

“Is access to justice the cornerstone of a democratic society under the rule of law? If so, why? If not, why not?”

Isabel Gibbens

To ask whether access to justice is the cornerstone of a democracy under the rule of law requires, firstly, a definition of what these constitutional terms mean. Although a debated subject, the modern consensus of the rule of law in the United Kingdom is that Parliament is sovereign and can make and unmake any law it wants to, but in doing so, it must make laws designed for the good of the people. In addition, Lord Bingham’s analysis is now accepted as comprising its definition. Lord Bingham defines the core principle of the rule of law as follows:

[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts¹.

Apart from the integral idea that ‘the laws of the land should apply equally to all’,² Lord Bingham articulates a number of sub-rules. For example, on mandates that everyone is entitled to a fair trial.³ Moreover, in the event of disputes, people ‘should be able, in the last resort, to go to court to have their rights and liabilities determined’.⁴ Therefore, access to justice allows citizens to uphold their rights, to challenge discrimination, and hold decision-makers to account.⁵ By implication, this would mean that if there is a segment of the population that is unable to access the courts, or disenfranchised from securing a fair trial, this country could no longer consider itself a democracy under the rule of law.

¹ Lord Bingham, ‘The Rule of Law Text Transcript’ (*The University of Cambridge*, 1 November 2006) <‘The Rule of Law’ Text Transcript | Centre for Public Law (cam.ac.uk)> accessed 8 January 2022

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ United Nations, ‘Access to Justice’ (*United Nations and the Rule of Law*) <Access to Justice - United Nations and the Rule of Law> accessed 7 July 2021

Authoritative commentary on how access to justice is the cornerstone of the rule of law appears in the judgment of Lord Reed (with whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes agreed) in *R (UNISON) v Lord Chancellor*.⁶ Here, Lord Reed declared that people must have ‘unimpeded access’⁷ to the courts, as without such access, ‘laws are liable to become a dead letter’⁸ and the ‘democratic election of Members of Parliament may become a meaningless charade’.⁹ Arguably, this ‘unimpeded access’ requires a fully funded legal aid system to ensure that all people, even the poorest who cannot afford to pay, are given legal representation.

Successive governments have argued that unfettered access to legal aid in all cases is too expensive. In 2012, the annual legal aid budget was £2 billion¹⁰ and the coalition government claimed this was ‘unsustainable’. They voted to cut the annual legal aid bill by over half by 2018.¹¹ This crippled access to legal aid for many deserving cases. In this essay, I will argue that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘the 2012 Act’) created a unique lens through which we can examine the key question of whether access to justice is indeed the cornerstone of the rule of law. With the 2012 Act, thousands of citizens lost their access to legal aid, and therefore, lost their access to justice, all of which fundamentally damaged the rule of law.

The 2012 Act removed legal aid for most areas of law except for criminal (although funding was greatly reduced) and for some other exceptions such as in domestic violence cases heard in the family courts. For civil work (family law, housing, employment etc), legal aid essentially vanished. Moreover, in the civil areas that are still funded, eligibility requirements are now extremely

⁶ *R (on the application of UNISON) (Appellant) v Lord Chancellor* [2017] UKSC 51

⁷ *Ibid* [68] (Lord Reed).

⁸ *Ibid*.

⁹ *Ibid* .

¹⁰ Jonathan Este, ‘Legal Aid at 70’ (*The Conversation*, July 29 2019) <Legal aid at 70: how decades of cuts have diminished the right to legal equality (theconversation.com)> accessed 7 July 2021

¹¹ Chambers Student, ‘How Legal Aid Works’ (*Chambers Student*, 2012) <How legal aid works - Chambers Student Guide> accessed 7 July 2021

difficult. Previously, if you qualified for welfare benefits you were automatically entitled to legal aid. Now, income and disposable income are means tested and there is now also capital means testing, which can force people to borrow against their homes, or even sell them.¹²

These new eligibility criteria have had a dramatic effect in reducing attempts to access justice. For example, welfare benefit cases have declined by 99%. Legal Help, for people challenging decisions to tribunals, has dropped from 82,500 cases to 15 between 2012-14. There was a 58% fall in Legal Help for housing law from 2012-18.¹³ It has been reported that between 2013 and 2017, judicial review claims were halved,¹⁴ despite this being a key component of the rule of law, allowing people to hold government ministers to account. All these statistics represent people who have been denied access to justice and are unable to redress wrongs in civil areas. In light of this, how can we describe ourselves as a democracy under the rule of law?

