***Access to justice in the 21st century: how can it be maximised?***

**Introduction: the value of access to justice**

1. Aesop tells of a man who turned all his riches into a gold ingot and buried it in a field, where he might be said also to have deposited his heart and spirit. Every day he would gloat over his treasure, until one day a labourer guessed what he was up to, dug up the ingot and carried it off. The man, discovering the theft, was weeping over his loss, when a passer-by said to him: “*Don’t despair, my friend. For when you had all that gold you didn’t really have it. Take a stone and put that in the earth instead, and imagine that it is your gold. It will serve the same purpose. For, as far as I can see, even when the gold was there you made no use of it*”.[[1]](#footnote-1)
2. As gold which is not used is worth little more than a stone buried in a field, so law without access to justice fails to procure the rule of law in any meaningful way. It is for that reason that Lord Bingham made accessibility his first principle of the rule of law: “*The law must be accessible . . . it is not much use being entitled to, for example, a winter fuel allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it*”[[2]](#footnote-2). A society in which citizens lack equal access to justice faces a rule of law deficit.

**The problem: cuts to legal aid and increased court fees**

1. Five years after the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) became law, and four years since its measures came into force, the question of how access to justice can be maximised in the face of Government cuts to legal aid has rarely been more timely or important, for we are already experiencing a sizable rule of law deficit. One only needs to read the excellent LASPO reports of the Bar Council[[3]](#footnote-3) and the Law Society[[4]](#footnote-4) to appreciate the scale of the problem and the steps which lawyers are already taking to promote and preserve access to justice.
2. Such is the scale of the crisis that judges have been outspoken in their criticism of legal aid cuts. Mostyn J in *MG v JF* [2015] EWHC 564 (Fam) commented that “*since the reforms have taken effect there have been an appreciable number of cases which have demonstrated that the blithe assumption in the consultation paper (that the parties’ emotional involvement in the case will not necessarily mean that they are unable to present it themselves, and that there is no reason to believe that such cases will be routinely legally complex) is unfounded. This was entirely predictable*.”[[5]](#footnote-5) Judge Hallam in *Re H* [2014] EWFC B127 dealt with an unrepresented mother with speech, hearing and learning difficulties. An official of the Legal Aid Agency stated that there would be no breach of convention rights were she to remain unfunded. The judge stated “*I find that statement astounding*”.[[6]](#footnote-6)
3. A further problem is the ever-increasing cost of bringing claims to court. Lord Thomas, in his 2016 report as Lord Chief Justice, expressed concern about the impact of The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 in the following terms:

“*The judiciary has voiced its concern and opposition to the succession of significant fee increases which have been proposed and, largely, implemented . . .*

*The judiciary remain very concerned about the implications for access to justice (for the more mainstream, lower value, and consumer cases) and the economic wisdom of the course being followed (in terms of business and commercial litigation, and the competitiveness of England and Wales as the jurisdiction of choice for international disputes). Members of the senior judiciary gave evidence on this to the Justice Select Committee in January 2016 and welcomed the Committee’s Report published in June 2016*”[[7]](#footnote-7)

1. As Lord Dyson said to the Justice Select Committee, “*access to justice is the critical point. It should not be forgotten that not only is that a principle that most right-minded people would accept as absolutely essential to any civilised society and as a very important element of the rule of law, but it has been recognised as such by Parliament itself, because the principle is enshrined in the Courts Act. As you know, when setting the court fees, the Lord Chancellor is required by the statute to have regard to the necessity of maintaining access to justice. To my mind, that is the real area for debate*”.[[8]](#footnote-8)
2. In the real world of the small or medium-sized enterprises or the victims of serious personal injuries, these recent changes present an obvious risk that those who have suffered the greatest harm will be the most likely to be put off by significant increases in court fees – constituting a significant barrier to justice for many.

