



LEGAL AID AND ACCESS TO JUSTICE IN ENGLAND AND INDIA

Andrew Higgins*

I. INTRODUCTION

In the book *Civil Justice in Crisis*, published in 1999, Adrian Zuckerman edited a series of articles reviewing the state of civil justice around the world. The title chosen for the book summed up a rather bleak assessment of civil justice in common law and civil law jurisdictions and developed and developing countries. Zuckerman stated:

A sense of crisis in the administration of civil justice is by no means universal, but it is widespread. Most countries represented in this book are experiencing difficulties in the operation of their system of civil justice. Whether the difficulties take the form of exorbitant costs or of excessive delays, they have serious implications...[C]ost can place access to justice beyond the reach of citizens with limited means. Delays may render access to justice useless.¹

Unfortunately, it is a melancholy truth that civil justice always appears to be in a state of crisis and always in the midst of reforms designed to ameliorate it. Where there have been no recent reforms, there are usually urgent calls for them.

In England, the crisis of the moment is the Government's further cuts to legal aid, which prompted the conservative English Bar to go on strike for the first time in its long history.² In light of the high cost of litigation in England, the

* Associate Professor, Civil Procedure, Faculty of Law, University of Oxford and Fellow in Law, Mansfield College. Email correspondence to: Andrew.Higgins@law.ox.ac.uk.

¹ A. Zuckerman (ed), *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF PROCEDURE* (OUP Oxford 1999) 12.

² J. Cusick, *Don't call it a strike: Barristers withdraw their labour and the courts including the old bailey for silent for the first time in centuries over legal aid cuts* THE INDEPENDENT (January 6,

absence of state funding for civil claims risks putting access to justice beyond the reach of many. They may be forced to represent themselves, which adds to the cost or length of proceedings and makes it more difficult for the court to deliver justice on the merits. Some people will be deterred from pursuing a claim or defence altogether.³

Despite the cuts to legal aid, which have been described as ‘swinging’ by the Law Society,⁴ England’s legal aid system remains expensive. The annual cost of legal aid is around £2 billion with almost half being spent on civil legal aid. According to the Ministry of Justice, the UK Legal Aid System costs more per head than any other country.⁵ For over a decade the Government has been spending more money to help fewer and fewer people.

The story is rather different in India. A legal system that is both accessible and effective in protecting legal rights, especially for the poor and disenfranchised, is still more of an aspiration than an accurate description of India’s civil justice system. Recently, a team of academic and civil society researchers conducted extensive ethnographies of litigants, judges, lawyers, and courtroom personnel within multiple districts in three states, Maharashtra, Gujarat, and Himachal Pradesh, to assess access to justice in the lower tier of Indian courts. The research, carried out between 2010 and 2012 and published in the Harvard journal of Human Rights, demonstrated that the civil justice system in lower Indian courts is chronically underfunded in every respect - - lack of judges and adequate training for them, lack of legal aid, lack of courtroom staff and basic courthouse infrastructure. All of this is exacerbated by high rates of illiteracy amongst litigants, caste and sex discrimination against both lawyers and litigants, and widespread corruption.⁶

This article examines the funding of civil justice in both England and India including whether the right to public legal aid does or should extend to a right to legal representation in civil proceedings. It also briefly outlines various reform options for the public and private funding of the civil justice system to make it more affordable to the state and accessible to ordinary citizens.

2014).

³ See R. Lowe, *Lord Woolf: UK legal aid cuts may cause ‘extreme’ psychological damage* IBA NEWS (March 20, 2013); O. Bowcott *Judges criticise impact of legal aid cuts* THE GUARDIAN (May 14, 2014).

⁴ D. Hudson, CEO of the Law Society, quoted in Law Society Press Release: “UK taxpayers will pay cost of government’s legal aid cuts” (January 9, 2012), available at <https://www.lawsociety.org.uk/news/press-releases/uk-taxpayers-will-pay-cost-of-governments-legal-aid-cuts/> (Last accessed on June 18, 2014).

⁵ Ministry of Justice, *Transforming Legal Aid: Next Steps’ Consultation Paper*, 5 (September – November 2013).

⁶ J. Krishnan et al, *Grappling at the grass roots: access to justice in India’s lower tier* 27 (2014) HARVARD HUMAN RIGHTS JOURNAL, 501.

II. THE RIGHT TO LEGAL AID IN ENGLAND

When discussing the availability of legal aid it is important to distinguish between the provision of legal aid as a matter of social and legal policy, and what legal rights persons may have to state funded legal representation.

Historically, England's legal aid system had the lofty aim of guaranteeing access to court *and* equality of arms. As Zuckerman observes, the aim was "not only to provide the poor with a basic legal service, but to grant to the poor a level of legal services sufficient to ensure that they are not at a disadvantage compared with their richer opponents."⁷ From its inception in 1949, when the Labour Government radically expanded the scope of public services, creating Britain's modern welfare state, legal aid was available to all persons who satisfied financial eligibility criteria and whose case had legal merit. The Legal Aid Board paid the aided person's lawyer's bills as if the legally aided person was paying them personally.

