

LAW CENTRES FEDERATION ANNUAL CONFERENCE 2011

OPENING ADDRESS

Lady Hale, Justice of the Supreme Court of the United Kingdom

It is not the proper role of any judge to attack Government policy. If the Government of the day decides that the right solution to a massive budget deficit is massive cuts in public spending, that is a matter for them to decide and Her Majesty's loyal opposition to oppose if they see fit. The role of Her Majesty's loyal judges is to decide the resulting disputes according to law.

But it is the proper role of the judges to warn the Government of the consequences of the particular choices they make in pursuit of their policies. In the case of legal aid cuts, there is no shortage of warnings, because those consequences are on several different levels.

First, there is the level of constitutional principle. We are a society and an economy built on the rule of law. Businessmen need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. As the Bar Council¹ has put it, 'individuals' belief that they live in a society in which harm done falls to be recompensed, or that obligations made will be honoured, is important.' If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.

This means that everyone must have access to the courts or other machinery to vindicate their rights and enforce the obligations of others towards them. I would not automatically equate access to justice with access to lawyers. If our justice system were resourced and equipped to deliver equal justice to everyone, irrespective of the quality of the legal representation they had, then I would not argue for universal legal aid.

¹ *The Merits of a Contingent Legal Aid Fund*, Bar Council, April 2009, p 2.

But it is perfectly clear that we do not have such a justice system. We have, as the late and much lamented Lord Bingham pointed out, an adversarial legal system which depends upon lawyers to prepare, present and argue the case. The judge is a neutral umpire between the competing sides. The quality of the advocacy should not win the case. But we all know that it often does. And this is true at all levels of the system – from the First Tier Tribunal to the United Kingdom Supreme Court.

We do not resource our courts to do the job of preparing the case. We used to resource some tribunals to do it but the assimilation of courts and tribunals means that while this does still happen in some tribunals it is happening less and less. So much of our system is essentially reliant on the parties to prepare and present their cases.

So that is why lawyers of my generation agree with those European scholars who argued during the second world war that a legal service was as important as a health service, indeed, perhaps more so:²

‘Legal aid is a service which the modern state owes to its citizens as a matter of principle. . . . Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law.’

But secondly, even if we did not believe this as a matter of constitutional principle, we might believe it as a matter of practical common sense. It is a great mistake to believe that most legal rights are vindicated, and most legal obligations enforced, in the courts. We are the tiny tip of a very big iceberg.

Many legal rights and obligations are not enforced at all. Most people do not recognise that a practical problem they may have is also a legal problem – unless they

² EJ Cohn, ‘Legal Aid for the Poor: A Study in Comparative Law and Legal Reform’ (1943) 59 *Law Quarterly Review* 250, 253.

are forced to do so because they are the defendant in proceedings brought by someone else – a creditor, landlord, spouse or whatever.

But what everybody who may have a legal problem – and particularly the people who find themselves defendants to their creditors’ or landlords’ or even spouses’ claims – needs is access to good legal advice and practical help. It was a big moment when the legal aid scheme extended, from representation in court proceedings, to advice and assistance with all manner of legal problems.

My legal assistant has written movingly of his pro bono work relating to home safety for women and children. He has conducted numerous cases, arguing for the rights of tenants who have been left with no electricity or no hot water, or who have been told that they are intentionally homeless because they refuse to live in damp, squalid and unsafe accommodation on violent estates with young children. He has nearly always been able to negotiate a reasonable settlement without the need to go to court. As he says,

‘I know it is contrary to the safety and welfare of these people to leave them to negotiate the system on their own. I also find it hard to believe that it would make economic sense to do so, given that their problems will almost certainly be exacerbated and present, in time, a much increased drain on public resources.’

We all know that early help to sort things out, before anyone might think of going to court, is most effective. Just a little advice and a few letters can save such a lot. So the most worrying feature of the new scheme is its all or nothing character – if the subject matter is in, you can get advice, help and representation; if the subject matter is out, you cannot even get advice and help, let alone representation, through legal aid.

Surely we can warn Government that this is a false economy. It is the reverse of the old woman who swallowed a fly . . .

Thirdly, we can warn about the particular subject-matters that are in and out. The Government has obviously had the ECHR jurisprudence in mind. It has devised a test of seriousness of consequences, no doubt inspired by the *McLibel* case:³

‘The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.’

