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Justice for the Rich: Have Changes to the Way Criminal Legal Aid is Awarded Undermined Access to Justice?

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Abstract

This article explores the effect that austerity-oriented public policy has had on access to justice in England and Wales, specifically in regard to the way in which legal aid is administered in criminal cases following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The purpose of this paper is to explore the view, now, that only those with the means to fund their own legal representation are recipients of 'true' justice. While others, who would have previously relied on legal aid to pay for representation, are now having to represent themselves in court.

Keywords

Access to Justice, Human Rights, Legal Aid

The legal principle of access to justice is an ancient and unerring one; its origins can be traced as far back as 1215 in Magna Carta which says: 'To no one will we sell, to no one deny or delay right or justice'.¹ This has been further built upon by the European Convention on Human Rights ('ECHR'). Article 6(3)(c) of which provides that:

'[every person has the right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.²

It is clear that the idea of access to justice is concretely enshrined into both the public conscience and the laws which regulate society. It is therefore inevitable that any attempt to interfere with this fundamental right is to be met with a great deal of criticism.

Legal aid in England and Wales has changed significantly since its origins in the late-nineteenth century. Following the recommendations of the 1944 Rushcliffe Committee, the Labour Government in 1948 stated that legislation would be introduced:

'to provide legal advice for those of slender means and resources, so that no one would be financially unable to prosecute a just and reasonable claim or defend a legal right; and to allow counsel and solicitors to be remunerated for their services'.³

So followed the Legal Aid and Advice Act 1949, implemented by the social welfare driven, post-war Atlee government ensuring those of 'small or moderate means' were provided with free legal representation in all courts and tribunals. Additionally, if expenditure exceeded budget, a supplementary grant was obtained.⁴ The Legal Aid and Advice Act 1949 has subsequently been replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO 2012') as the principle piece of legislation which governs the administration of legal funding in England and Wales. LASPO 2012 introduced a raft of changes to the way in which eligibility for legal aid is assessed.

Following LASPO 2012, the Legal Aid Agency ('LAA') assumed responsibility for administering criminal legal aid. 'The LAA provides funding for defendants either by entering into a 'standard

¹ Godfrey Rupert Carless Davis (tr), *Magna Carta* (British Museum 1963) cl 40.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 6(3)(c).

³ Henry Brooke, *The History of Legal Aid 1945-2010* (Bach Commission on Access to Justice 2017) 5.

⁴ *Ibid* 5-6.

crime contract' with solicitors in private practice, or by providing salaried public defenders in certain parts of the country' LASPO 2012 subsequently introduced two eligibility tests for granting legal aid. The first is the interests of justice test, i.e. 'when the interests of justice so require'. Factors such as whether the individual would be capable of representing himself, or whether the individual would suffer a loss of his livelihood are taken into account. The second test is means-based; applicants are required to complete a form based around financial stability, and if their disposable income exceeds £3,398 annually, they will not qualify for criminal legal aid.⁵ Condemnation of LASPO 2012 came following the case of Charlie Gard, a baby whose life support was withdrawn following a court order. Gard's parents were ineligible for legal aid under regulations introduced in LASPO 2012 and, had it not been for a firm willing to work pro bono, would have had to represent themselves in court, as is often the case. Anne Perkins commented that 'Excluding citizens from the law is a process of disempowerment...it enhances the lethal sense of government and its agencies that they will not be held to account.'⁶

Moreover, the Lord Chief Justice said in his 2015 report that 'The continuing reduction in resources to the courts had, and continues to have a serious impact' and 'Our system of justice has become unaffordable to most. In consequence there has been a considerable increase of litigants in person for whom our current court system is not really designed'.⁷ The competence of slashing legal funding must be called into question when the most senior judge in England and Wales makes such a damning indictment. Many other judges have also questioned the effectiveness of LASPO 2012, Mr Justice Bodey described cuts as 'shaming' and he reportedly 'sometimes had to help litigants in person by cross-examining witnesses on their behalf' when presiding over the family courts.⁸ Bodey J's comments mirror those of Supreme Court President Baroness Hale who described the cuts as a 'false economy'.⁹

⁵ Deborah Sharpley, *Criminal Litigation Practice and Procedure* (College of Law Publishing 2018) 112-118.