However as demand for legal services increased, and therefore demands on legal aid increased, successive governments have been confronted with a dilemma; they could keep paying legal aid fees without limit or they could limit the legal support they provided for the poor. As Zuckerman noted in 1999:

Legal aid has now reached a level far greater than the spending on the courts themselves, amounting to £1.6 billion in the present financial year. This vast budget largely represents direct payments to the legal profession. Such a level of expenditure is clearly unsustainable. It is now clear that a system whereby the system of publicly funded services is governed by what the affluent are used to purchasing for themselves, rather than by what the taxpayer can afford, was destined to break down.⁸

To put the legal aid budget on a more sustainable footing, successive governments chose to limit their support for the poor by tightening the eligibility criteria. Legal aid in civil cases is now limited to certain types of cases including housing claims, debt claims that would lead to bankruptcy or loss of a home, welfare benefits appeals, discrimination cases, certain immigration and asylum claims, victims of abuse or children in family cases, mental health cases, educational special needs assessment cases and community care cases. In addition, a person's income and capital must be within specified and stringent limits (means test) and their case needs to have a reasonable prospect of success (merits test). Legal aid is generally not available in consumer and other contractual disputes, most immigration cases, tort and other general claims including ordinary claims

⁷ *Supra* Note 1, 36.

⁸ *Supra* Note 1, 38.

for personal injury or defamation, conveyancing, trust law, will making, company or partnership law or business law. However the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act) provides exceptionally for legal aid to be approved for a case outside the scope of legal aid, as well as legal aid in certain cases involving very high legal costs.⁹

For persons who do not qualify for legal aid, the costs of litigation are normally prohibitive, especially for individuals and small business owners. In his final report on the costs of civil litigation, Sir Rupert Jackson cited evidence that 73 per cent of all UK households have savings of less than £10,000. Legal costs for just one litigant can be many times higher than £10,000 in fully-contested litigation.¹⁰ This would mean that three quarters of households could not afford access to court without legal aid or using the value of their claim to pay for it (on a conditional fee or contingency fee basis) while their other financial assets (their own home in most cases) would be at risk from an adverse costs order without the benefit of legal expenses insurance.

Governments have not only tightened the financial eligibility criteria and the types of disputes for which legal aid is available, they have moved to reduce the fees paid to lawyers representing legally aided clients. The proposed fee changes prompted walk outs by members of the criminal bar. Protests from the profession have had some success, with the Government abandoning proposals to restrict choice of lawyer for legally aided clients.¹¹

Judges, lawyers and MPs have all questioned whether the Government's changes to legal aid threaten access to justice. Lord Neuberger, the President of the UK Supreme Court, stated in a lecture on 'Access to Justice in an Age of Austerity':

If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped - that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staff's time and of the judge's time in and out of court.¹²

The doctrinal question for English lawyers is whether the right of access to court, guaranteed by Article 6 of the European Convention of Human Rights (ECHR), entails a right to publicly funded legal representation. The short answer

⁹ See the Ministry of Justice's website for eligibility criteria: <http://www.justice.gov.uk/legal-aid>

¹⁰ R Jackson, *Review of civil litigation costs: final report* Ch 1 [1.2] (December 2009).

¹¹ F Gibb, *Legal Aid is slashed for criminals and the rich* THE TIMES (September 5, 2013); Ministry of Justice, *Transforming Legal Aid: Next Steps* Consultation Paper (September – November 2013).

¹² Lord Neuberger, *Justice in an Age of Austerity*, Tom Sargant Memorial Lecture, 15 (October 15, 2013).

is yes but only in narrowly defined circumstances. The issue was discussed by the UK Parliament's Joint Committee on Human Rights (JCHR) in its review of the Government's proposed changes. In its report, the JCHR noted that it had written to the Lord Chancellor requesting a the Government's assessment of the compatibility of its proposals with all relevant human rights standards, including Article 6(1) of the ECHR and the non- discrimination principle in Article 14, and the common law rights of access to court and effective access to justice. In its response the Government accepted that there is a common law right of access to the court, but went on to state that this is not the same as a common law right to legal aid. It stated:

We do not consider that there is any basis at common law that a litigant is in general entitled to a state subsidy in respect of lawyers' fees. The legal aid reforms do not involve any fundamental right of access to the courts, rather the question of whether a person should receive legal aid funding.¹³

In oral evidence to the JCHR the Lord Chancellor observed 'it is completely unrealistic to believe that we can provide legal aid support to give every person in all circumstances access to the justice system.'¹⁴

The JCHR accepted that there was no general common law right to legal aid, but argued that legal aid may be required in certain circumstances to make the common law right of access to court meaningful. In particular it claimed that the state is required to ensure that such aid is available 'to make access possible for those with insufficient resources in relation to legally complex disputes concerning matters of fundamental importance.' It went on to state:

We are surprised that the Government does not appear to accept that its proposals to reform legal aid engage the fundamental common law right of effective access to justice, including legal advice when necessary. We believe that there is a basic constitutional requirement that legal aid should be available to make access to court possible in relation to important and legally complex disputes, subject to means and merits tests and other proportionate limitations.¹⁵

The JCHR is correct in its description of the 'right' to legal aid. However there is nothing in the reforms adopted by the Government which, *prima facie*, suggest a breach of Art 6. This is because the LASPO Act makes provision for

¹³ House of Lords House of Commons Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform legal aid*, Seventh Report of Session 2013–14, ¶ 29 (December 2013).

¹⁴ *Id* ¶ 30.

¹⁵ *Id* ¶¶ 31-32.

legal aid funding in exceptional cases that would not otherwise be eligible for aid. One of the criteria for deciding whether exceptional case funding is necessary is whether the failure to provide aid would be a breach of the individual's ECHR rights as incorporated into English law by the Human Rights Act 1998.¹⁶ Accordingly, only a mistaken application of the new law could constitute a breach of art 6.

Many legal systems, including England, recognize a constitutional right to legal assistance to defend criminal proceedings when one's liberty, or even life, may be at stake.¹⁷ The right to legal assistance for civil proceedings is more limited. In *Airey v. Ireland* the European Court of Human Rights (ECtHR) held that legal assistance may be necessary for a fair trial in family law proceedings, which were determinative of important family rights and relationships, and may have serious consequences for any children of the family.¹⁸

Later in *Steel and Morris v. the UK*,¹⁹ the ECtHR held that the right to equality of arms under Article 6 may also entail a right to adequate legal representation. It stated: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively, and that he or she is able to enjoy equality of arms with the opposing side."²⁰ In that case, McDonald's, a large multinational corporation which operated a fast food business, sued various individuals for defamation over leaflets the defendants had published protesting the corporation's record on environmental and social issues. The proceedings against the other defendants were withdrawn in exchange for an apology, but Steel and Morris chose to defend the action. The defendants had low incomes and were unable to afford legal representation. They were denied legal aid because legal aid was not available for defamation proceedings at the time. The defendants represented themselves throughout the trial and subsequent appeal, with occasional assistance from lawyers on a pro bono basis. The corporation was represented by specialist leading and junior counsel and solicitors. The trial lasted for 313 days, which at the time was the record for the longest civil trial in England. The defendants were found to have libelled the corporation and damages of £60,000 were awarded, which were reduced to £40,000 on appeal. The defendants appealed to the ECtHR claiming, inter alia, that the government's failure to provide legal aid was a breach of their right to fair trial. The ECtHR agreed, ruling that the UK

¹⁶ Section 10(3), Legal Aid Sentencing and Punishment of Offenders Act 2012.

¹⁷ *Benham v. UK* (App no 19380/92) (1996) 22 EHRR 293; In the U.S see *Gideon v. Wainwright* 372 U.S. 335 (1963); In Australia there is no absolute right to legal representation but the court will absent exceptional circumstances grant an adjournment or stay until an indigent accused charged with a serious offence can obtain legal representation, see *Dietrich v. R* [1992] HCA 57, (1992) 177 CLR 292.

¹⁸ *Airey v. Ireland* (App no 6289/73) [1979] EHRR 305. See also *McVicar v. UK* (App no 46311/99) (2002) 12 BHRC 567, ¶ 61.

¹⁹ *Steel and Morris v. UK* (App no 68416/01) (2005) 41 EHRR 22.

²⁰ *Id* ¶59.

Government's failure to provide legal representation to the defendants in what were incredibly complex proceedings, had denied them the opportunity to present their case effectively, and thus breached their right to fair trial.

An important factor in the ECtHR's reasoning was that Steel and Morris were defendants seeking to protect their right to freedom of expression, a right accorded considerable importance under the ECHR. Moreover, the financial consequences of the applicants failing to verify each defamatory statement complained of were significant.²¹ Steel and Morris 'did not choose to commence defamation proceedings' but this does not mean that the state can always deny legal aid to impecunious claimants. Whether a person becomes a claimant or defendant is largely a matter of chance and sometimes timing. As the ECtHR made clear, whether the provision of legal aid is necessary for a fair hearing must be determined on the 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 himself or herself effectively.²²

The upshot of this jurisprudence is that provided the state provides access to legal assistance for indigent litigants seeking to vindicate or defend fundamentally important rights in complex cases, there is little risk that their legal schemes could breach Article 6. What does seem clear, however, is that increasingly legal aid is available only in circumstances that would otherwise engage the constitutional right to legal assistance.