**How to maximise access to justice**

1. How, then, can access to justice be maximised? It is submitted that there are three means which, if used concurrently and correctly, can provide unimpeded access to the justice in the 21st century:
   1. Innovation;
   2. Regulation; and
   3. Legislation.
2. The importance of this three-pronged approach is that it avoids the temptation to lay the entire burden of access to justice at the Government’s feet whilst equally refusing to let it off the hook for problems which, truth be told, it had a significant hand in causing. It also makes the most of technological advancement to reduce the time and cost of resolving disputes.

*Innovation: making justice more affordable*

1. The first step in promoting access to justice is the use of technological innovation to make justice more open, accessible and affordable. In an internet age, the introduction of an Online Court should be welcomed and encouraged.
2. The ODR Advisory Group of the Civil Justice Council was commissioned on 25 April 2014 to explore the potential for online dispute resolution for civil proceedings with a value of less than £25,000. Their first report of February 2015[[9]](#footnote-9) indicated that the establishment of a new Online Court for civil matters would increase access to justice and yield substantial savings for the court system.
3. Lord Justice Briggs’ Civil Courts Structure Review: Interim Report of December 2015 joined the call for the introduction of an Online Court and commented that “*the genius of this innovative approach is that (if it can be made to work) it is designed to place upon an electronic file, available both to the parties and to the court, the essential details of, and evidence about, a litigant’s case at the outset. By contrast the common experience of DJs hearing small claims track cases at present is that the key facts and evidence remain buried in the minds of the litigants and in their ill-assorted bundles of documents even when they arrive at court for a trial*.”[[10]](#footnote-10) His Final Report of July 2016 responds to various criticisms levelled at the proposed Online Court in, it is respectfully submitted, compelling terms.[[11]](#footnote-11)
4. The process of implementing the Online Court scheme is clearly not without difficulty, but the potential benefits are obvious – direct access to justice for those who cannot afford lawyers or could not afford the significant cost of an oral hearing, increased access for those for whom court attendance would prove challenging, intelligibility for claimants and defendants in terms of expectations and process, an effective means of directing disputes to ADR rather than to a judge and an efficient resolution of disputes on the papers where possible.
5. The Canadian Civil Resolution Tribunal, the Financial Ombudsman Service, the Traffic Penalty Tribunal and the European Small Claims Procedure already attest to some of these benefits, including the advantages of simplified procedures in which evidence and submissions are filed without the expense of lawyers or an oral hearing.
6. An example of how an Online Court might operate demonstrates some of these benefits in terms of access to justice. Imagine that Ben saves for many months so that he can buy his partner an infinity ring costing £1000 from an online jewellery retailer. The retailer’s online terms and conditions state that no refunds will be given for engraved items. Ben opts to have the ring engraved with his partner’s initials. When the ring arrives, several diamonds are missing and Ben complains to the retailer, requesting a full refund. The retailer refuses, in reliance on its standard terms and conditions. Ben and his partner and now so disappointed that they would rather get a complete refund and purchase a different ring from another retailer. But Ben is in a difficult position:
   1. The retailer already has lawyers and they are sticking to their terms and conditions;
   2. The Consumer Rights Act 2015 appears to give Ben the legal right to a full refund despite the retailer’s terms and conditions, but Ben doesn’t know that.
   3. Even if Ben’s lawyer friends can point him to the Consumer Rights Act 2015, the retailer may still refuse to acknowledge Ben’s rights and Ben is understandably reluctant to pay significantly more than the ring is worth to secure his rights in the County Court.
7. What use, then, are Ben’s consumer rights? How can he overcome the barriers he faces in accessing justice?
8. The Online Court provides a number of important solutions and could remove several barriers to justice. Using an appropriately designed online system, Ben could:
   1. At stage 1, be provided with online assistance covering (i) the bare essentials of the law likely to apply to his case; and (ii) guidance in the steps to be completed and the documentation required to enforce his rights;
   2. At stage 2, receive assistance and direction in considering avenues for conciliation and ADR or otherwise managing the case; and
   3. At stage 3, submit the dispute to a judge at minimal cost and without the need for legal representation or, if necessary, a face-to-face trial.
9. Important questions still need to be answered about the impact of such proposals on the workload of judges and civil servants, and the system would have to be tested and designed to ensure that it actually delivered access to justice. But it is submitted that in a country where 78% of adults use the internet every day[[12]](#footnote-12), an Online Court is, in principle, capable of substantially reducing the barriers to justice which individuals and small businesses face daily.