⁶ Anne Perkins, 'The Charlie Gard case is a sad reminder that the law is the preserve of the powerful' *Guardian* (London, 12 April 2017).

⁷ Judiciary of England and Wales, *The Lord Chief Justice's Report* (Judicial Office 2015) 5, 8.

⁸ Owen Bowcott, 'Senior judge warns over 'shaming' impact of legal aid cuts' *Guardian* (London, 13 October 2017).

⁹ Owen Bowcott, 'UK's new supreme court chief calls for clarity on ECJ after Brexit' *Guardian* (London, 5 October 2017).

It is evident that, at the highest levels of the English judiciary, there is very little favour for LASPO 2012's reforms. This is seemingly also the case for counsel. In 2018 the Criminal Bar Association organised strike action, refusing to take on cases in protest of legal aid cuts. Action was only called off after the Ministry of Justice offered £15m 'to raise payment rates for reading evidence and documents in trials'. In response, the chair of the Criminal Bar Association, Angela Rafferty QC said:

'The damage done in recent decades will not be undone in weeks, or perhaps years. This proposal is the beginning and not the end of our campaign to improve the broken system we all work in every day. We still face exceptional difficulties, as do our solicitor colleagues.'¹⁰

A cynic would argue that it is inevitable that those with legal careers would oppose LASPO 2012's reforms, given that it affects their salary. It was recently revealed that some barristers can often earn less than minimum wage; 'a junior prosecuting barrister...will receive £46.50 for a single court appearance. If that takes a full eight-hour day...this works out at £5.80 an hour'.¹¹ It is no surprise then, that there would be opposition from legal circles. However, the fact that senior figures in the judiciary have vocally opposed the reforms is a significant indicator that LASPO 2012 is having a negative effect on access to justice.

Among the naysayers, there are those who have praised the cost-effectiveness of LASPO 2012. Ex-Justice Minister Lord McNally said legal aid funding is not 'a bottomless pit' and that cuts were necessary following the 2008 financial crash. An obvious benefit of LASPO 2012 is that the money saved can be redirected to other sources, such as education or the National Health Service, however it is important to remember that there have been swingeing cuts across every facet of public services.¹² MP for Westminster North and former Shadow Education Minister, Karen Buck has been vocally critical of LASPO 2012; in a House of Commons debate she said: 'cuts to the Ministry of Justice were higher than to any other department, at 40%. The impact of cuts on that scale is simply unsustainable.'

¹⁰ Owen Bowcott, 'Barristers in England and Wales call off industrial action' *Guardian* (London, 12 June 2018).

¹¹ Rachel Schraer, 'Could barristers earn more working in McDonald's?' *BBC News* (London, 27 February 2019).

¹² HM Treasury, *Budget 2010* (June 2010)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/248096/0061.pdf> Accessed 7 March 2019.

Buck added:

‘legal aid expenditure has fallen by £600 million since 2013...legal aid...claims fell from 188,643 to 92,124 – in other words, they halved... the number of providers has plunged by 800 in criminal law and 1,200 in civil law... legal aid is no longer available to many of those who need it. Even those eligible for help find it hard to access it, and major gaps in services are not being addressed. As is so often the case, the most disadvantaged and disempowered bear the burden.’¹³

Buck’s views reflect a common majority both inside and outside of parliament. She has evidenced that the swingeing cuts made to the Ministry of Justice have had an adverse effect on the basic principle that is access to justice. As a result of the reduction in expenditure, there is now a growing number of people for whom it is impossible to obtain legal representation. Thereby meaning many are forced to represent themselves in court, despite having little to no understanding of the English judicial system, its practices and procedures. This is potentially giving rise to miscarriages of justice. For example, if a defendant could scarcely afford representation in the crown court to defend himself against a crime he did not commit, but was ineligible for legal aid, a jury is likely inclined to have preference for the prosecution, who would have counsel with more experience of proceedings than the defendant. Moreover, Buck went on to say:

‘important research by the mental health charity Mind found that half the people facing legal problems that were removed from the scope of legal aid by LASPO have mental health problems.’¹⁴

Although Buck does not state whether the aforementioned mental health problems arise as a result of issues regarding legal aid disputes, it remains a cause for concern. Legal issues undoubtedly contribute to, if not cause, mental health problems. In response to Buck’s submission, Hugh Gaffney MP said:

‘Not only is legal aid no longer available for those who need it, those who are ineligible are finding it harder and harder to access. I hope that the Government, as part of their review, will do all they can to right the wrongs, and acknowledge that the cuts have

¹³ HC Deb 4 September 2018, vol 646, cols 66WH-80WH.

¹⁴ Ibid.

not worked, have not been just and must be reversed. They must be reversed for the age-old principle that is access to justice but also because of the people who use legal aid, the people eligible for legal aid and the people who deserve it.’¹⁵

Gaffney’s comments correspond with Buck’s views, along with many other MPs. However, in response to their submissions, Lucy Frazer made the following remarks:

‘When the programme to reform legal aid commenced in 2010, the scale of the financial crisis facing the Government was unprecedented... They rightly focused their resources on the most vulnerable people in our society and set up the following principles for LASPO: to discourage unnecessary and adversarial litigation at public expense; to make significant savings to the cost of the scheme; to deliver better overall value for money for the taxpayer; and to target legal aid to those who most need it.’¹⁶

There is a common thread among supporters of the implementation and supposed success of LASPO 2012: its cost-effectiveness, this is true to a certain extent; in 2010 the Ministry of Justice budget was £10.9 billion, and the projected 2019-20 Ministry of Justice budget is a 40% smaller sum at £6.38 billion.¹⁷ Despite their repeated insistence that LASPO 2012 is value for money and more of a benefit than a detriment, a consolidation of research from Bindman’s shows that it is probably the opposite that is true, like Baroness Hale, they maintain that LASPO 2012 is a ‘false economy’.¹⁸

Bindmans cited the Law Commission which pointed out that ‘the provision of advice and legal support can have a major beneficial impact on the lives of service users, resulting in savings down the line to the state, as well as increased income for clients.’ Demonstrating this, Citizens Advice estimates showing that ‘for every £1 spent on legal aid, the State saves: £2.34 from housing advice; £2.98 from debt advice; £8.80 from benefits advice; and £7.13 from employment advice’. Furthermore, they claimed that a guide from the International Bar Association maintained that ‘legal aid delivery generates significant social and economic

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Jane Croft and Barney Thompson, ‘Justice for all? Inside the legal aid crisis’ *Financial Times* (London, 27 September 2018).

¹⁸ See, n 9 Bowcott.

benefits.’ It also suggested that governments should ‘estimate the social and economic costs and benefits of legal aid service delivery, including by taking into account the social and economic costs of failure to deliver services.’¹⁹ Detractors would argue that as Bindman’s is a firm of solicitors, their findings cannot possibly be held to be fair and impartial. Conversely, it could be argued that all of the research they have consolidated is from a variety of reputable and independent sources such as Royal Commissions and Citizens Advice.²⁰

There is an abundance of case law illustrating the current problems facing the principle of access to justice in England and Wales. In *R (on the application of S) v Director of Legal Aid Casework*²¹ there was an appeal made by the Director of Legal Aid Casework and the Lord Chancellor against a declaration ([2015] EWHC 1965 (Admin)) that the ‘exceptional case funding scheme’ in s 10 LASPO 2012 was unlawful. The judge’s decision in the High Court case was based on the fact that the application form was ‘too complex’ for laypersons or even solicitors. This was rejected in the Court of Appeal who allowed the appeal on the basis that:

- (1) the judge in the High Court ‘had not made clear how it failed to meet the test of inherent unfairness’;
- (2) the regulations ‘offered a balanced, proportionate approach to the grant of legal aid, which could not be condemned as arbitrary’; ‘the merits criteria were carefully specified and exceptions were carefully spelt out’; and
- (3) Paragraph 8 of the guidance ‘did not restrict grants of legal aid to such cases.’