III. THE RIGHT TO LEGAL AID IN INDIA

The right to legal aid receives greater protection in the Indian legal system, but in practice the funds and assistance made available to civil litigants is paltry. The Indian Constitution is a shining example to lawyers around the world who argue that there can be no rule of law without access to legal assistance, and therefore it is incumbent on the state to provide legal assistance to those who cannot afford it. Article 39A of the Constitution, which is headed **Equal justice and free legal aid** states:

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

²¹ *Id* ¶63.

²² *Id* ¶62.

This Directive Principle was enacted in 1976²³ during Emergency Rule, but little was done to provide justice to those who needed it until the Supreme Court of India in *Hussainara Khatoon v. State of Bihar*²⁴ observed that the guarantee under Art 21 to a ‘reasonable, fair and just’ procedure when a person’s liberty or life is at stake included a right to legal assistance. The Court went on to state:

We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation wide legal service programme to provide free legal services to them.²⁵

Hussainara Khatoon demonstrates the injustices that can be caused by delays attributable to lack of legal representation. The case involved prisoners who had been in detention without trial for a longer period than they would have been had they been convicted and sentenced. Their cases had been delayed because they were unable to obtain legal assistance.

There is now a national legal aid system in India which is presently regulated by the Legal Aid Authorities Act 2007. A person is eligible for assistance under the Act if he is -

- (a) a member of a Scheduled Caste or Scheduled Tribe;
- (b) a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution;
- (c) a woman or a child;
- (d) a mentally ill or otherwise disabled person;
- (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- (f) an industrial workman; or
- (g) in custody, including custody in a protective home or in a juvenile home
- (h) of in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987; or

²³ As amended by The Constitution (Forty-Second Amendment) Act, 1976. The implementation of legal aid before the Emergency was desultory: G. Oliver Koppell, *The Indian Lawyer as Social Innovator: Legal Aid in India* 3 LAW AND SOCIETY REVIEW 299 (1969).

²⁴ *Hussainara Khatoon v. State of Bihar*, 1979 SCR (3) 532.

²⁵ *Id.*, 537.

- (i) A person whose annual income less than nine thousand rupees or such other higher amount as may be prescribed by the State Government, and less than twelve thousand rupees or such other higher amount as may be prescribed by the Central Government if the case is before the Supreme Court.

The Supreme Court of India has also set up Supreme Court Legal Services Committee (SCLSC) to ensure free legal aid to the poor and disenfranchised in the Supreme Court. It is headed by a judge of Supreme Court of India and has distinguished members nominated by Chief justice of India. The SCLSC has a panel of competent advocates on record with certain minimum number of years of experience who handle the cases in the Supreme Court. In addition, the SCLSC has full time legal consultant who provides legal advice to poor litigants either on personal visit or through the post.²⁶ Legal aid for formal court proceedings is supplemented by an elaborate 'Lok Adalat' or People's Court system that provides cheap alternative dispute resolution.²⁷

Despite the legislative framework and organisational structure to provide legal aid, in practical terms 'very little legal aid is provided by either the bar or the state' in India especially in the lower courts.²⁸ Moreover, the legal aid that is provided by lawyers on legal aid panels who are paid very small sums for each case. Legal commentators have argued that successive governments have failed to provide the necessary facilities and incentives to improve the quality and skills of these advocates which has resulted in inequality of representation in court between the contesting parties.²⁹

IV. SHOULD THE STATE SPEND MORE ON ACCESS TO JUSTICE?

Given the limited funding for legal aid in developed countries like England, and the even lower amounts of funding available in developing countries like India, the main theoretical question is whether the state ought to invest more in civil justice.

From the perspective of lawyers it is almost axiomatic that the state should spend more on the civil justice system. Yet as a matter of social policy or moral

²⁶ G Mallikarjun, *Legal Aid in India and the Judicial Contribution* 7 NALSAR LAW REVIEW 234, 240 (2013).

²⁷ T Zainulbhai *Justice For All: Improving the Lok Adalat System in India* 34 FORDHAM INTERNATIONAL LAW JOURNAL 248 (2011).

²⁸ *Supra* Note 5, 518.

²⁹ P. Sidhva, *Legal Aid in India: The Need for Strong Laws and High Minds* OXFORD HUMAN RIGHTS HUB BLOG (November 18, 2012), available at <http://ohrh.law.ox.ac.uk/legal-aid-in-india-the-need-for-strong-laws-and-high-minds/> (Last accessed June 18, 2014).

philosophy the issue is not straightforward. In a liberal democratic society, which is governed by the rule of law and committed to protecting and promoting the autonomy of its members, the state must provide an effective and accessible system for enforcing private rights. How can one prosper if one's substantive rights and freedoms are not properly protected?