*Regulation: from generosity to responsibility*

1. The second step in promoting access to justice is a move from reliance on the generosity of lawyers towards regulatory acceptance that pro bono work should be seen as a professional responsibility.
2. This second step is likely to prove unpopular and controversial, especially given Michael Gove’s infamous response to legal aid cuts that lawyers need to “*look at their consciences*” and make up the shortfall themselves.[[13]](#footnote-13) That is not what this essay suggests. Lawyers plainly cannot resolve the problems of legal access which the Government has caused and it hardly lies in the mouth of the Government to blame the lawyers.
3. However, in times of crisis, it is perhaps right to reconsider John the Baptist’s instruction that “*anyone who has two shirts should share with the one who has none, and anyone who has food should do the same*”[[14]](#footnote-14) and the rather more uncomfortably direction of Jesus in the Sermon on the Mount that “*if someone takes your coat, do not withhold your shirt from them*”[[15]](#footnote-15). Although it is not suggested that these ethical norms be appended to the BSB’s Code of Conduct, it is submitted that the underlying principle can be applied in a more suitable way - though a level of pro bono work being considered mandatory from a professional regulatory perspective.
4. It is important, in making this suggestion, to acknowledge the current levels of pro bono work being undertaken by lawyers across the country. A report by the Law Society in 2015[[16]](#footnote-16) found that approximately 37% of solicitors had taken on pro bono work in the preceding twelve months and that the estimated financial value of the pro bono work undertaken across all private practice solicitors was equivalent to approximately 2.4% of total turnover for solicitor firms. Tellingly, though, 63% of solicitors had done some pro bono work at some point in their career, suggesting that those willing, in principle, to take on pro bono work are not necessarily doing so annually.
5. The statistics for barristers are harder to come by but the Bar Council indicates that over 50% of the Bar supported the Bar Pro Bono Unit financially through a £30 donation during electronic Authorisation of Practice in 2016[[17]](#footnote-17) and the Bar Pro Bono Unit’s website indicates that over 3,600 barristers, including a third of all QC’s, have committed to take on the Unit’s cases.[[18]](#footnote-18) The total number of self-employed barristers in 2016 was 12,775.[[19]](#footnote-19) Finally, the BSB’s second biennial survey of the Bar 2013 recorded that around 44% of self-employed barristers undertook some pro bono or charitable work in 2012/13 (though only 15% of the employed Bar).[[20]](#footnote-20)
6. Whilst these statistics are encouraging, they also demonstrate that there is scope and capacity to encourage (even require) more pro bono work by both sides of the legal profession.
7. It is submitted that a useful starting point would be for the Bar Standards Board and the Solicitors Regulation Authority to introduce minimum pro bono requirements for all barristers and solicitors, perhaps in terms which mirror the old minimum hour requirements for CPD. The goal would be to set a minimum expectation for the significant numbers of lawyers who do not take on any significant bro bono work, whilst placing no additional burdens (beyond a basic reporting obligation) on the many who already do far more than their fair share.
8. Exceptions would be needed, perhaps for those lawyers who earn below a certain amount or whose work is usually publically funded, and expectation levels would need to be set carefully. This would have to be a far cry from the mandatory 50 to 100 hours of pro bono work per year which the Chief Judge of New York State proposed for lawyers in 2014[[21]](#footnote-21), although it is important to note that the completion of 50 hours of pro bono work has been required of all applicants to the New York Bar since September 2012.[[22]](#footnote-22)
9. Ultimately, it is submitted that mandatory pro bono hours per lawyer would, if set carefully, be a realistic and valuable step towards alleviating the worst impacts of legal aid cuts and ensuring that those who benefit most from access to the legal system are seen to contribute most to widening that access.

