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Young Legal Aid Lawyers: Social Mobility

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I congratulate the Young Legal Aid Lawyers on their study of Social Mobility and Diversity in the Legal Aid Sector. But we have to be distressed by its message, in the subtitle 'One step forward, two steps back'. The authors warn that young lawyers from less socially advantaged backgrounds may soon not be able to go into the very areas of practice that probably drew them towards the law in the first place - what Helena Kennedy calls 'poor folks law' - and for which they may be especially well suited - if only because of having a greater understanding of where the clients coming from than do lawyers from more privileged backgrounds.

What is going on now is the opposite of everything that many people of my generation hoped for and indeed thought was coming to pass. I was born in 1945, three years after the Beveridge report laid the foundations for the welfare state. Beveridge identified the five giant evils in society - squalor, ignorance, want, idleness and disease. Even before the second world war had ended the government had begun to tackle some of these and the Labour government tackled them all in the post war years.

I benefitted hugely from their efforts to combat ignorance - I had an excellent education at state schools, a state scholarship to Cambridge, and the possibility of qualifying as a barrister through a combination of a self-tuition correspondence course and a pupillage which taught me the practical skills that I needed. I had to borrow £125 from the bank to join an Inn of Court and that was pretty scary. The then equivalent of £17,350 for bar school would have been quite unthinkable. There are those who wonder whether we might go back to something closer to the options we used to have. They certainly made access possible to some who could not contemplate it now.

The other thing that my generation benefitted from was the last great plank in the welfare state, the Legal Aid and Advice Act 1949. In his recent Justice/Tom Sargent Lecture, Lord Neuberger suggests that:

‘The media may concentrate on the government’s health, social security and education programmes, but these are both secondary and rather recent functions of government. The defence of the realm and maintaining the rule of law at home are the two sole traditional duties of a government. Indeed they

are fundamental. If we are not free from invasion, or the rule of law breaks down, the social security, health and education become valueless, or at any rate very severely devalued.¹

I'm not sure I would entirely agree. If you haven't enough to eat, the rule of law may seem more of a threat than a promise, as any poacher might tell you. Nor has the rule of law always been equated with access to justice for all. But the same point was made by those who argued for the legal aid scheme in the 1940s. In his famous book on the *Rule of Law*, Lord Bingham cites what EJ Cohn wrote in 1943:²

‘Legal aid is a service which the modern State owes to its citizens as a matter of principle. . . . Just as the modern State tried 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.’

The 1949 Act did recognise that it was the role of the state, not only to provide a system of courts, judges and enforcement which could deliver justice, but also to ensure that everyone had access to it. And although I don't make the mistake of equating access to justice with access to lawyers, it is undoubtedly the case that, as Lord Bingham also pointed out, in the common law world access to lawyers is the best way of securing access to justice. We do not have courts and judges equipped to carry out their own investigations into the case and are heavily reliant on the parties to tell us what it is all about and the argue both the law and the facts. So the 1949 Act meant that we needed many more lawyers.

Throughout most of my professional life time, both of those things - access to the legal profession and access to legal advice and representation - had been getting better. But no-one could be complacent about access to the profession.

The Milburn Commission on Child Poverty and Social Mobility has just reported that the latest available figures show that 31% of solicitors in England and Wales went to independent schools.³ The figure for barristers is probably much higher. The 2012 Bar Barometer showed that almost 40% of

¹ *Justice in an Age of Austerity*, 15 October 2013., para 5.

² EJ Cohn, ‘Legal Aid for the Poor: A Study in Comparative Law and Legal Reform’ (1943) 59 *Law Quarterly Review* 250; R Egerton, ‘Historical Aspects of Legal Aid’ (1945) 61 *Law Quarterly Review* 87, both cited in Bingham, *op cit*, p 87.

³ Social Mobility and Child Poverty Commission, *State of the Nation 2013: social mobility and child poverty in Great Britain*, October 2013, Chapter 8, para 52. Available at <https://www.gov.uk/smcpc>.

pupil barristers in 2010/11 went to fee paying schools, 35% went to Oxbridge, 64% went to Russell Group Universities, and 81% came from professional backgrounds.⁴ And, as we all know, things are worse in the judiciary, with almost three-quarters of the senior judiciary – High Court and above – going to independent schools three-quarters going to Oxbridge and another fifth going to Russell Group universities.⁵ For a long time, I was the only Judge on our court not to have gone to a fee-paying school (and even I grew up in one), but we now have at least one other (not that all schools are easy to classify).