Spending money on legal aid might also end up saving public money rather than costing the public purse. Cutting legal aid obviously represents a false economy *to the justice system* if the effect of the cuts is that litigants take much longer to litigate their cases taking up valuable judicial time and court resources. Indeed it is reasonable to hypothesize that for most legal disputes there is an irreducible minimum of complexity, and therefore an irreducible minimum of legal training is required to successfully navigate that procedure.³⁰ If self-represented litigants are to have their cases decided on the merits, then inevitably it is the judge who performs the necessary legal work – particularly identification of the issues and instructing the parties about what evidence is and is not relevant - in order to decide the case justly. The alternative is for the case to be dismissed on technical grounds which is a 'rank denial of justice' just as much as not being able to litigate the claim at all.³¹ Worse, disposal of cases on technical grounds still takes up valuable court resources and, as Lord Woolf has noted,³² can lead to resentment, distress and paranoia on the part of the litigant who feels they have become the victim of a double injustice.

However access to legal assistance can also save government expenditure on other services, especially in developed countries. When the current government introduced its first round of cuts to Legal Aid in 2011, its own impact assessment indicated that the reforms could generate knock-on costs including reduced social cohesion, increased criminality, reduced business and economic efficiency, increased resource costs to other Departments, and increased transfer payments from other Departments.³³

Research conducted by King's College London for the Law Society of England & Wales estimated the financial cost of the unintended consequences of legal aid cuts to be in the region of £139 million per annum. Accordingly, the planned net saving of the Government from legal aid cuts were likely to be far less than the Government's estimates of £270 million per annum.

³⁰ For an illuminating discussion on the case for compulsory legal representation and its compatibility with principles of autonomy see R. Assy, *THE RIGHT TO SELF-REPRESENTATION* (Oxford University Press, 2014).

³¹ *Supra* Note 11.

³² *Supra* Note 3.

³³ Ministry of Justice, *Impact Assessment: Cumulative Legal Aid Reform Proposals* (London, 2011), available at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/latimpactassessment.pdf (Last accessed June 26, 2014).

Moreover, numerous unintended costs could not be estimated, so KCL's research is likely to be a substantial underestimate of the true costs of legal aid cuts.³⁴ Research in Australia has produced similar results. According to an Australian nation-wide survey into unmet legal need carried out by the Law and Justice Foundation of NSW, the majority of people with legal problems³⁵ had a 'substantial problem' that had a severe or moderate impact on everyday life leading to income loss or financial strain, stress-related illness, physical illness and relationship breakdowns and a need to move home.³⁶

A strong argument can be made that in many countries, including England and India, the total level of public funding for the civil and criminal justice system falls short of what is required in a liberal democratic society. Nonetheless, governments must also fund a range of other vital public services including health and education. The state has to make difficult choices in allocating public resources. Should, for example, the state cut funding for drug treatment programs to increase the legal assistance for persons involved in criminal or civil proceedings that are partly attributable to drug dependency? In India, too, there is 'substantial scepticism about expending effort or money on providing legal services instead of on programs that concentrate on building multifaceted organizations for the poor.'³⁷ So far as public expenditure is concerned, for the poorest Indians programs to provide electricity, clean running water and basic health care services might seem a more pressing priority than legal aid (although one cannot deny the value of law in helping Indians establish a legal right to such services).

Some very distinguished lawyers have argued the case for legal exceptionalism – i.e. that maintaining the rule of law is the primary function of the state and more important than the provision of other public services. In his speech on Access to Justice, Lord Neuberger stated:

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 from abroad and maintaining the rule of law at home are the two sole traditional duties of a government. More

³⁴ G. Cookson, *Unintended Consequences: the cost of the Government's Legal Aid Reforms: A Report for the Law Society of England & Wales*, 6 (November 2011), available at <http://www.kcl.ac.uk/campuslife/student/news/stories/UnintendedConsequences-FinalReport.pdf> (Last accessed June 26, 2014).

³⁵ Law and Justice Foundation of NSW, *Legal Australia – Wide Survey*, August 2012, xvii, available at [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf) (Last accessed June 26, 2014). Half of the respondents had one or more legal problem in the previous 12 months and for almost half of those problems respondents either failed to take legal advice or took no action at all.

³⁶ *Id.* xvi.

³⁷ R. Gordon and J. Lindsay, *Law and the Poor in Rural India: The Prospects for Legal Aid* 5 *AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW* 655, 766 (1990).

importantly, they are fundamental. If we are not free from invasion, or the rule of law breaks down, then social security, health, and education become valueless, or at any rate very severely devalued.³⁸

Non-lawyers might question the philosophical basis for this prioritization of legal relations and interests over the protection of other values that feature on almost everyone's definition of the good life and are also critical to a healthy liberal democracy. One can safely assume that the President of the Royal College of Physicians has not delivered an address on public health observing that while it is important, public funding of health care is secondary to the rule of law. Few, if any, politicians would be willing to draw up a list of hospital closures needed to increase legal aid funding. Another option would be to increase the level of taxation but tax increases enjoy limited public support including amongst lawyers. Perhaps recognising that a call for more funding would be more persuasive if the source of the funding was also identified, the Law Society for England & Wales made the curiously specific recommendation of an increase in sales tax on alcohol to pay for legal aid.³⁹

No serious legal scholar has developed a credible theory of justice that requires the state to underwrite every civil claim or provide representation in every criminal matter at the cost of reducing other public services. It is conceivable that libertarian theories of the state which emphasize that its principal obligation is to maintain security and uphold the law would support at least higher levels of legal aid funding relative to other public services.⁴⁰ On the other hand, most libertarian theories of the state tend to advocate for a small one, and whether that would extend to a publicly funded right to legal representation for all civil cases is doubtful.

