for legal aid is filed at the local court, higher courts, or the Constitutional Court at any stage of the civil proceeding. While the application can be informal or even made verbally at the court, a specific form must be used that includes the person's financial situation. The local court is responsible for assisting people by providing necessary information and referring them to the Bar (Lawyers) Association. Every local Bar Association has an office responsible for legal aid applications.

What expenses are covered?

Legal aid covers court costs, lawyer fees, and costs for court-ordered expertise in the case of legal gender recognition. However, legal aid does not cover any costs the person may have to pay to the opposing party, particularly their lawyer fees in the event of losing the case.

Is there freedom to choose a lawyer?

No. The lawyer is assigned by a local Bar (Lawyers) Association through an automated system. Only lawyers registered in the system are authorised to provide legal assistance.

Further information (in Turkish)

Detailed explanation of the legal aid system:

<http://www.barobirlik.org.tr/Detay.aspx?ID=14780&Tip=Haber>

Declaration about the personal and financial situation:

<http://www.hukukitavsiyeler.com/2015/03/13/adli-yardim-nedir-adli-yardimdan-nasil-faydalanilir/>

Further reading

Access to legal aid and a number of country information sheets (including Czech Republic, England and Wales, Estonia, France, Germany, Lithuania, Sweden, among others) with national guidelines for the provision of legal aid:

<https://tgeu.org/claimrights>

The European e-justice portal in 23 languages:

<https://e-justice.europa.eu>

European Judicial Network in civil and commercial matters webpage on legal aid in a selection of EU Member States:

http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm

European Court of Human Rights, “Guide on Article 6 of the European Convention on Human Rights”, updated in 2017:

http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

European Union Agency for Fundamental Rights, “Handbook on European law relating to access to justice”, 2016:

<http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>

The Council of Europe and the Ministry of Justice of Russia, “Free Civil Legal Aid Decision-Making Tool”, 2017:

<https://www.coe.int/en/web/moscow/-/the-ministry-of-justice-of-russia-publishes-free-civil-legal-aid-decision-making-tool->

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<https://www.opensocietyfoundations.org/briefing-papers/legal-aid-europe-minimum-requirements-under-international-law>

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<http://tgeu.org/wp-content/uploads/2015/07/TGEUs-Activists-Guide-on-Trans-Peoples-Rights-under-EU-Law.pdf>

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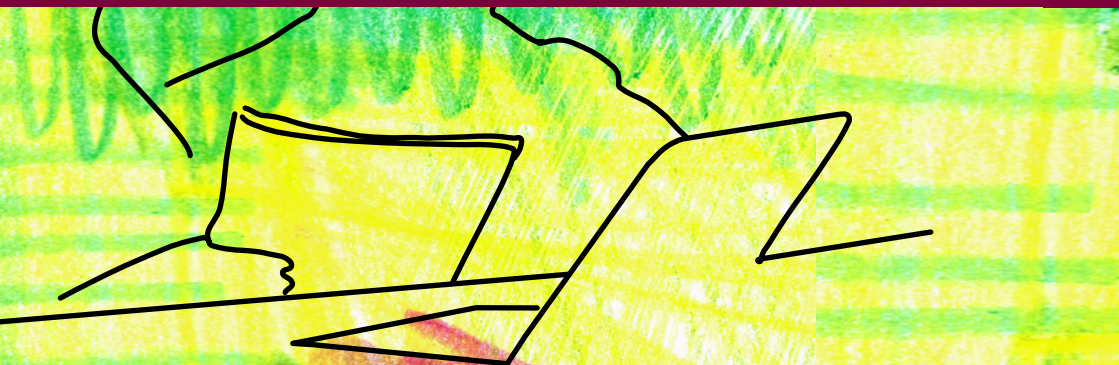
<http://tgeu.org/wp-content/uploads/2015/07/TGEUs-Know-your-Rights-Guide-for-Trans-People-in-the-EU.pdf>

Legal terms explained

Civil case or proceeding is where an individual (or an entity, for example, a company) brings a claim against another individual or private entity to a court for a legal decision on a particular matter. These matters can include discrimination, personal injury, divorce, property disputes, among others. In civil proceedings, the claimant (also called applicant or plaintiff) files a suit in court, and usually must demonstrate with evidence that they have a valid claim.

Criminal case or proceeding is where the state charges, arrests, and prosecutes an individual for a violation of criminal law. Criminal proceedings begin with an investigation where there is reason to believe that a crime has been committed. Police will later charge a suspect, and the case may progress through various stages, sometimes ending in a trial, where the accused person will defend themselves against the charge of committing a crime.

Administrative case or proceeding provides a possibility for an individual to protect their rights against public authorities and hold the authority accountable for the legality of its acts and decisions. In these disputes, one of the parties is always the state.



Legal aid allows access to basic rights.

It can take many forms, including support for the costs of a lawyer, access to legal documentation or free legal counselling.

This guide explains who is eligible for free legal aid.

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