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Criminal legal aid: some global perspectives

Roger Smith argues that the news is not all bad

There is good news and bad news. Those in the UK will find the bad unsurprising. The surprise may come more from the notion that is any good news. Globally four mixed trends in criminal legal aid can be identified: the remuneration squeeze; a slow advance of provision in countries that have previously not had much; the growth of international agreements and instruments designed to encourage or enforce minimum legal aid provision; and an uneven and stuttering debate about practice and quality.

The bad news: you are not alone

A good indicator of the international move to cut legal aid remuneration in countries that have previously had reasonable legal aid schemes is provided by the number of lawyers' strikes. The Edinburgh Bar Association in Scotland decided last November to withdraw from the police station duty solicitor scheme. There have been other manifestations of professional anger at plans by the Scottish Legal Aid Board to impose financial contributions on clients and get practitioners to collect them. There have been strikes, threats of strikes and/or demonstrations by criminal lawyers in Australia and New Zealand. The most successful action was taken in Canada when the Ontario Criminal Lawyers' Association ran a successful campaign to scupper the government's criminal justice process by refusing to take cases involving 'guns and gangs'. After a bruising campaign, the lawyers actually got

more money. In many states, among them England and Wales, the issue is not so much hostility to legal aid: it is the drive within governments generally to save money. This is what made the campaign against the *Legal Aid, Sentencing and Punishment of Offenders Bill* in the UK, which slashed civil legal aid and was part of a programme to reduce criminal spending as well, so difficult.

The long and winding road

The picture of doom and gloom is not, however, universal. The most thorough international comparison of expenditure on legal aid comes from the Council of Europe (CEPEJ, 2012). The Council's European Commission for Efficiency of Justice identifies a 'positive European trend regarding access to justice through the indicator of [the] amount allocated to legal aid; such trend being consistent with the requirements and spirit of the European Convention on Human Rights. An encouraging average increase in expenditure of 17.6 per cent between 2008 and 2010 can be underlined in Europe, though seven member states have decreased their legal aid budget (Ireland, Hungary, Lithuania, Georgia, Armenia,

Bulgaria, Latvia). (ibid). Percentage increases have, of course, to be related to the amount of underlying spend. Slovenia may have clocked a

two year increase of 107 per cent but at the end of the period it spent only 2.8 euros per inhabitant annually on legal aid (compared with 46 euros in England and Wales).

This expansion of legal aid expenditure among states aspiring to

meet their constitutional and international requirements is not limited to Europe. For example, Brazil has made considerable strides in establishing a national network of public defender offices in recent years: 'a significant increase is noticed in the volume of financial resources invested by the government for the improvement of free legal aid services, delivered through Public Defender Offices. In comparison to the budget approved for the Public Defender Offices between 2007 and 2009, a raise of about 45 per cent is seen. The number of public defenders in activity is also growing at a regular pace: in 2003 there were 3250 public defenders in Brazil. In 2009, this figure leaped to 4398 (corresponding to an increase of over 35 per cent). These figures reveal the Brazilian government's major effort to comply with its constitutional duty in guaranteeing to all equal access to justice, especially for its least able and most vulnerable citizens, according to the Constitution' (Alves, 2011).

In some countries, this move towards greater concern for legal aid has been driven by external funders. For example, Sierra Leone recently passed legislation which a press outlet announced in the following terms: 'one of the most progressive legal aid laws in Africa – with an innovative approach to providing access to justice for all that will reinforce the rule of law in a society still scarred by the brutal civil war that ended in 2002' (Sierra Express, 2011). The legislation, which makes interesting use of paralegals, resulted from work by the Open Society Justice Initiative, the UK Department for International Development, and the World Bank as well as local civil society organisations.