Briggs LJ, dissenting, maintained that the defects in the scheme were ‘systematic and inherent’ because of a combination of ‘an inaccessible application process and the absence of an economic business model sufficient to encourage lawyers to help litigants in person’.²² By majority decision the courts in this case elected to allow a controversial section of LASPO 2012 to remain. The fact remains that if Briggs LJ’s opposition to the verdict indicates that there must be at least some evidence that the regulations in the Act are unsuitable; there is

¹⁹ Geoffrey Bindman, ‘Legal aid cuts are a false economy’ (*Bindmans*, 21 January 2019). <www.bindmans.com/insight/blog/legal-aid-cuts-are-a-false-economy> Accessed 28 March 2019.

²⁰ *Ibid.*

²¹ [2016] EWCA Civ 464; [2016] 1 WLR 4733.

²² *R (on the application of S) v Director of Legal Aid Casework* [2016] EWCA Civ 464; [2016] 1 WLR 4733.

room for improvement. Questions must be asked as to the effectiveness of the new system if a senior judge thinks there are problems in need of resolution.

Similarly, in *R (on the application of London Criminal Courts Solicitors' Association) v Lord Chancellor*²³, the applicant sought judicial review of 'the Lord Chancellor's proposals pursuant to LASPO 2012, to make changes for the provision of legal aid services by solicitors; the applicable standard of review was the conventional Wednesbury standard of judicial supervision'. In this case, their application was refused on the grounds that (1) if the Lord Chancellor had failed to comply with his duty he would be acting illegally and the court would take the appropriate measures to prevent this, and (2) the Lord Chancellor acted 'reasonably' according to the Wednesbury standard.²⁴

There is a substantial wealth of evidence to suggest that the changes to legal aid following LASPO 2012 have had a significantly negative effect on the fundamental constitutional principle of access to justice, enshrined in Magna Carta and ECHR to highlight its importance.²⁵ The 2012 Act has received almost universal condemnation from those in all areas of society. From those intimately affected by its introduction, who would otherwise have been in receipt of legal aid under the previous system, to those who work closely with those in receipt of legal aid, solicitors, barristers, and charities. Those who represent the electorate who are affected by the policy in the House of Commons, to those who have reached the highest echelons of the judicial system of England and Wales, from the Lord Chief Justice to the President of the Supreme Court.²⁶ There is also evidence from case law that LASPO 2012 has had a negative effect on access to justice. Despite some positive judicial treatment, there are still naysayers and a plentiful amount of negativity surrounding the 2012 Act.

Despite the deluge of criticism on all fronts, the government staunchly maintains that LASPO 2012 is a beneficial piece of legislation which improves the prospects of the economy and is substantially more cost effective. This is an arguable point, however, bodies such as Bindmans have contended that legal aid is more cost effective than alternatives as it saves the state money in other areas on issues such as debt and housing advice.²⁷ Based on the criticism LASPO 12 has attracted, it is probably likely that more reforms will be implemented

²³ [2015] EWHC 295 (Admin); [2015] 2 WLUK 600.

²⁴ *R (on the application of London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWHC 295 (Admin); [2015] 2 WLUK 600.

²⁵ See, n.2 Article 6 and n.3 Brooke.

²⁶ See, n.8, and n.9 Bowcott.

²⁷ See, n.12 HM Treasury and n.15 House of Commons.

in the near future, probably more beneficial to access to justice than detrimental. There is a government review of LASPO 2012's effectiveness currently underway and will be published in the near future; only time will tell.