LEGAL AID TALK - ECBA WARSAW

The UK's Welfare State, set up after World War II, had four pillars: free health care, free state education, social security, and access to justice for all through legal aid[1]. To understand the accelerating collapse of the last pillar, we need to go back to the beginning. A political compromise between the government and powerful private interests meant that the State did not take complete control of those providing the services: not all doctors became state employees, and private health care has always competed with state provision; private schools continue to exist, and tend to draw off the children of richer parents, thus perpetuating class divisions. Only social security was fully nationalised, and it has always been contested as an indulgence for the lazy and workshy.

The state administered the Legal Aid scheme, but the lawyers who provided the service remained in private practice and retained all their professional traditions and privileges. They kept the divide between solicitors (mainly litigators) and barristers (mainly advocates). Those traditions included a very British sense of fair play, and giving support to the underdog. For its first twenty years legal aid was confined to criminal and divorce cases - the Cinderellas of legal practice, looked down on by the ugly but richer sisters in commercial law. Nevertheless, by 1950 about 80% of the UK population had become eligible for it. Its chief architect, Lord Rushcliffe, believed it should not be available only to the poorest, but to 'those of small or moderate means'. In criminal law, a poor defendant could get the same lawyer as a millionaire. The same QC might defend a tramp accused of murder one week, and a prince the next. It was written into the Bar's Code of Conduct that a barrister could not turn down a legal aid case just because the fee was not high enough.

During the 1970s Legal Aid grew and became more widely available. By now it was fixture a fixture in the legal landscape and was widely recognised to be a socially valuable institution. It extended into housing law, personal injury, employment, medical negligence, and immigration law. As judicial review of administrative action became a mainstream area of law, legal aid enabled litigants to mount challenges to the executive. Until roughly the late 1980s, there was a consensus that legal aid was valuable, if not ideal, as a means of empowering ordinary citizens to assert their legal rights with the free or subsidised assistance of good lawyers. As we will see, that concept has gone out of favour. It has made governments so uncomfortable that they have cut it to the bone.

In my field, criminal law, Legal Aid re-invigorated the defence Bar, which had become something of a backwater: the fees were good enough to attract star lawyers, who could have earned ten times more in commercial work, but chose to give their careers to a more interesting and important type of law. In the UK, most criminal barristers prosecute and defend: the shared experience makes them better at both, and gives them an invaluable objectivity when handling a case either for the State or the defence.

There was no golden age, but the good years of legal aid coincided with free university education: graduates were not burdened with massive student debts as they are now. Law became '*la carrière ouverte aux talents*' and legal aid work in particular began to attract significant numbers of women, ethnic minorities, and talented individuals whose social origins would have made a legal career

[1] Through the **Legal Advice and Assistance Act** 1949

inconceivable in the past. Student debt, and the vastly reduced fees available in legally aid work, are discouraging young people without money behind them from becoming lawyers. Legal Aid work is in danger of becoming a hobby for the rich.

Many legal aid lawyers were not just passive receivers of cases, but actively worked to change the law where they perceived social injustices. Notable successes include the recognition of prisoner's rights (championed among others by Stephen Sedley QC, later a Judge in the Court of Appeal), the rights of asylum seekers, the rights of employees, inquests into deaths in transport disasters, and the imaginative use of judicial review.

Our adversarial system operates dialectically: each side advances its case, and tries to knock down the other's: in crime, the jury (or magistrates in less serious cases) decide whether the prosecution case has survived the onslaught so that they can be sure of guilt. It takes skill and experience in the advocates to make the system work. Not everyone can. Criminal law and procedure are complicated. You need good lawyers to get just results - good in both senses: highly competent and highly ethical. Legal Aid enabled a cadre of tough and seasoned criminal lawyers to work to a high standard with the security of decent if not spectacular remuneration. That is no longer considered desirable.

The system was not perfect. People made extravagant claims that it was a Rolls Royce Service. It was never that, but it was good enough: it commanded respect and trust - except by governments. An independent profession, ethically driven, and full of argumentative individuals whose *raison d'être* was to question what people told them, caused trouble. People whom the police wanted to put behind bars were acquitted. Miscarriages of justices were exposed, as was corruption and malpractice by important people. Administrative decisions were challenged, often successfully, often in cases where the stakes were high for ministers - not least when they wanted to remove asylum seekers or use other coercive powers. In 1994, the then Home Secretary was found to be in contempt of court, for breaching an undertaking not to remove a Zimbabwean asylum seeker[2]. No one had thought previously that a Minister could be in contempt. It happened again 2012, when a different Home Secretary broke an undertaking to release an Algerian national who had been detained for 14 months pending deportation[3]. These cases could not have been brought without legal aid. They hit very raw nerves in government.

From the late 1990s, the government began to mount an organized attack on legal aid. Rates went down; restrictions on who could get it increased. The screws that had held the system in place were loosened. The consensus that access to justice for all was an indispensable part of the rule of law began to evaporate. Ministers publicly attacked legal aid lawyers for doing their job, and planted misleading earnings figures in the press to suggest that they were 'fat cats', exploiting the system. The profession did little to resist - but it changed the professional rules, so that advocates no longer had to take legal aid cases if the fee was too low: a massive retreat from the proud tradition of turning no one away. But it was not until the present government came in that Legal Aid, and the access to justice that it brought to the many, was fatally damaged. This was no accident. In 2012, the Minister of Justice, Kenneth Clarke, whose department is responsible for Courts, Legal Aid, prisons, and much else in legal policy, said: 'What we mustn't do is just leave untouched a system that has grown astonishingly, making the poor extremely litigious.' Justice is treated as a commodity, available to those with the means to pay

[2] **M v Home Office** [1994] 1 AC 377
[3] Lamari [2012] EWHC 1630 (Admin)

for it. We have a country in which the Courts are effectively closed to a huge swathe of the population who cannot get legal aid, and who cannot afford a decent lawyer.

Clarke's **Legal Aid, Sentencing and Punishment of Offenders Act** 2012 (LASPO) simply abolished legal aid in areas of civil law that are particularly important for the poorer sections of the population: employment, housing, family law, social welfare and medical negligence. Prison law went - returning prisoners to a legal black hole, and blacker still for foreign nationals. Parliament voted all this through with barely a murmur of dissent.

The Ministry of Justice - a name of which George Orwell would have been proud to invent - releases misinformation about the costs of the system. The UK does not have one of the most 'generous' legal aid regimes in the world: it was about average until the recent rounds of cuts. Criminal lawyers do not earn an average of £84,000 per year - it is more like £27,000. Some people think that a well funded, effective system of legal aid that enables all citizens to get access to justice is a matter of pride.

Clarke's successor, Chris Grayling, turned his fire on criminal legal aid. He proposed cuts so savage that he united the entire legal profession (solicitors and barristers) and drove them to strike action, before he announced a partial retreat. British lawyers are deeply conservative, and have never contemplated withdrawing their co-operation before. This was the last straw for them. The future for legally aided criminal practice is still bleak. The contract terms and the fees currently on offer make this work financially unviable for most solicitors, and it appears likely that the only people who can make it pay will be the great outsourcing conglomerates. A national road haulage firm has taken an interest. Their sole concern will be to show a profit to shareholders, not to provide the best possible service to their clients.

So we now have a legal system, and a legal profession, which, as the saying goes, are open to all - like the Ritz Hotel.