The awful thing about those Milburn figures is that, having been steadily improving (from a mobility point of view), they now seem to be getting worse. Of the previous year's cohort of pupils, only 23% went to Oxbridge, only 46% went to Russell Group universities, and only 55% came from professional backgrounds. This is a startling leap in a single year, and of course one cannot place too much weight on one year's data. But Milburn is concerned that 'this trend could become a trajectory if urgent action is not taken'.⁶

Sadly this is happening despite the Bar and the legal profession generally having recognised the problem before other professions have done so and taken some active steps to combat it – for example, through more transparent procedures for obtaining pupillages and through PRIME, the fair access to quality work experience scheme established by the Law Societies and the Sutton Trust. We know that the main problems are that recruitment to law jobs is left to the market; that the market favours a small number of top universities; that an Oxbridge graduate with a non-law or lower class degree is more likely to be recruited than a post-1992 university graduate with a first class degree in law; that students from independent schools are more likely to go to Oxbridge and other top Universities than state school students with the same grades – though not necessarily because the universities are discriminating but because the state school students don't set their sights so high.

These facts alone show the persistence of social advantage, independent schooling and Oxbridge in determining people's access to the legal profession. But it applies to many other professions too. One fascinating fact to emerge from a study of the occupational destinations of new graduates,⁷ done for the

⁴ General Council of the Bar, *Bar Barometer: Trends in the profile of the Bar*, November 2012.

⁵ A Milburn, *Fair Access to Professional Careers: A progress report by the Independent Reviewer on Social Mobility and Child Poverty*, May 2012, figs 3.1 and 3.2; see also Sutton Trust, *The Educational Backgrounds of Leading Lawyers, Journalists, Vice Chancellors, Politicians, Medics and Chief Executives*, 2009.

⁶ *Loc cit.*

⁷ L. Macmillan and A. Vignoles, *Mapping the Occupational Destinations of New Graduates*, 2013. Available at www.gov.uk/smcpc.

Milburn Commission, was that if you compare two graduates, one from a high socioeconomic background and the other from a low socioeconomic background, with the same qualifications, who went to the same type of University, and took the same subjects, those from the better off backgrounds were more likely to be working in top jobs three years from graduation. An independent school student has a 3% higher chance of entering a top occupation than a state school student with the same educational achievements. This is higher than the 2.3% gap between men and women.

I expect the authors of the Young Legal Aid Lawyers study would say that one of the causes of this, apart from all those networks that their parents have, is the prevalence of work experience and internships in today's recruitment criteria. Diverse candidates find it much harder to get these, partly because they don't have the contacts and partly because they can't afford to work without pay for any length of time. But I don't want to steal the authors' thunder.

All of this bothers me hugely. But it bothers me even more that we have greatly increased the numbers of law schools, the numbers of law graduates, the numbers of people qualifying as barristers, solicitors and legal executives, at a time when the numbers of law jobs available are diminishing. What is the point of all our outreach work with schools, of the Sutton Trust's splendid pathways to law programme, and similar initiatives by the professions, if we tempt more and more young people to aspire to a legal career that most of them can never have? I think that the answer to that is that we cannot deny people the educational opportunities which are the first rung on the ladder, because some of them undoubtedly will make it into the legal profession and some of those will make a great success of it. But it is very hard positively to encourage them to try.

The problem is greatest in those areas of law which are probably most attractive to the idealistic young. There have always been students who go into the law because they want to make loads of money and have their sights set on the more lucrative areas of practice from the outset. And it may well be that some of those areas are not feeling the pinch in the way that publicly funded work is doing. But most of the young people I meet want to be human rights lawyers or criminal advocates, rather than conveyancers or commercial lawyers. Most of them have not heard of transactional work (although of course they soon will if they go to one of the universities targeted by the big city firms).