The effects of the cuts have reverberated throughout the legal system - including in employment law, where victims of discrimination in the workplace on the grounds of race, religion and sex have been deterred from progressing their claims, because they could not afford a lawyer.¹⁵ Similar scenarios have occurred in the housing sector, where only tenants who can prove 'significant harm' to their health has been caused by disrepairs can obtain legal aid.¹⁶

Family law is one of the worst areas impacted in civil law, as there are so many people now unrepresented and acting as litigants in person. During

¹² Professor Donald Hirsch, 'Priced out of Justice? Means testing legal aid and making ends meet' (*The Law Society, March 2018*) 3 -4
<<https://www.lawsociety.org.uk/Topics/Research/legal-aid-means-test-report>> accessed 6 July 2021

¹³ The Secret Barrister, *Fake Law: The Truth About Justice in an Age of Lies* (Picador 2020) 191

¹⁴ *Ibid* (7).

¹⁵ Monidipa Fouzder, 'Legal aid system 'leaving employees to fight discrimination alone' (*The Law Gazette, 19 June 2019*) <Legal aid system 'leaving employees to fight discrimination alone' | News | Law Gazette > accessed 7 July 2021

¹⁶ Lucy Heath, 'Behind the numbers: what impacts have legal aid cuts had on housing?' (*Inside Housing, 7 February 2020*) <Inside Housing - Insight - Behind the numbers: what impacts have legal aid cuts had on housing?> accessed 7 July 2021

2017, in 35% of cases, both sides were without a lawyer. In 20% of cases, at least one party was unrepresented.¹⁷ This has led to unimaginable scenarios, where victims of rape or domestic violence are cross-examined by their alleged abusers, who are acting as litigants in person.¹⁸ Personal cross-examination by defendants in cases of rape were outlawed in criminal cases in 1999; yet now they have entered the family courts because of the loss of legal aid. I would argue that this discriminates against women, who are more likely to be victims in these scenarios. This undermines one of the fundamental tenets of the rule of law, that all citizens are equal in the eyes of the law and have a right not be discriminated against. If victims must relive the trauma in court by being questioned by their abusers, then the process of achieving justice becomes unbearable. Although the government has recognised this problem, they have been reluctant to rectify it because of the added cost to the legal aid budget.¹⁹

Furthermore, where fathers are seeking contact with their children in the family courts, many men have reportedly given up,²⁰ as they are forced to navigate the court process by themselves. Men who would previously have qualified for legal aid because of their low incomes are now forced to represent themselves due to unrealistic means testing.²¹ Without professional legal representation, these men are clearly at a disadvantage in the courts, and this cannot be considered equal access to justice.

The devastating impacts of stringent means testing have been felt by parents in proceedings brought by the local authority. Where the local authority is proposing to remove a child from their parents under a care order, legal aid is

¹⁷ Amelia Hill, 'How legal aid cuts filled family courts with bewildered litigants' (*The Guardian*, 26 December 2018) <How legal aid cuts filled family courts with bewildered litigants | Legal aid | The Guardian> accessed 5 July 2021

¹⁸ Mr Justice Cobb, 'Do the vulnerable have effective access to family justice?' (2018) Fam Law 36, 6 <(lexisnexis.com)> accessed 6 July 2021

¹⁹ Ibid.

²⁰ Owen Bowcott, Amelia Hill and Pamela Duncan, 'Revealed: legal aid cuts forcing parents to give up fight for children' (*The Guardian*, 26 Dec 2018) <Revealed: legal aid cuts forcing parents to give up fight for children | Legal aid | The Guardian> accessed 6 July 2021

²¹ Sir James Munby, 'The Crisis in Private Law – by Sir James Munby' (*The Transparency Project*, 10 February 2020) <The crisis in private law – by Sir James Munby | The Transparency Project> accessed 15 January 2022

non-means tested. Yet, where a placement order is pursued, in which a child has already been removed under a care order, and the local authority is deciding where they should live, legal aid *is* means tested.²² This is in spite of the draconian consequences for the parents in both of these situations – the permanent loss of one’s child – making these distinctions around funding irrational. Now that funding is so restricted in this area of family law, this can lead to injustice, where parents are denied legal aid because they earn too much, despite being unable to afford private representation. In *Re: D (A child)*,²³ Sir James Munby, during his tenure as President of the Family Division, asserted that to expect parents to be unrepresented in these cases would be ‘unjust; it would involve a breach of their rights under Articles 6 and 8 of the [European] Convention; it would be a denial of justice.’²⁴

The current funding gaps in the system and, arguably, the consequential denial of access to justice are being mitigated by lawyers agreeing to work *pro bono*.²⁵ This can involve hundreds of hours of unremunerated work, which Sir James Munby commented on, asking why the State should ‘leave it to private individuals to ensure that the State is not in breach of the State’s – the United Kingdom’s – obligations under the Convention?’²⁶ Indeed, if parents are faced with the removal of their child but are unable to afford funding and cannot secure a lawyer to work *pro bono*, then having to defend themselves is a breach of their rights. If there is no equality of arms against a public body, there cannot truly be said to be a fair trial. In such circumstances, the rule of law is undercut.

