Pre-chewed Politics

Democracy and Participation
Does the UK need a Right to Justice Act?

What's the story?

Since 1st April 2018, criminal barristers have refused to take on new legal aid cases, and have planned mass walkouts, to protest government reforms and budget cuts that the Criminal Bar Association argue have left the justice system "underfunded and in chaos". Critics point to research showing a sharp rise in the number of people representing themselves in court, having been unable to find, or afford, legal representation. Critics largely attribute this to increasing restrictions on legal aid, particularly those imposed by the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. In November 2017, the Bach Commission on Access to Justice concluded that the rule of law in the UK is "under attack", and that new laws are needed to "restore access to justice as a fundamental public entitlement."

What is legal aid, and how was it impacted by the 2012 LASPO Act?

Legal aid is public money used to pay the costs of legal advice and representation for those who cannot afford it. In 2012, the Conservative-led coalition government argued that, as part of its efforts to reduce the national deficit, the £2 billion spent on legal aid each year had to be reduced. The resulting LASPO Act made a number of controversial cost-cutting reforms. Firstly, it greatly restricted the range of issues for which civil (non-criminal) legal aid was available, excluding it from many immigration, welfare, debt, housing and family law cases. While the law did provide for "exceptional case funding" to be given in very particular circumstances, for example, if a divorce case involved domestic abuse, critics argued that meeting the evidence requirements to qualify for such aid proved far too difficult. Secondly, the Act toughened the existing means-test used to judge if someone is on a low enough income to qualify for legal aid. Critics argue that the current means-test, which has not been adjusted for inflation, does not reflect the cost of living today, and that too many people have to either sacrifice an acceptable living standard in order to pay legal fees, or not seek legal advice or representation at all. Thirdly, the Act cut the fees paid to legal aid barristers and solicitors, leading to a decline in their numbers, and making it difficult for those who do qualify for legal aid, or who can afford fees, to actually find help. Finally, the Act replaced the non-departmental Legal Services Commission, which was responsible for administering legal aid, with a new Legal Aid Agency, an executive agency within the Ministry of Justice. Critics have raised the concern that this new agency lacks sufficient independence and suggest that it is more likely to bow to pressure to cut costs by refusing legal aid even when requirements are met.

What did the Bach Commission recommend?

In its 2017 report, the Bach Commission proposed a new Right to Justice Act to essentially make it a legally enforceable right for individuals to receive legal assistance without incurring "costs that they cannot afford". The Act would establish a new independent Justice Commission to ensure that the right is monitored and enforced appropriately. The Bach Commission also recommended immediate actions for the Government. It suggested that the current legal aid eligibility rules should be reformed so that more people, including all benefits recipients, can access legal aid. It also proposed widening the scope of civil legal aid to once again include: early legal help (to support earlier dispute resolution); all matters involving children; and some areas of family and immigration law. It also argued that the current Legal Aid Agency should be replaced by a more independent, arm's length body that would be able to operate the legal aid system free from ministerial influence. Finally, the Commission proposed a national legal education strategy to improve the public's awareness of what legal rights and support actually exist.

Debate! A hundred years ago, Lord Justice Sir James Mathew said, "in England justice is open to all – like the Ritz hotel." What do you think he meant by this? Does this hold true today?

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Concerns over recent reforms to legal aid and the suggestion that the UK needs a Right to Justice Act, are interesting examples when writing about the health of democracy in the UK and the degree to which our rights are protected. Alongside parliamentary sovereignty, the rule of law is considered to be one of the 'twin pillars' of the UK Constitution. Textbook definitions of the rule of law often focus on the idea that no-one should be "above" the law – the law applies as equally to the Prime Minister as it does to ordinary citizens, there should be no exemptions for the rich and powerful. However, critics have raised the concern that, increasingly, people on low incomes are falling "beneath" the law – either because they conclude that they cannot afford to defend their rights in court, or because they attempt to proceed alone, without the professional legal representation needed to stand a fair chance of succeeding in court. In some cases, a lack of free legal advice and education will likely mean that many are unaware that they even have legal rights to defend. Buzzfeed's 2017 survey of magistrates found that around 30% of all criminal defendants appeared in magistrate's courts without a lawyer – up from 24% in 2014. Even in more serious cases at Crown Courts, 7% (around 6,000 people) appeared without legal representation. A few magistrates even reported that some people without representation had been found guilty of crimes they likely did not commit, as it is simply cheaper and easier to plead guilty.

When legal aid was first introduced under the Legal Aid and Advice Act in 1949, as a key pillar of the post-war Labour Government's welfare reforms, it was available to around 80% of the population. However, repeated rounds of cuts, coupled with increasingly stringent eligibility requirements, meant that by 2008, long before the 2012 LASPO Act, this figure had dropped to 29%. It is estimated that, today, eligibility is closer to 20%. Campaigners for constitutional reform might argue that the fact that successive governments have been able to chip away at the protections established in 1949 highlights a key flaw with the UK's uncodified constitution. As Parliament is sovereign, it can take away rights just as easily as it grants them. We have no legally entrenched laws that require a special procedure for their repeal. The right to justice dates back to Magna Carta (Clause 40: "To no one will we sell, to no one deny or delay right or justice") and is also enshrined in the European Convention on Human Rights (Article 6: "everyone is entitled to a fair and public hearing"; criminal defendants are to be given free legal assistance "when the interests of justice so require"). However, the 'right to justice' is also fairly ambiguous, and successive governments have argued that they have to balance such rights against the need to manage public spending levels on behalf of tax payers. In order to prevent legal aid from being granted for very minor, straight forward, and non-imprisonable offences, applicants not only have to pass a means-test, but also an 'interests of justice' test, assessing whether the case is serious enough to warrant legal aid. However, the question of when exactly the 'interests of justice' require the provision of legal aid is subjective, and critics argue that, in order to save money, the Government has adopted an increasingly strict interpretation. A Freedom of Information request revealed that the proportion of cases that failed the 'interests of justice' test increased from 47% in 2013-2014 to 67% in 2016-17, including court hearings for burglary, possession of class A drugs with intent to supply and assaulting a police officer. The Government argues that the 2012 LASPO Act is compatible with the Human Rights Act (1998) and the rule of law because "emergency case funding" is still available for the most serious cases, but, again, fewer people are passing the Government's more subjective tests than anticipated.

However, the Bach Commission argued that the problem is less to do with our lack of entrenched rights, and more to do with the fact that existing laws leave "too much ambiguity and therefore too much discretion about what our right to justice means in practice." The Commission's report argued that, in practice, a Right to Justice Act, which clearly established a right to receive reasonable legal assistance without incurring unaffordable costs, could become *politically* entrenched. As with the Human Rights Act (1998), judges could be given the power to issue a declaration of incompatibility if other laws were found to infringe on this new right, placing great political pressure on the government to reconsider and amend their proposals. Any government that wished to reduce legal aid would be exposed to the considerable political consequences of diminishing a much more clearly established constitutional right.

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