The key point is that justice, both in its legal form and as a general description of how society should be ordered, has an inherent resource dimension. Even if a case could be made for legal exceptionalism one cannot expect the best possible civil justice system that (unlimited) money can buy. As Zuckerman states:

A legitimate claim that the state should protect our rights does not entail an entitlement to the best possible law enforcement system regardless of expense. One is no more entitled to the best possible system of justice than one is to the best possible health, education, or transport services. Since public resources

³⁸ *Supra* Note 12, 2-3.

³⁹ The Law Society, *Access to Justice Review: Final Report* (November 2010), 38. The Society argued that many offences were alcohol related. It also called for a levy on the financial services industry to cover the costs of fraud cases arising out of financial crime.

⁴⁰ For example, Nozick in *ANARCHY, STATE AND UTOPIA* (1974).

are limited we can only demand such civil rights enforcement as can reasonably be afforded by the taxpayer.⁴¹

Similarly, Dworkin has argued that all that litigants are entitled to expect is a reasonable allocation of resources needed to achieve reasonable protection and enforcement of their rights.⁴²

V. THE FUTURE

Given the limited public funds available for civil justice in both developed and developing countries, the one thing on which there is almost universal consensus is the need for structural reform. While deeply opposed to the cuts to legal aid funding, many English lawyers grudgingly accept that neither the current government or future governments are likely to reverse them.⁴³

Without structural reform, access to justice will remain or increasingly become, beyond the reach of most people. And for those brave, desperate or foolish enough to litigate their own claims the chances of their cases being determined on the merits after a full and fair hearing are not high, while the cost of hearing their claims and defences will be higher than would be the case if legal assistance were affordable.

So what can be done? It is beyond the scope of this paper to discuss the reform options in detail but it is worth setting out some of them, including those that might be deemed radical or controversial. The chronic nature of the problem of limited access to justice means there is little to be gained from ruling options out. It must also be borne in mind that delivering access to justice requires the courts to deliver correct outcomes i.e. judgments that we can be reasonably confident are correct, in a timely manner and at proportionate cost. The twin evils of excessive delay and cost have been criticized for centuries in England and India,⁴⁴ and many reform efforts have been directed towards addressing one or both of these problems with mixed success. The challenge facing lawmakers, lawyers and judges today is how to deliver accurate, timely, and affordable results with less public money. Creative thinking is required. However because of the limited public funding of civil justice systems in many parts of the world, many lawyers have done a great deal of thinking about what is needed to help the poor and disenfranchised protect their legal rights at the lowest possible cost. Below is a list of

⁴¹ A. Zuckerman, *ON CIVIL PROCEDURE*, ¶ 1.10 (3rd ed., Sweet & Maxwell, 2013).

⁴² R.M. Dworkin, *A MATTER OF PRINCIPLE* 92 (1985).

⁴³ UCL Faculty of Laws Seminar, *Litigants in Person: What Can Courts Do?* (June 18, 2014). According to senior lawyers who cannot be named as the seminar was conducted under the Chatham House Rule).

⁴⁴ Most famously in the Magna Carta, Clause 40: "To no-one will we sell, to no one deny or delay right or justice." Delays are also a chronic feature of the Indian legal system.

potential reforms, including those that have been tried with some success, and those that more radical.

A. Procedural reform, including simplified pleading rules, liberalised standing requirements and effective collective redress rules.

Judicial efforts in India to secure access to justice for the poor and disenfranchised have focused on reforming procedural law to make it easier to bring claims before the court, especially for the enforcement of fundamental rights. The Indian Supreme Court has introduced liberal standing requirements for public interest litigation, which allow anyone to file a claim to protect the fundamental rights of others where those others have difficulty accessing court. The Supreme Court in *Gupta v. Union of India*⁴⁵ held:

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right ... and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.