There is now so little funding for legal aid that even in the criminal sector, the criminal defence part of the legal profession is threatened with collapse. This means that even if a defendant qualifies for legal aid, they may not be able to obtain it in the near future, as there are so few legal aid law firms left to represent them. Since 2010, almost 59% of criminal law firms funded largely

²² *Re D (A child)* [2015] EWFC 2 [6] (Sir James Munby)

²³ *Re D (A child)* [2014] EWFC 39

²⁴ *Ibid* [31] (Sir James Munby).

²⁵ *Re D (A Child)* (n 22) [5] (Sir James Munby).

²⁶ *Ibid*.

by legal aid have been forced to shut.²⁷ Law centres, funded by legal aid, where lawyers work *pro bono*, are also closing their doors because of funding cuts.²⁸ Law students are dissuaded from joining that part of the legal profession due to the low fees.²⁹ At the Bar, some junior barristers funded by legal aid do not even make minimum wage.³⁰ The situation has become so dire that it is now possible to imagine a future where lack of funding means that even defendants who do qualify for funding may find themselves unable to gain representation. The country would then face the extraordinary situation where defendants, perhaps accused of serious crimes, would have to defend themselves in court.

Research in 2017 found that people who represented themselves are more likely to be found guilty than those with a lawyer.³¹ Under these circumstances, it would be hard to maintain any belief that the criminal justice system was fair or that there was equal access to a fair trial for all. Obviously, if defendants, totally ignorant of the law, are made to represent themselves in these situations, then the concept of the rule of law will become utterly hollow. I would argue that the cuts already in place have so chipped away at access to justice in this country that we already have undermined our right to be considered a democracy under the rule of law. If thousands of people are now unable to gain representation in the courts, they are then denied justice and cannot access their legal rights according to Lord Reed's definition.

Ironically, the budget for legal aid in England and Wales, before 2012, was £2 billion per year.³² This was the bill for ensuring universal access to justice. A

²⁷ The Law Society, 'Independent criminal legal aid review – Law Society response' (*The Law Society*, 28 May 2021) <<https://www.lawsociety.org.uk/campaigns/consultation-responses/independent-criminal-legal-aid-review-law-society-response>> accessed 5 July 2020

²⁸ LawCareers.Net, 'Is a career as a legal aid lawyer viable in 2020?' (*LawCareers.Net*, 25 February 2020) <Is a career as a legal aid lawyer viable in 2020? - Features (lawcareers.net)> accessed 5 July 2021

²⁹ *Ibid.*

³⁰ The Bar Council, 'Government paying junior barristers less than national minimum wage' (*The Bar Council*, 1 October 2020) <<https://www.barcouncil.org.uk/resource/government-paying-junior-barristers-less-than-national-minimum-wage.html>> accessed 6 July 2021

³¹ LawCareers.Net (n 17).

³² Este (n 5).

basic question then arises: is that a reasonable price to pay to ensure that this country can reclaim its place as a democracy under the rule of law? To those who claim that £2 billion per year is an unsustainable cost, it is worth pointing out that we spent £114 billion on the NHS in 2018-19.³³ Whilst the right to healthcare is provided by the NHS, arguably the universal right to justice and protection under the law is provided by the legal aid system, and this is just as important.

In conclusion, as Lord Reed stated, ‘the constitutional right of access to the courts is inherent in the rule of law’,³⁴ and sufficient public funding for legal aid is the only way to ensure universal access to justice and a fair trial. If legal aid is not increased, citizens cannot meaningfully enforce their rights, and we as a country lose our status as a democracy under the rule of law.

Isabel Gibbens is the Winner of the 2021 West London Law Society Prize Fund Essay Competition. The above essay is an updated version of her original submission to the Competition.

³³ Rachael Harker, ‘Research Briefing NHS Expenditure’ (*UK Parliament*, 17 January 2020) <NHS Expenditure - House of Commons Library (parliament.uk)> accessed 6 July 2021

³⁴ R (On the Application of UNISON) (n 7) [66] (Lord Reed).