

# What's Wrong With Legal Aid? Lessons From Outside The UK<sup>1</sup>

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✉ CLS funding; Comparative law; Funding arrangements; Legal advice centres; Legal aid; Legal expenses insurance; Litigants in person; Pro bono work

## Part 1

### Introduction

Legal aid has always had a troubled history.<sup>2</sup> Those intimately involved with it have deeply ambivalent attitudes towards law and justice for the poor. Goriely tells us the state, the courts, and lawyers as deliverers and interpreters of legal aid have at various times promoted it, decried it, and defended it, never quite sure what the benefits ought to be and who were meant to be the beneficiaries. Moorhead, in his innovative argument about the often misleading rationales underlying legal aid, shows that the debates about legal aid start from incorrect premises which lead to mistaken outcomes.<sup>3</sup> In this article we argue that legal aid has to be taken in tandem with the provision of welfare services. This encapsulates two processes: first, that the state takes a holistic approach to social and economic problem solving; and secondly, that intermediation becomes a normalised mode of effecting delivery. It is obvious that in some areas of social policy the state is not the most successful deliverer of services. Partnerships are therefore necessary within and among different resources and providers. We

<sup>1</sup> The research for this article was supported by the Fundamental Legal Aid Review ("FLAR") of the Department for Constitutional Affairs and the Cabinet Office, to whom we are grateful. FLAR provided the authors with both funding and access to data. We are very grateful to Christina Curry for her research assistance. The views represented herein are solely those of the authors, but we thank Andy Boon for his comments, and the reviewers for theirs.

<sup>2</sup> T. Goriely, "Law for the Poor: the Relationship between Advice Agencies and Solicitors in the Development of Poverty Law" (1996) 3 *International Journal of the Legal Profession* 215. More recently see the indictment of American legal aid in S. Bogira, *Courtroom 302: a Year Behind the Scenes in an American Criminal Courthouse* (Knopf, New York, 2005).

<sup>3</sup> R. Moorhead, "Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism" (1988) 25 *Journal of Law and Society* 365.

argue, in addition, that legal aid has to be viewed within the perspective of the juridification of everyday life, that to an extent a constitutionalising process has occurred with legal aid which is posing a struggle between the exercise of individual rights and the state's move to bureaucratise legal aid as part of the administrative structure.

We start by telling a story that seems to encompass all that is wrong with the system. Even though this story seems to come out of an episode of *Eastenders*, it is in fact true. Wayne is 35, unmarried, living at his mother's home, an alcoholic, on incapacity benefit, with four children by two different mothers. He started drinking at 13—his father was violent—and by 18 had already been imprisoned for burglary. Wayne met Kylie and they soon had two children. Kylie was housed by the council. He moved in with her but was never registered at the address. Kylie was on the “social” and Wayne worked sporadically depending on how much he drank. Kylie started an affair. On finding out, Wayne wrecked her house. After sectioning in the local psychiatric hospital, where he started to self-mutilate, Wayne was prosecuted. He has been involved with many aspects of the legal system all funded through legal aid.

Wayne's story speaks, in part, to the failure of the legal system and the welfare system to catch and deal with misery and failure.<sup>4</sup> The United Kingdom spends vast amounts of its GDP on legal aid and welfare with seemingly little benefit for its expenditure, as we see later. In Wayne's situation far more could have been done before Wayne came into contact with the justice system. It is probable that more has been spent on pursuing Wayne through the courts and wards than in dealing with his problems. Moreover, it has been done in an ad hoc, sporadic manner that often renders the entire process meaningless to the individual. It becomes a tiresome process to be endured before normal life can be resumed. If the work of preventing Wayne's decline had been carried out, significant sums of money would have been saved and moreover Wayne would have probably contributed to society more beneficially.

One of the questions that emerges in this article is about the status of legal aid as a right. Is it one? Or is it something—a boon or a gift—to be given or withdrawn at the whim of the state? In this regard legal aid is similar to welfare. In the 1960s Charles Reich laid out his schema for the “new property”,<sup>5</sup> which articulated the view that people had property rights in government decisions, that people should not be abused by bureaucratic discretion. This was particularly crucial in the case of welfare where individuals would be powerless against the state. The US Supreme Court upheld Reich's ideas in *Goldberg v Kelly* when it said welfare rights were property within the meaning

<sup>4</sup> This point has been echoed by Pleasance *et al.* in relation to the Community Legal Service. They argue that effective targeting of legal aid within the context of limited resources requires special knowledge of populations vulnerable to the experience of justiciable problems. P. Pleasance, A. Buck, M. Smith, N. Balmer and A. Patel, “Needs Assessment and the Community Legal Service in England and Wales” (2004) 11 *International Journal of the Legal Profession* 213 at 229–230.

