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Should We Rely on Pro Bono to Keep the Rule of Law Afloat?

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Without a system that allows people to assert their rights or defend themselves against the state, there is no rule of law. It only seems right that a society that values state services like free healthcare, applies a similar logic to publicly funded legal services – you do not have to use it, but it is there if you need to. Despite this, state provision of legal aid has been on a steady decline for several decades, with governments justifying these cuts by encouraging pro bono work to 'fill the gap' (Mcleay, 2008).

Legal aid – or government funding – to subsidise access to lawyers for those who cannot afford them is crucial to ensuring that our right to a fair trial is upheld, as required by Article 6 of the European Convention of Human Rights ("ECHR"). Also, a lawyer's particular obligation to the justice system incentivises pro bono work, or services provided by the legal profession without charge, greatly aiding the role of the State in its attempt to provide universal access.

This article examines the impact of cuts to legal aid, including the increase in unmet legal needs that has led to vulnerable sections of society falling through the justice safety net. What are the proposals to restore access to justice? Is the reliance on pro bono work to fill this gap justified? Do the limitations and advantages of pro bono models in some countries provide guidelines to assess what would be the best model to adopt? Does the decreasing government responsibility in the form of cuts to legal aid point towards an expectation of a culture of mandatory pro bono work?

The 2012 cuts to the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO") removed £751m from a £2.2 billion fund. In doing so, it took money away from critical areas including family law, clinical negligence, employment law, and the issues of debt and housing (EachOther, 2017). This has caused an increase of 'DIY justice' where those without legal representation are forced to represent themselves (Hudson, 2019). The chances for a miscarriage of justice become painfully clear when it is revealed that only 45% of people said they had understood what was said in court and 22% did not have English as a first language (Dugan, 2017). In immigration cases, legal aid cuts expose unaccompanied or separated children to making applications to stay in the UK on their own, unrepresented. This is not uncommon; the Ministry of Justice pins the figure at 2,500 children a year who are forced to be claimants of their own rights (Bowcott, 2016). Additionally, changes, which preclude access to legal aid in family courts unless one partner can prove that they are a victim of domestic violence, are insensitive – placing an inconsiderate burden on victims in order to be eligible for financial support.

These cuts not only symbolise an erosion of the rule of law, but also a subversion of public opinion. As theorised in Dicey's conception of the rule of law, which outlines that everyone 'is equal before the law', cuts in

legal aid suggest that the law will *not* apply to everyone in the same way regardless of social or economic status. A 2015 YouGov poll revealed that 89% of the public believe access to justice, underpinned by legal aid, is a fundamental right, exceeding concerns related to accessing free healthcare and state pension (Bowcott, 2015). Access to the courts has been reiterated through centuries of English common law, with the case of *R (Unison) v Lord Chancellor* (2017) confirming this right by declaring the current employment tribunal fees as unlawful as they needed to be 'reasonably affordable' to all. This judgement went further to confirm that this right of access is "not of value to the particular individuals involved in litigation but also to society more broadly" (*R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*, (2017)).

This brings us to the question – if legal aid cuts have caused a loss to the rule of law's integrity, how do we restore access to justice? The widely cited Bach Report makes some key proposals; the need for a new legally enforceable statutory right to justice, a more sensitive assessment scheme for civil legal aid, and, most importantly, the need to bring all matters concerning children into the scope of legal aid (Back Commission, 2017). These proposals, which aim to re-expand legal aid mechanisms, are likely to be successful in upholding the rule of law. Such proposals add a layer of support to the 'right to a fair trial' which already exists under Article 6 of the ECHR and Article 8 of the ECHR in certain immigration cases (*R (Gudanaviciene and Others) v The Director of Legal Aid Casework and The Lord Chancellor*, (2014)).

However, these proposals still do not allow for the full realisation of ones' ECHR rights - as Choudhry and Herring (2017) argue, the Legal Aid restrictions under LASPO, by failing to guarantee victims of domestic abuse access to legal aid and forcing them to litigate against their abusers, directly breaches victims' rights under Article 6 and Article 8 of

the ECHR. Therefore, whilst a domestic statutory right would guarantee protection of this right more effectively, the UK's shift towards relying on pro bono filling the gap suggests that such reforms lack political will.