The extension of the PIL jurisdiction to determinate classes of persons is a recognition that legal disputes, especially involving ordinary citizens, frequently concern large numbers of similarly situated people. Effective collective redress procedures are crucial if these disputes are to be resolved fairly to all interested parties, and with proportionate use of public resources. Unfortunately, the UK's collective redress procedures are limited in scope and ineffective in cases in which the losses suffered by each individual are modest, but the losses suffered by the class as a whole are large. The Government is introducing opt out class actions for competition cases but has chosen not to introduce a generic opt out procedure.⁴⁶

Another important feature of the PIL jurisdiction, is that the Supreme Court has interpreted the Constitutional right in Article 32 to petition the Court in 'appropriate proceedings' to protect fundamental rights as enabling it to simplify procedural requirements. In *Gupta v. Union of India* the court observed that the term 'appropriate proceedings' does not refer to the form but to the purpose of the proceeding: so long as the purpose of the proceeding is to enforce a

⁴⁵ *Gupta v. Union of India*, (1981) Supp SCC 87.

⁴⁶ Department for Business Innovation and Skills, *Private Action in Competition Law: A Consultation on Options for Reform* ¶ 5.4 (April 2012).

fundamental right, any form will do.⁴⁷ This allowed the Court to develop epistolary jurisdiction by which letters were accepted as petitions. Here to, this emphasis on substance rather than form might also assist English courts reduce the technical barriers to access to justice, as well as reduce costly and counterproductive satellite litigation over pleadings.

B. More de-regulation of legal services to reduce the cost of legal assistance

Greater deregulation of the legal services profession would increase the supply of affordable legal assistance. The UK Parliament has significantly de-regulated the legal services market in England & Wales, especially in the provision of legal advice.⁴⁸ However lawyers retain a virtual monopoly on representation in court. It may be necessary to move to the approach in some Tribunals, such as the Employment Tribunal, which allow non-lawyer advocates to represent litigants.

One of the most straightforward, and sorely needed reforms, is to allow litigants the freedom to choose how they pay their lawyers including by way of contingency fees. In circumstances where the costs of litigation are high, and the state is unwilling to fully subsidise it, restrictions on how clients can pay their lawyers inevitably further restrict access to justice for the poor. England has moved to greater use of commercial funding including third party funding and damages based agreements with lawyers. However the damages based agreement regulations have been strongly criticized as poorly drafted and with too many restrictions on the types of agreements, especially the size of the contingency fee that can be agreed.⁴⁹ Concerns about exploitation of clients are better dealt with through the ordinary rules of contract regulating consumer contracts, while concerns about lawyer misconduct – which are almost certainly over-hyped⁵⁰ – can be dealt with through the court's inherent powers to prevent abuse of its processes.⁵¹

C. Regulation of lawyers' fees and/or lawyers' time through mandatory participation in pro bono or fixed fee schemes targeted at indigent litigants

Instead of de-regulating the legal services market, another option could be more regulation of the legal services market by making legal representation

⁴⁷ *Gupta v. Union of India*, (1981) Supp SCC 87.

⁴⁸ In England, for example, legal advice is no longer a reserved legal activity under the Legal Services Act 2007 and can be provided by anyone.

⁴⁹ R Mulheron, *The Damages-Based Agreements Regulations 2013: some conundrums in the "brave new world" of funding* (2013) 32 CJQ 241.

⁵⁰ They are commonly used in the United States and Canada.

⁵¹ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd.*, 2006 HCA 41.

compulsory for persons involved in legal proceedings, whilst also regulating the fees lawyers can charge for their services so as to ensure representation is affordable to all persons otherwise not eligible for legal aid. In some civil law countries, no one can appear in court without legal representation and tariff systems are used to regulate legal costs, including maximum lawyer-client fees. Italy is perhaps a notable example and despite repeated challenges to its rules on competition grounds, the European Court of Justice has continued to reject them and even praised the Italian model as an effective way of promoting access to justice.⁵²

An alternative to regulating lawyers' fees per se is to require lawyers to dedicate a small percentage of their billable hours to representing indigent litigants and/or doing pro bono work. In essence, make some 'public service' work compulsory for all practicing lawyers. This is a radical proposal but there are some partial precedents for it. For example, in Australia several governments link the award of legal service work from government departments to a requirement to carry out a specified amount of pro bono work.⁵³ Similarly, the New York Bar requires lawyers to engage in a set amount of pro bono work as a condition of admission to the bar.⁵⁴ Other American States are planning to adopt the same or similar rules in their own jurisdiction.

D. Cross subsidization of civil justice by court users through use of differential court fees

Earlier in 2014 the UK Ministry of Justice announced plans to charge court fees based on the value of the claim, even if the fee is higher than the cost of actually hearing the case, as a means of helping fund other areas of the civil justice system.⁵⁵ The reforms were met with widespread opposition including from senior judges. In a submission on the proposals the senior judiciary questioned how the position of the courts in providing access to justice for all and maintaining the rule of law for the benefit of all could be reconciled with the proposition that they should be financed only by those who actually use them?⁵⁶

⁵² See *Commission v. Italy*, (C-565/08) (European Court of Justice Grand Chamber, 29 March 2011) ECR 2011, I-02101.

⁵³ National Pro Bono Resource Centre, About Pro Bono – Pro Bono Provisions in Government Tender Arrangements for Legal Services, available at <http://www.nationalprobono.org.au> (Last accessed on February 28, 2013).