Which brings me to the other great disappointment of my declining years - the steady and now precipitous decline in the legal aid and advice scheme which plays such an important part in securing genuine access to justice for all. There are three aspects to the erosion of the legal aid scheme of which we used to be so proud: eligibility, scope and rewards for the lawyers who work in it.

When the Legal Aid and Advice Act was passed, around 80% of the population were eligible for legal aid. By 2008 it was down to about 30% (and I am surprised that it was so high). There has been a steady erosion over many years, since at least the 1990s when serious attempts were made to stem the ever rising tide of legal aid expenditure. If it meant that rising incomes meant that more and more people were able to afford to employ lawyers, that would be a good thing. But I am sure that eligibility levels have gone down in real terms, which is not such a good thing.

Then there is scope. The first legal representation scheme was quite narrow in scope, limited to the High Court, county courts, Assizes and quarter sessions. That was where the bulk of serious legal disputes were decided. Then criminal legal aid was extended to cases in magistrates' courts and a more economical scheme introduced for family cases in magistrates courts. These enabled people like me who went to the bar in 1960s and 1970s to make a start. Then it extended into mental health review tribunals because the liberty of the subject was at stake. But there was also legal help, which brought the possibility of legal advice and assistance with the much wider range of legal problems which ordinary people experience these days. So we could be proud that the scheme was no longer limited to those traditional disputes dealt with in the courts but could also enable people to assert the new rights which the law had given them, for example in disputes with their employers or their landlords.

Again, the first inroads were made in the 1990s, with the removal of most personal injury claims and the introduction of conditional fee agreements, which have brought their own problems. But at least the idea was that those who could not afford it would still have access to lawyers. Now all of that has been brought to a shuddering halt by LASPO. The Act itself has taken many important areas of work completely out of scope. Of course I feel particularly concerned about the impact of removing legal aid from most private family law cases and relegating them to mediation.

Most family judges are great believers in mediation - they know that with suitable help the parties should be able to reach a better result than they can do. As President of National Family Mediation, I share their views. But that only works if both parties are willing to engage in mediation. And why would the stronger or richer party engage in mediation if there is not the real possibility of going to court to settle matters fairly if the mediation fails? And how can there be a real possibility of going to court to settle matters fairly if legal aid is not available to the one who cannot afford a lawyer?

The judges are worried at two prospects. The first is that people with good cases will not pursue them in court, which will be a denial of justice. The second is that people with bad or good cases will pursue them in person, which will be time consuming and inefficient. But the real problem is the case where one party can afford legal representation and the other cannot. There is a weaker and poorer party and

a richer and stronger party in most family cases. Denying the weaker and poorer party a level playing field is a denial of justice.

But of course this so-called reform has done more than save money on lawyers. At present it is also saving money on mediators. Referrals have dropped dramatically. This is not surprising. Not only does the stronger party have little incentive to mediate; the lawyers were the primary source of referrals to mediation. Now that people can no longer get legal aid, they no longer have to go for an explanation of mediation as a pre-condition of getting it for family proceedings. The obligation to attend a MIAM is not coming into force until next year. NFM services are wondering whether they can hang on until then. I would like to think that the government regards this as an own goal.

The message is that legal aid lawyers and mediators must work together for the benefit of separating families – for lawyers to reassure the public that some money is still available for them to support people going to mediation, and that it is available for the mediation, so they do not need to go straight to court, and for mediators to adapt their practices so that the memoranda of understanding they produce are easier for lawyers to assess.

Thirdly of course there have also been severe cutbacks in the remuneration available for legal aid lawyers. I hear stories every day of very able practitioners who are having to leave because they cannot make ends meet. Some of these are the very diverse and socially mobile young lawyers whom we want to attract into the profession. But the combination of a high cost education and a low-paid career is going to be more and more of a deterrent.

I wish I could see a way ahead in these difficult days. I understand how difficult it is for the government to bring expenditure on legal services under control without taking drastic steps like these. I salute the courage and determination of the young legal aid lawyers who are bent on continuing to provide a service to the poorest and most disadvantaged in our society and also on promoting a more diverse and socially mobile legal profession. Good luck to you!