<sup>5</sup> C. Reich, “The New Property” (1964) 73 *Yale Law Journal* 733.

of the Constitution and could not be cut off without due process.<sup>6</sup> Reich argued the disinherited needed a new bill of rights. Economists, having become interested in property rights, have also demonstrated how “communal rights” give rise to a special category of problems. For example:

“The difficulty with a communal right is that it is not conducive to the accurate measurement of the cost that will be associated with any person’s use of the resource. Persons who own communal rights will tend to exercise these rights in ways that ignore the full consequences of their actions.”<sup>7</sup>

If we take this view, imbuing welfare and legal aid with the status of embedded rights will inevitably create demands for large amounts of resources that governments will not be able to satisfy with credible fiscal policies.

For governments legal aid has almost been too successful, especially schemes which rely on *judicare* as the mode of delivery. Because of this, legal aid has become the victim and the beneficiary of the juridification of everyday life. The thrust of this claim is founded in Weber’s conception of the roles of bureaucracy and legal domination.<sup>8</sup> Within his conception the modern state is bound by legal rationality. Since bureaucracy depends on the predictive and calculable effects of the rule of law, difficulties arise for officials when they have to attend to individual cases: [bureaucracy] rejects the “decision-making from case to case” that is typical of non-bureaucratic forms of administration.<sup>9</sup> Thus older, welfarist ideas of legal aid are antithetical to the modern forms of administration, or new public management,<sup>10</sup> as they are mired in individuality. Conversely, legal aid has allowed lawyers and individuals to pursue causes by virtue of due process that may be inimical to the state’s interests, as exemplified by Reich’s ideas. The dilemma posed by juridification is one that is usually resolved in the state’s favour. In the United Kingdom this resolution has not yet encompassed the interplay between welfare and legal aid. The deficiencies of the former will continue to exert pressure on the latter as people, through their lawyers, lay claim to their “new” property rights and make economics justiciable.<sup>11</sup> Juridification, as with bureaucratisation, is ineluctable. We cannot turn it back, but we can learn how to cope with and perhaps to attenuate some of its effects.<sup>12</sup>

<sup>6</sup> *Goldberg v Kelly*, 397 U.S. 254 (1970) (a state’s termination of public aid, without affording the beneficiary a hearing prior to termination, violates notions of procedural due process as set out in the Fourteenth Amendment’s Due Process Clause).

<sup>7</sup> A. Alchian and H. Demsetz, “The Property Right Paradigm” (1973) 33 *Journal of Economic History* 16 at 18. See also H. Demsetz, “Towards a Theory of Property Rights” (1967) 57 *American Economic Review* 347.

<sup>8</sup> R. Bendix, *Max Weber: an Intellectual Portrait* (University of California Press, Berkeley, 1977), at p.385.

<sup>9</sup> R. Bendix, fn.8 above, at p.429.

<sup>10</sup> Moorhead, fn.3 above, at 383. These are often expressed through mechanisms such as franchising and block-contracting.

<sup>11</sup> S. Wilks, “Markets and Law: Competition Policy and the Juridification of the Economic Sphere” (paper presented at SASE, George Washington University, 2004).

<sup>12</sup> G. Teubner, “General Aspects” in G. Teubner (ed.), *Juridification of Social Spheres* (De Gruyter, Berlin, 1987).

In this article we use the perspectives of other countries to make available some potential solutions to the United Kingdom's problems. Our focus is on civil legal aid, with some reference to family; however, criminal legal aid is beyond the scope of this study. There are two broad sections: a presentation of approaches to eligibility and costs' containment, and an examination of intermediated alternatives.

### Overview of legal aid funding<sup>13</sup>

David Lammy MP, the legal aid minister, reported that spending on legal aid, both criminal and civil, had risen from £1.5 billion in 1997 to £2 billion in 2004.<sup>14</sup> To place this in a comparative perspective the statistics in Table 1 below show the differences between the United Kingdom and other countries.