⁵⁴ 22 NYCRR §520.16. All persons admitted to the New York State bar after January 1st, 2015 must perform fifty hours of qualifying pro bono service.

⁵⁵ Ministry of Justice 'Court Fees: Proposals for Reform' Public Consultation Paper, December 2013 (Available at https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/courtfesconsultation.pdf (Last accessed on June 26, 2014).

⁵⁶ The Response of the Senior Judiciary to the Ministry of Justice Consultation Paper Court Fees: Proposals for Reform, 5 Cm 8751 (February 4, 2014).

It is not hard to see the normative claim being made by the senior judges: a public service for the benefit of all should be paid for by all through the taxation system. That may be a defensible policy position; there are good reasons for funding vital public services from public taxation. However the rule of law does not require that users of the system are subsidised by those who do not use it. What the rule of law requires is that those who need to access court are able to do so. Neither the source of funding nor the precise funding model have implications for the rule of law provided, of course, the system is adequately funded and the costs of using the system are proportionate to the value of the rights in dispute. A progressive user pays system for funding civil justice does not offend the rule of law, and is one creative way of promoting access to justice for all.

E. Judicial specialization, more legal aid lawyers in court, and more use of technology

The perennial question for every jurisdiction is how best to allocate the limited public funds available for their civil justice systems. At present the UK Government spends a great deal of money providing legal assistance to relatively few people. This raises the question of whether a more equitable distribution of resources is achievable or desirable, in light of the fact that without access to legal aid many persons will either take no legal action or end up representing themselves and usually badly. One option may be to provide additional resources to the persons who invariably have to assist litigants in person; namely judges and court staff. Extra training and resources for judges, including training specialist judges to handle specific types of disputes (as is the case with Tribunals) will help judges deal better with litigants in person including identifying their underlying complaint and the evidence that is relevant to it.

Similarly, litigants without their own lawyer could still meaningfully benefit from legal assistance, and where necessary advocacy, even at the court room or tribunal door. A 15 minute consultation with a specialist lawyer working from the court may not be ideal, but could significantly improve the litigant's prospects of adequately presenting their case in an effective and efficient manner. The main structural change this would represent is that instead of an increasingly small number of litigants with their own publicly funded lawyer, all litigants could obtain the benefit of some legal assistance prior to their hearing.

A related reform is to rely more on government employed lawyers, rather than private providers, to provide legal assistance. The recent dispute in England between the Government and the Bar relates to whether the Government's legal aid fees for private lawyers are sufficient for them to make a reasonable living. The Government maintains that the fees are fair, whereas the profession maintains that it would be impossible for many lawyers to live decently from legal aid fees, and those that would be prepared to take the work would be junior,

inexperienced lawyers⁵⁷. A small dedicated team of Government lawyers, covering all experience levels, may be a better way of delivering legal assistance to those who need it.⁵⁸ What is clearly unsustainable is to use public funds to subsidize private lawyers to represent indigent clients as if they were well off litigants able to pay the lawyer's ordinary commercial rates.

F. Better civic legal education

A UK charity, Law for Life: the Foundation for Public Legal Education, is dedicated to helping people develop legal knowledge and skills. Unlike the finance literacy movement, which enjoys millions of pounds of government subsidies, legal literacy currently receives no direct state support. According to the charity's head, Michael Smyth, "Research has shown that people with even the most rudimentary knowledge about how the law works tend to have far more positive outcomes than those who have no knowledge."⁵⁹ The charity has called for more legal education in the national schools' curriculum.

This initiative may be valuable, especially in Britain, but in India the far bigger problem is illiteracy per se which makes navigating the court system extremely difficult.⁶⁰ Legal training for lawyers is also said to be of a poor standard.⁶¹

VI. CONCLUSION

This paper examined the right to legal aid, and the role of legal aid in funding the civil justice systems in England and India. While a sound case can be made that the state should increase the level of funding it provides to the civil justice system, the case is not clear cut. The claim that the legal system should take priority over other public services in the allocation of public money is doubtful. In any event, the importance of access to court for everyone with an arguable claim or defence cannot justify an expensive and inefficient system that is not just unaffordable to ordinary litigants, but taxpayers as well. Structural reform is required if the civil justice system is to put on a sustainable footing, whilst ensuring access to justice is available to all, in both developed and developing countries. The paper outlined some reform options with the aim of promoting further debate about potential creative solutions to what is a major structural problem.

⁵⁷ J. Cusick, *Don't call it a strike: Barristers withdraw their labour and the courts including the old bailey for silent for the first time in centuries over legal aid cuts*, THE INDEPENDENT (January 6, 2014).

⁵⁸ The UK Government is going down this path.

⁵⁹ *Supra* Note 3.

⁶⁰ *Supra* Note 5, 520.

⁶¹ *Id.*, 519.