Figures from the Bar Council reveal that a record high of one in every four barristers practicing in England and Wales undertook pro bono work in 2018 and barristers, through Advocate, dedicated over 10,000 hours of legal help in 2018 (New Figures Reveal Barristers' Commitment to Pro Bono, 2019). However, the voluntary nature of pro bono means there are many legal cases that remain unsupported. It is, therefore, imperative that there is not only a legal aid plan like the Bach Report that provides guidelines for what the most necessary services are and who qualifies, but also a discussion between the bar and government to remove the ambiguity around who is responsible.

Looking at the way other countries regulate legal aid and pro bono can be useful in deciding which approach may yield the best access to justice. While Australia lacks a constitutional, legislative, or common law right to free legal representation, the High Court, in the landmark case of *Dietrich v the Queen* (1992), affirmed a common law obligation on courts to refuse to permit an unfair trial as well as the right to legal aid in serious criminal cases (*Dietrich v The Queen*, (1992)). This determination is in the right direction, but it contrasts with the approach of nations like Germany and Lithuania, who despite having significantly different systems of pro bono regulation, embrace legal aid to allow a maximum number of people to receive legal services. The main criticism to this model is whether 'some kind of legal service' is really better than the mobilisation of pro bono services, which doesn't cover everyone but provides higher 'quality' services.

Michael Gove, in his former role as Justice Secretary, suggested that mandatory pro bono work could address the deficit caused by legal aid

cuts. New York uses this model by mandating a compulsory 50 hours of pro bono work, translating to a total of 400,000 hours per year state-wide to gain admission to the New York State Bar. Having a more predictable pro bono contribution is an important model to predict how realistically and to what extent it can supplement legal aid. It also means a more accurate budget prediction for unmet legal needs can be calculated.

However, Yale Professor Jonathan R. Macey presents the main counter argument to such a model. He argues "requiring lawyers to provide legal services to the poor is wasteful and inefficient" (Macey, 1992). This raises the question of whether the commercial viability of a case matters when deciding if it deserves to be adjudicated, and moreover, deserves the cost of free legal assistance. Macey argues that when clients incur costs to hire a lawyer, they will mainly bring lawsuits only when the expected benefits from litigation outweigh the costs of bringing the suit. Therefore, cases that don't satisfy this could become all too common under mandatory pro bono provisions.

However, the sentiments of former Australian Chief Justice of the High Court, Michael Kirby, that 'law is not just a business', diminishes the need for setting a standard of commercially viable cases. Instead, it proves exactly how disconnected Macey's argument is from ideas of rule of law and access to justice. Furthermore, the Baltic Journal concluded that individual clients are usually served better under the pro bono model because lawyers will have a greater interest in the case, particularly as it is not motivated by money (Gruodytė and Kirchner, 2012).

And yet, the strongest argument against the reliance on pro bono stands as a normative one – should the government be able to use mandatory pro bono work to escape responsibility for providing equality and access

to justice? Or does such a model simply present the potential to influence lawyers by indirectly being more of a material benefit than burden? Mandatory pro bono work can increase demand for legal services during periods of over-supply of lawyers. Daniels and Martin found that pro bono work is often used to polish a firm's image through obvious presents of time and money, attract and retain legal talent, and positively influence firm rankings (Daniels and Martin, 2009). Australia, which has experienced similar progressive cuts in legal aid funding, has seen a rise in the work done especially by large firms, despite cuts in the number of lawyers (Latham and Watkins LLP, 2015). Lawyers may be considered as having a 'monopoly over justice' as Fiona McLeay asserts, wherein they are in a special category that allows them to benefit from reduced competition for a particular service, and a lack of their representation reduces both the effectiveness and legitimacy of the justice system. However, this raises the question of whether a lawyer, who arguably has a monopoly over justice, holds a moral obligation to provide a flexible alternative to a properly funded system of legal aid (Mcleay, 2008) – a debate which opens its own can of worms. Thus, pro bono work may be liable to be a mandatory function because it is inherently obligatory.

According to a World Justice Product report, 1.4 billion people worldwide have unmet justice needs. An estimated 36% of people in the world have experienced a legal problem in the last two years, and more than half are not able to meet their justice needs (World Justice Project, 2019). Vulnerable groups are more likely to experience hardship as a result of their legal problem(s); therefore, it is all the more concerning to see cuts to legal aid funding.

Many in the legal community have raised concerns about pro bono work by private lawyers being encouraged by governments as a means of 'filling the gap' in legal services in order to justify further reduction in legal aid funding (Mcleay, 2008). While mandatory pro bono work is

desirable, it is unlikely to be a sustainable solution to a service that should be funded and morally supported first and foremost by the government. However, in times of increasing legal aid cuts, pro bono work is indeed the Titanic ship momentarily keeping the rule of law afloat.