The conflicting pressures on a state in developing legal aid provision are well illustrated by China which has, to its credit, been working on a process of improvement – albeit that progress is subject to contradictions and setbacks. The Danish Human Rights Institute recently summed up what has been happening: 'In the mid-1990s, the Ministry of Justice began

In many states the issue is the drive within governments to save money

the establishment of a national system of legal aid centres (LACs) with a mandate to receive applications for assistance and to provide services to poor people with legal or social problems. The legal basis for the operation of the LACs is the State Council's Legal Aid Regulation of 2003. Under the Regulation, local government has the responsibility to establish and finance the work of the centres, which organise lawyers in the local community to carry out pro bono work. The Law on Lawyers obliges all lawyers to take on 20 legal aid cases each year as a condition of their practicing licence. Bar associations are involved in the work of identifying and appointing lawyers or law firms to take on individual cases referred by the LACs. Local governments have the possibility to enlarge the scope of the centre's mandate through the adoption of local regulations, but few have done so.' (Danish Institute for Human Rights, 2010). China is, however, a country of lines in the sand and it has proved easy for legal aid lawyers to cross them. A number of lawyers have been threatened and legal NGOs closed, most famously Gongmeng (the Open Constitution Centre) in 2009.

Enter the international

In their origin, legal aid schemes in countries like England and Wales, the USA, Canada and Australia were national. They developed to meet individual needs which the state was prepared to fund. In England and Wales, the expansion of legal aid representation after the Second World War was led by the field of divorce. However, the growth of international human rights instruments meant that a right to legal representation of some kind was integrated into the statement of the right of fair trial in criminal cases and, internationally, this became more important. Thus, Article 14(3) (d) of the International Covenant on Civil and Political Rights, Article 6(3)(c) of the European Convention on Human Rights and Article 8(2) (d) of the American Convention on Human Rights all allow for state-funded criminal representation.

Civil requirements have been more piecemeal.

International courts, where they have the power, have been prepared to extend the right of representation. The best example of this is the European Court of Human Rights case of *Salduz v Turkey* in 2008. This galvanised European governments into action because of its insistence that suspects require legal assistance from the point when a police interview might be relied upon at trial. As a result, a number of countries, among them those with well-established legal aid schemes like the Netherlands and Scotland, have been required to extend their scope to include provision for legal advice at police stations.

In the European Union (EU), transnational engagement has extended beyond a direct human rights framework into a programme of measures, led by the European Arrest Warrant, to increase judicial co-operation. The availability of a lawyer, and then the duty of the state to fund that lawyer where the client cannot afford to do so, are the subjects of a series of regulations being enacted by the EU. These may well, in the end, fall victim to a reaction against the Union amongst some Member States but they are indications of the growing international context in which legal aid is unavoidably seen as essential as unlawful activities cross national borders. In consequence of this concern, the European Commission has funded a number of interesting comparative studies (e.g. Cape et al., 2010).

The United Nations itself has entered the field of international minimum standards in legal aid, passing in December 2012 a set of principles and guidelines (United Nations, 2012). This was a tribute to the international engagement of the NGOs which successfully lobbied for it. These included Prison Reform International, which started the process through its work in Malawi, and the Open Society Justice Initiative, a highly successful member of the Soros charitable empire, which played a major role in developing legal aid in Central and Eastern Europe as well as elsewhere in the world.

Practice issues

Finally, somewhat obscured by debates about resources, there is a growing engagement with a variety of issues about the practice of legal aid. The UK has led a concern with quality assurance and its ideas about peer and other review have been followed elsewhere. However, the concern with quality has the potential to expand beyond the policing of provision into issues about training and skills. In some countries, there remains a tendency to over-identify lawyers with their clients, something which has led Indian lawyers, for example, to refuse to act for defendants in terrorism cases.

There is no way of easily summing up the global position regarding criminal legal aid at the present time except by saying that the issue is dynamic. The interests of states in the rule of law and in restraining expenditure, of the legal professions in safeguarding what they see as their interests, and the needs of suspects or defendants themselves are jostling for position. You would not want to bet that the interests of suspects will come out on top. ■

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