So the Bill has cleverly added the power to grant legal aid if denial would be in breach of the applicant's convention rights: yet another example of leaving it to the judges to pick up the hard cases?

But we all know that the seriousness of the consequences is not directly linked to the subject matter of the case. A credit card debt can easily lead to homelessness. A family breakdown can easily lead to debt and ultimate homelessness. Losing your job can lead to family breakdown, debt and homelessness. If the problem had been tackled in the right way at the right time it might not have done so.

Fourthly, we can point out the disproportionate impact upon the poorest and most vulnerable in society. Indeed, the government's own equality impact statement accepts that the changes will have a disproportionate impact upon women, ethnic minorities and people with disabilities.⁴ And they say that this is justifiable because they are disproportionate users of the service in these areas. This is an interesting argument about which I had better not say anything more, as it is bound to come before us in one shape or form in future. Others have warned that children will be the losers if their parents are not given sensible advice.⁵ The Legal Action Group fears

³ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

⁴ *Legal Aid Reform: Scope Changes*, available at www.justice.gov.uk/consultations/legal-aid-reform-151110.htm.

⁵ Eg reported remarks of Sue Berelowicz, Deputy Children's Commissioner, commenting on Sound Off for Justice study, *The Independent*, 19 September 2011.

‘that this would lead to an underclass of people disenfranchised from civil justice and indifferent to the rule of law’.⁶

We can all pick holes in – warn of the consequences of - the particular inclusions and exclusions but my personal view is that exclusion by subject matter is fundamentally misconceived. In the olden days the distinctions were between representation and help, and courts and other dispute resolution machinery. It was a legal practice-based model. It took a long time to include the non-court, non-legal practice-based areas, such as welfare benefits, education and disability. These, rather than the traditional court-based disputes, are where the real help is needed, yet these are the ones which are most under threat.

Fifthly, we in the courts can of course warn that the consequence will either be that some very vulnerable people do not get the chance to bring their claims or defend themselves properly before the courts, or that the courts will be overflowing with people attempting to assert their claims or defend themselves as litigants in person. I think that is very selfish of us. We ought all to be taking courses in how best to preserve judicial neutrality in an adversarial system where one party is represented and the other is not. I am not worried as much by an increase in litigants in person as I am by the likely increase in people with good claims or good defences who do not realise this and give up before they begin to fight.

I do not know whether the battle of the Bill is yet over. The House of Lords Constitution Committee delivered a short, sharp commentary on the Bill on 16 November.⁷ The House of Lords itself debated the second reading from 15.07 until 23.09 on 21 November (with their usual break for dinner). Almost all the debate was about the changes to legal aid and almost everyone who spoke was against it. It is, as someone has commented, an ironical fact that the best protectors of the rights of the marginalised and vulnerable in society are not our elected representatives but the unelected mix of the great, the good and the superannuated who populate our upper chamber. Where would we be without them?

⁶ Evidence to the House of Commons Justice Committee inquiry into access to justice, available at www.lag.org.uk.

⁷ 21st Report of Session 2010-2012, *Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill*, HL Paper 222.

But of course we cannot pin all our hopes on amendments to the Bill. I know that many law centres are successfully exploring other forms of funding. There are some philanthropic sources out there to be tapped. Long may they, too, remain devoted to the cause of equal access to justice. But, like pro bono work, these are all dependent upon the good will of those in charge. Having been for 15 years a trustee of a charitable foundation, I know how fickle they can be. They go for the exciting new projects which can make a difference rather than for boring and predictable core-funding. But proper advice and help in complex areas of the law needs specialists who can stay in post for reliable lengths of time. A well meaning lawyer who knows nothing about the area in question can do more harm than good.

The hope for the future is that there are now so many people, all over the system, who recognise and believe in these truths. When I was young that simply would not have been so - the poor got whatever the system let them have, there was no such thing as community care law, employees had no claims beyond their notice period, and victims of domestic abuse stayed victims. But now the great and the good in Parliament are fighting for equal access for justice for the most vulnerable and marginalised members of our society. Whatever our fears for the future, the world is now a different and better place than it was when I was young. The Law Centres movement has had a lot to do with that and long may to continue to do so.