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By Chris Richards

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In an age of austerity, access to justice is a luxury

by Chris Richards, City University

By the time you have read this sentence, Legal Aid will have cost the British taxpayer two hundred pounds. Over the past decade, the state has contributed an average of two billion pounds a year to support those who cannot access legal advice on their own means¹. But times are tough, so we are told, and Britain needs to balance the books. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act of 2012 removed £350 million from the legal aid budget², limiting financial support for cases involving family law, immigration, welfare, employment and clinical negligence. Does this run the risk of denying people access to justice? And would this be such a bad thing?

Even as Spitfires soared above the Weald, men like William Beveridge knew that the War, however grave, would not last forever. The sacrifices made in the fight against Nazi tyranny would deserve something more than a return to the *status quo ante bellum*, a mouldering postwar settlement of poverty and despair. The principles of common burden and common benefit, enshrined in wartime service, would instead be applied to the new Welfare State. Healthcare, education, unemployment and retirement benefits would for the first time be paid out of general taxation. As part of this new initiative, the Rushcliffe Committee suggested a more equitable system of public legal funding. Barristers and solicitors in private practice would henceforth be paid, by the state, to provide legal advice and representation to those who could not otherwise afford it. This undertaking was formalised in the Legal Advice and Assistance Act 1949, which remained the legislative bedrock of legal aid provision throughout the latter half of the twentieth century.

No longer would ordinary people be prey to a legal system they had no hope of understanding. Judges Judy and Rinder aside, the law is exquisitely complex. Whether defending one's own actions or seeking redress, the general public must often rely on professionals, privy to the skills and experience acquired over a lifetime. As in medicine, social security and education, the principle of a common contribution to pay for these services requires funding by the taxpayer. It is clear that more money buys more time, more resources, and a better standard of advocacy. However, the public purse is not infinite. The cost of funding the legal system must be balanced against the other demands on the exchequer, in times of feast as well as famine. The £1.7 billion spent on Legal Aid last year could have built fifty schools, trained a hundred doctors, and left enough for a Type 45 destroyer³. There must be some way in which we prioritise spending – deciding what should be funded, and what should not.

How do we make this judgement? 'Luxury' would suggest something excessive, nonessential – fat to be trimmed. In truth the judiciary have a keen nose for those proceedings which are truly frivolous, and often respond with a well-placed costs order. The question is more over the basic standard of provision available to every citizen. If there are two conflicting principles at stake – the merits of each case, and the cost of hearing them, should we in the interests of justice simply make money no

¹ Ministry of Justice, *Legal Aid Statistics in England and Wales, Legal Aid Agency, 2013-2014* (24 June 2014)

² House of Commons Justice Committee, *Government's proposed reform of legal aid* (Third Report of Session 2010–11, 30 March 2011)

³ Author's calculations.

object? This would probably require a full-service, insurance-based system along the lines of the National Health Service, and a significant increase in public expenditure. With the current government's fondness for privatisation, and in the throes of the worst downturn since the Great Depression, such a system would be a hard sell.

We may nonetheless have as our guiding principle that the supremacy of the law must not be restricted by the material circumstances in which it is carried out. Political philosophers in the liberal tradition have long argued that a justice system where the wealthy could simply buy a favourable outcome would be justice in name only. Comprehensive access to justice is doubly important in that the rule of law forms the bedrock of our democratic system. The law is written by Parliament, acting on the will of the British public. The judiciary then interpret the law, providing legal precedents that stretch all the way back to Magna Carta. It is the greatest check on the misuse of power we have. In its short history, legal aid has exposed police corruption, human rights abuses, and countless miscarriages of justice. The names of Hillsborough, Orgreave, Barry George and Bloody Sunday still reverberate in our national consciousness. Each case impinged upon powerful state or private interests, and simply would not have been pursued had funding not been available.

Current attempts to reduce the legal aid bill are far removed from these egalitarian principles. They remove funding from the more mundane cases, reserving it for those cases which retain some unusual characteristic. In family law, routine child custody and divorce cases no longer qualify for legal aid except where forced marriage, domestic violence, or child abduction are involved. The effect is dramatic. Family courts are clogged with litigants in person, suffering unnecessary stress and delay⁴. They take advice from a proliferation of paid McKenzie Friends, who suffer neither the training nor regulation of legal professionals. The restriction of legal aid to cases involving forced marriage, domestic violence, or child abduction creates a perverse incentive for litigants to pursue false allegations of this nature, in order to qualify for legal representation⁵. In short, the premise that certain kinds of law do not deserve public funding is false. Some legal disputes may be less complicated than others, and hence less expensive, but they all nonetheless deserve a fair hearing.

Even if we measure success by simply how much money is saved, cuts to legal aid may still represent a false economy. People denied access to legal advice and representation suffer a wide variety of ill-effects, including loss of income, stress-related illness, and relationship breakdown. The Citizen's Advice Bureau estimates that for every £1 cut from legal advice services, an additional £2.34 to £8.80 of extra costs are passed onto other arms of the state - the police, the NHS, and social services⁶. Denied representation, litigants-in-person may save the cost of the lawyers who would otherwise argue their case, but may waste even more money in precious court time. Disputes that would be resolved in one or two hearings with the help of effective advocacy drag on for ten or more. In such cases, judges have threatened to pay for representation out of the court's own funds

⁴ Sir John Thomas, Lord Chief Justice, as reported in "Litigants in person putting pressure on courts system – LCJ" (John Hyde, *Law Gazette*, 03 April 2014) www.lawgazette.co.uk/law/litigants-in-person-putting-pressure-on-courts-system-lcj/5040663.article, accessed 12/09/14.

⁵ A possibility lately raised by Sir Nicholas Wall, former President of the Family Division of the High Court (House of Commons Justice Select Committee, *ibid.* para. 85)

⁶ Citizens Advice Bureau, *Towards a business case for legal aid* (Paper to the Legal Services Research Centre's Eighth International Research Conference, July 2010)

to prevent further waste and miscarriage of justice⁷. Governments must seek value wherever they can, but cutting legal aid risks saving a penny only to lose a pound.

If the state is genuinely too poor to provide access to justice for all, could pro bono provision fill the gap? A very great deal of work is done across the country by lawyers and law students who believe that their labours, though unremunerated, serve the public good. (The author, for one, will shortly be acting as a McKenzie Friend for a parent's rights organisation in London.) Compared to the state funding of the legal system, pro bono work still falls short in three important ways. Who decides what serves the 'public good'? The person or organisation providing pro bono services can offer their services to whoever they wish. Neither are lawyers under any formal compulsion to keep working pro bono – if times are hard, or if they simply lose interest, they may stop their help and leave their client in the lurch. Pro bono representation in adversarial proceedings also routinely compromises the principle of equality of arms when only offered to one party.

If the law is worth doing, then it is worth doing well. True access to justice requires a legal system where the merits of each case are put before the cost of hearing them. To achieve this aim, there can be no substitute for a legal system funded and administered by the state for the public benefit. Despite the present downturn, one must recall that the Welfare State was first instituted during a postwar era far leaner than today. A futile attempt to balance the books by swingeing cuts to public services – a regime termed 'sadoxmonetarism' by the Princeton economist Paul Krugman⁸ – may compromise the very principles the Welfare State was established to defend.

⁷ Sir Justice Munby, President of the Family Division of the High Court, in *Q v Q; Re B (A Child), Re C (A Child)* [2014] EWFC 31

⁸ e.g. Paul Krugman, 'The Intellectual Contradictions of Sado-Monetarism' *New York Times* (New York, 08 April 2013)