*Legislation: LASPO and The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015*

1. The third step in promoting access to justice, and perhaps the most important and unavoidable one, is a reversal of current Government policy and recent legislative changes - in particular the amendment of LASPO and The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 to increase the availability of legal aid and reduce court fees.
2. Whilst innovation by, and the regulation of, lawyers can solve some of the access to justice problems of the 21st century, Government intervention and funding remain critical. Access to justice is a facet of the rule of law which the Lord Chancellor must protect. To quote Lord Reed in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51: “*People must in principle have unimpeded access*” to the courts because “*without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other*”[[23]](#footnote-23).
3. Taking that responsibility seriously means Government action to reduce court fees and increasing the availability of legal aid, in particular in those cases which the Law Society has already highlighted the greatest need, such as cases concerning the rights of children, Special Guardianship Order applications and early advice in family and housing cases.[[24]](#footnote-24)

**Conclusion**

1. It has been argued that access to justice can be maximised through a combination of innovation, regulation and legislation - bringing together lawyers and the Government to provide greater efficiency, assistance and funding to ensure that laws are not dead letters (or gold ingots buried in the ground).
2. Despite the benefits offered by these proposals, an urgent Government review of the impact of LASPO and the recent increases in court fees is needed to gauge the scale of the access to justice crisis and to start the process of reopening the courts to those who need them most.

1. Aesop, *The Miser*. [↑](#footnote-ref-1)
2. Tom Bingham, *The Rule of Law* (2011), pp.37-38. [↑](#footnote-ref-2)
3. The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On* (September 2014); <http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report__september_2014_.pdf> [↑](#footnote-ref-3)
4. The Law Society, *Access Denied? LASPO four years on: a Law Society review* (June 2017); <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/> [↑](#footnote-ref-4)
5. *MG v JF* [2015] EWHC 564 (Fam) at [15]. [↑](#footnote-ref-5)
6. *Re H* [2014] EWFC B127 at [6]. [↑](#footnote-ref-6)
7. The Lord Chief Justice’s Report 2016, p. 19. [↑](#footnote-ref-7)
8. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/courts-and-tribunals-fees-and-charges/oral/28990.html> [↑](#footnote-ref-8)
9. <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> [↑](#footnote-ref-9)
10. <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf> [↑](#footnote-ref-10)
11. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [↑](#footnote-ref-11)
12. <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2015-08-06> [↑](#footnote-ref-12)
13. <http://www.telegraph.co.uk/news/uknews/law-and-order/11693145/Michael-Gove-Wealthy-lawyers-should-do-more-free-work-for-the-justice-system.html> [↑](#footnote-ref-13)
14. Luke 3:11, The Bible (NIV). [↑](#footnote-ref-14)
15. Luke 6:29, The Bible (NIV). [↑](#footnote-ref-15)
16. <http://www.lawsociety.org.uk/support-services/research-trends/solicitors-pro-bono-work-2015/> [↑](#footnote-ref-16)
17. <http://www.barcouncil.org.uk/media-centre/bar-blog/contributing-writers/2017/february/guest-blog-bar-pro-bono-unit-reports-to-each-chambers-for-the-first-time/> [↑](#footnote-ref-17)
18. <https://www.barprobono.org.uk/overview.html> [↑](#footnote-ref-18)
19. <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/> [↑](#footnote-ref-19)
20. <http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf> [↑](#footnote-ref-20)
21. <https://www.lawgazette.co.uk/comment-and-opinion/100-hours-mandatory-pro-bono-a-year/5045577.article> [↑](#footnote-ref-21)
22. <https://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml> [↑](#footnote-ref-22)
23. *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at [68]. [↑](#footnote-ref-23)
24. <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/> [↑](#footnote-ref-24)