Clearly, England and Wales is far in excess of any other country on the table; its per capital expenditure is, at the extremes, 17 times that of the United States and four times that of the Netherlands.<sup>15</sup> The other countries in the table are mature, developed economies and societies that are not averse to spending on welfare. Nevertheless, the United Kingdom has a serious problem with legal aid and advice expenditure that, on present trends, will get significantly worse. The European Commission for the Efficiency of Justice ("CEPEJ") Report paints a similar picture in 2004 showing a total expenditure on criminal and civil legal aid in England and Wales of €2,800,000,000 (£1.9 billion) with Germany reporting the next highest total with €462,000,000 (£319 million).<sup>16</sup> There is one other feature which marks out the United Kingdom from other jurisdictions, the numbers of cases granted legal aid. For England and Wales 1,640,000 criminal cases and 1,017,000 civil cases receive legal aid. For France, the comparable figures are criminal—290,395 and civil—398,252; and Germany funds 495,686 civil cases. No other country comes close to the United Kingdom in amounts of expenditure on or numbers of cases funded by legal aid.<sup>17</sup> Moreover, the United Kingdom is essentially a court-based system centred on litigation that is based on adversarialism, which is predisposed against processes like ADR that depend on the formation of consensus outside the courtroom.

The aim of this article is not to correct the ills of the legal and welfare systems. Yet it is necessary to see the two as linked for it is often the legal system that picks up the fallout from the welfare system. Marital breakdown, violence, alcoholism, unemployment, as Wayne's example graphically shows,

<sup>13</sup> See also A. Paterson and A. Sherr, "Editorial: Legal Aid and Globalisation" (2004) 11 *International Journal of the Legal Profession* 157.

<sup>14</sup> David Lammy MP, Parliamentary Under-Secretary at the Department for Constitutional Affairs. Speech to the Law Society Legal Aid Management Forum, London, April 29, 2004.

<sup>15</sup> Although the data are a few years old, their relevance is not diminished.

<sup>16</sup> R. Eshuis, *European Judicial Systems 2002: Report on the CEPEJ Evaluation Scheme* (CEPEJ, 2004), at p.15.

<sup>17</sup> With respect to England and Wales, a few statistics are pertinent: population: 52 million approximately; in 2003, 2.5 million people received legal aid, nearly 5 million people claimed welfare benefits and 10.5 million people were of state-pensionable age (National Statistics 2003); 8,000 solicitors' firms do legal aid work as well as 57 law centres and 2,800 Citizens Advice Bureaux.

**TABLE 1** *Comparative Civil Legal Service Investments*

(Nations ranked by relative share of GNP invested in publicly-funded civil legal services—lowest to highest)

Nation (or political subdivision of nation, e.g. province, state)	This Nation's Total Govt Investment in Civil Legal Services (in US dollars) [In US includes Federal, State, local govts, & IOLTA expenditures]	Govt's Per Capita Civil Legal Services Investment (in US dollars)	Govt's Civil Legal Services Investment per \$10,000 of GNP (in US dollars)	Total US Civil Legal Services Investment if US Invested as Much of its GNP as this Nation Does In Civil Legal Services	How Many Times Greater is this Nation's Civil Legal Services Investment than the US Investment [as % of GNP]
UNITED STATES (FY 1998)	\$600 million [pop = 270 million]	\$2.25	\$0.70	\$0.6 billion [e.g. \$600 million]	
GERMANY (1996)	\$390 million [pop = 80 million]	\$4.86	\$1.90	\$1.6 billion	2.5 times
FRANCE (1994)	\$270 million [pop = 59 million]	\$4.50	\$1.90	\$1.6 billion	2.5 times
AUSTRALIA (FY 1998-99)			[Each State has its own programme]		
New South Wales	\$31 million [pop = 6 million]	\$5.12	\$2.75	\$2.3 billion	4 times
CANADA (FY 1998-99)			[Each Province has its own programme]		
Quebec	\$52 million [pop = 7.3 million]	\$7.07	\$3.50	\$3.0 billion	5 times
Ontario	\$82 million [pop = 11.5 million]	\$7.06	\$3.60	\$3.0 billion	5 times
British Columbia	\$32 million [pop = 4 million]	\$7.80	\$4.00	\$3.34 billion	5.8 times
NETHERLANDS (1998)	\$150 million [pop = 15.5 million]	\$9.70	\$4.20	\$3.5 billion	6 times
NEW ZEALAND (FY 1998-99)	\$27 million [pop = 3.8 million]	\$7.10	\$5.10	\$4.25 billion	7 times
ENGLAND & Wales (1999)	\$2 billion \$1.35 billion [pop = 53 million]	\$39.00	Gross = \$17.00 Net = \$12.00	\$14.2 billion \$10.1 billion	23.5 times 17 times

Source: [www.equaljusticelibrary.org](http://www.equaljusticelibrary.org)



