> *The bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law* (Kirby, 2002).

References

Back Commission. (2017) 'The Fabian Policy Report: The Right To Justice', pp.2-40. Available at: http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf (Accessed: 29 December 2019).

Bowcott, O. (2015) 'Access To Justice A Greater Concern Than Free Healthcare – Poll', *The Guardian.* Available at: https://www.theguardian.com/law/2015/apr/13/justice-concern-free-healthcare-yougov-poll-legal-aid-cuts (Accessed: 29 December 2019).

Bowcott, O. (2016) 'Legal Aid Cuts Creating Two-Tier Justice System, Says Amnesty', *The Guardian.* Available at: https://www.theguardian.com/law/2016/oct/11/legal-aid-cuts-two-tier-system-amnesty-international-law-justice (Accessed:29 December 2019).

Bowcott, O. (2019) 'Jump In Unrepresented Defendants As Legal Aid Cuts Continue To Bite', *The Guardian.* Available at: https://www.theguardian.com/law/2019/nov/24/legal-aid-cuts-prompt-rise-in-unrepresented-defendants (Accessed: 29 December 2019).

Chaudhry, S. and Herring, J. (2017) 'A Human Right to Legal Aid? – The Implications of the Changes to the Legal Aid Scheme for Victims of Domestic Abuse', *Journal of Social Welfare and Family Law*, pp. 152-167.

Daniels, S. and Martin, J. (2009) 'Legal Services For The Poor: Access, Self-Interest, And Pro Bono', *Access to Justice; Sociology of Crime, Law and Deviance*, 12, pp.145-166.

Dietrich v The Queen (1992) HCA 57, 177 CLR 292.

Dugan, E. (2017) 'A Record Number Of People Are Representing Themselves In Court – This Is What It's Like', *BuzzFeed.* Available at: https://www.buzzfeed.com/emilydugan/a-record-number-of-people-are-representing-themselves-in (Accessed: 5 January 2020).

EachOther. (2017) *Legal Aid Cuts: A Future Of Mandatory Pro Bono Work?* Available at: https://eachother.org.uk/legal-aid-cuts-future-mandatory-pro-bono-work/ (Accessed: 29 December 2019).

Gruodytė, E. and Kirchner, S. (2012) 'Pro Bono Work vs. Legal Aid: Approaches to Ensuring Access to Justice and the Social Responsibility of the Attorney', *Baltic Journal of Law & Politics*, 5(2), pp.43-64.

Hudson, K. (2019) 'Our Legal System Is Broken. Who Will Fix It? | Letter', *The Guardian.* Available at: https://www.theguardian.com/law/2019/nov/26/our-legal-system-is-broken-who-will-fix-it (Accessed: 29 December 2019).

Kirby, M. (2002) 'Law Firms And Justice In Australia', *Speech Given At Australian Law Awards*.

Latham and Watkins LLP. (2015) 'Pro Bono Practices And Opportunities In Australia', pp.1-13. Available at: https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-australia.pdf (Accessed: 29 December 2019).

Lawyer Monthly. (2019) 'New Figures Reveal Barristers' Commitment To Pro Bono'. Available at: https://www.lawyer-monthly.com/2019/12/new-figures-reveal-barristers-commitment-to-pro-bono/ (Accessed: 29 December 2019).

Macey, J. (1992) 'Mandatory Pro Bono: Comfort for the Poor or Welfare of the Rich', *Cornell Law Review*, 77(5), pp. 1115-1123.

Mcleay, F. (2008) 'The Legal Profession's Beautiful Myth: Surveying The Justifications For The Lawyer's Obligation to Perform Pro Bono Work', *International Journal of the Legal Profession*, 15(3), pp.249-271.

R (Gudanaviciene and Others) v The Director of Legal Aid Casework and The Lord Chancellor (2014) Civ 1622. (EWCA).

R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) (2017) (2017) UKSC 51.

The Guardian. (2018) 'The Secret Barrister: 'Without Legal Aid, The Rule Of Law Collapses'. Available at: https://www.theguardian.com/law/2018/dec/27/secret-barrister-legal-aid-the-rule-law-cuts (Accessed: 29 December 2019).

World Justice Project. (2019) 'Groundbreaking Study Reveals Unmet Legal Needs Worldwide'. Available at:

https://worldjusticeproject.org/news/groundbreaking-study-reveals-unmet-legal-needs-worldwide (Accessed: 5 January 2020).