LEGAL AID IN ENGLAND

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Introduction

The problem of making justice available to people who cannot afford normal legal costs is one that causes difficulty in all countries where there is a highly developed system of law.

A legal system which carefully defines the rights and duties of citizens in a complicated society and which provides for the most thorough investigation of claims must necessarily be expensive to operate. Substantive law has become so extensive and the machinery for carrying it into effect so involved that they can only be understood and operated by a highly trained body of professional men. Moreover each case or matter is an individual one — there can be very little mass production in legal work — and it is inevitable, therefore, that the work which has to be done should involve a cost beyond the means of the poorer members of the community. How then avoid a situation in which such people, while having exactly the same rights in theory, are hopelessly handicapped when it comes to applying them?

It cannot be said that the problem has been solved satisfactorily in any country, but the experience of England in providing what is known as "Legal Aid" to poor persons may help to avoid some of the mistakes that have been in the past and still are being made.

England has a long history of Legal Aid to poor persons, as well as a promising future. At the present time, however, the assistance provided is far from adequate; there is a very limited amount of State Aid supplemented by the voluntary efforts of the legal profession, which are also very limited, and the two together are only able to deal with a small proportion of the necessary cases. If certain proposals which have been made, and which appear to meet with general approval, are implemented, there will before long be a system of State assistance in legal matters, far in advance of any that exists to-day.

It is these proposals that should receive the most careful consideration. There is a danger that countries which have not yet provided even the measure of legal aid now available in England will turn to the existing system as a model. It should be emphasized that a great deal of the existing procedure is out

of date and totally inadequate to cope with present needs. In some of the Dominions improvements on the English provisions have been introduced, but the result of the most recent inquiry in England, set out later in this article, shows that an entirely new approach to the subject is needed.

The historical background is, however, important because it shows how the present system has grown up and to what extent it has been successful. Let us, therefore, first review the position to date and then look at the proposals which have now been made for the future.

Legal Aid Up To Now

In England some special provision has been made from earliest times for poor persons. In the reign of Henry III (1260–1272) the courts had power to issue writs free for poor suitors and Statutes of Henry VII and Henry VIII made fairly comprehensive provisions for legal proceedings by poor persons. An increasing amount of vexatious litigation arose from the abuse of these provisions, with the result that restrictions were imposed which hampered the genuine as well as the undeserving cases. Finally the Statute of Henry VII was repealed and Rules of Court came into force regulating the Poor Persons Procedure in the High Court.

Already we have met one of the main obstacles encountered in any system of Legal Aid, namely the abuse of the system by unscrupulous people with the result that vexatious litigation ensues. This brings the whole system into disrepute, because, among other things, an unsuccessful poor person is usually unable, even if he is legally liable, to reimburse his opponent for the expense caused him. Under these early systems the applications by poor persons were made in open court and there was no machinery for the investigation of the applicant's means and insufficient opportunity to ascertain whether the applicant had a reasonable case or not. Some procedure for dealing adequately with both these points is essential in any system of Legal Aid.

Before 1914 the Poor Persons Procedure had almost fallen into disuse and in that year, after considerable agitation, revised Rules were introduced which are substantially the same as those still in force to-day.

Litigation in the High Court

These Rules apply only to the High Court and Court of Appeal and, in fact, are used almost entirely for divorce cases.

They provide a system enabling proceedings to be brought in the High Court or Court of Appeal practically free of charge by any person whose income does not exceed £2 a week or, in special circumstances, £4 a week, and whose capital does not exceed £50 or, in special circumstances, £100.

Applications are submitted to voluntary Committees of solicitors to decide whether:

(1) the applicant has a *prima facie* case;

(2) he is eligible from a financial point of view for the benefit of the procedure.

If the Committee is satisfied on both these points a certificate is granted and the case is referred to one of the firms of solicitors who have volunteered to act free of charge in these cases. The poor person pays only a deposit of £5 to £10, to cover out-of-pocket expenses. The case is conducted by the solicitor in the ordinary way and, if necessary, he instructs one of the counsel who have also volunteered for work of this kind. Except in very special circumstances, no costs are awarded to or against a poor person.

Apart from a payment made by the Government to cover the administrative costs, the system is one of unpaid, voluntary service by the legal profession, and it has undoubtedly done a great deal, so far as divorce is concerned, to mitigate the unfair position in which poor people would otherwise find themselves. Of this the lawyers are justifiably proud, but even they do not attempt to deny that there are deficiencies in the procedure.

One of the criticisms, which has perhaps worried academic lawyers rather than people more practically concerned with the Poor Persons Procedure, is that solicitors are not the right people to form the Committee to consider applications for Poor Persons Certificates. It has been pointed out that if a poor person is refused a certificate he will in practice be debarred from bringing his action to court owing to his lack of means. Theoretically at least, therefore, the granting of certificates should be in the hands of the court, and not of a body on whose members falls the burden of free representation if the certificate should be granted.

The outstanding practical criticism, however, is that the financial limits are far too strict. They were out of date, owing to the fall in the value of money, even before the last war; now they are quite inadequate. The reason they have not been

altered is that the system would be unable to cope with the numbers that would result if the limits were raised by even a small amount. It is a sad but undeniable fact that at the present time thousands of people are being kept out of the courts because their means are too small to pay for lawyers' services and too large to entitle them to Poor Persons Certificates. The lawyers cannot take on any more cases free and there is no reason why they should be expected to do so.

During the last war the shortage of lawyers left in private practice caused the virtually complete collapse of the Poor Persons Procedure for cases in the High Court. The cases awaiting solicitors piled up and the delay before proceedings could be started was often more than two years. It was obvious that the voluntary efforts of the legal profession were inadequate and would not be adequate even after the war because of the vast increase in divorce cases. The result was a completely new departure in the history of legal aid — the setting up of what is called the Services Divorce Department. This department was run by the Law Society, the organisation of the solicitors' branch of the profession, with a paid staff, the cost of the department being met by the Government. The Services Divorce Department was later extended to deal with the cases of civilians in districts where local solicitors were not able to cope with the quantity of work. Its staff was increased from time to time and branches were set up in provincial cities. In this department we have for the first time an official system of providing Legal Aid by a department of permanent salaried lawyers paid by the State.

Another weakness of the provisions for legal aid in the High Court is the fact, referred to later, that it is a system which provides for completely free professional services and makes no provision for assistance at reduced charges for those who can pay some but not full professional fees. Then there is the difficulty that successful applicants have to make a deposit, usually of £5 or £10, for the out-of-pocket expenses of their cases. Since the Poor Persons Certificate itself has already established that the applicant has virtually no means, to provide this deposit must be a very considerable hardship, and indeed there have been cases where it has been impossible and the case has been dropped.

One point already mentioned was that the poor person can seldom obtain costs against his opponent, even if he is successful. There seems no reason at all why a solicitor and

barrister should act free of charge in a case where the major part of their costs would normally have been paid by the opposing party. The present rule results in an opponent, who may be perfectly able to pay the costs, escaping his normal liability because the action was brought by a poor person; but up to now lawyers have themselves insisted on keeping the rule to avoid any suggestion that their remuneration might ever depend on the outcome of the case.

Other Courts

The Poor Persons Procedure applies, as has already been said, only to the High Court and Court of Appeal. In the criminal courts, under various Acts of Parliament, there are entirely different provisions. These provide for solicitors and, in serious cases, counsel, to be instructed on behalf of a poor person charged with a criminal offence. Unlike the Poor Persons Procedure in the High Court cases the lawyers receive some, though very inadequate, fees for such work. The certificates for a free defence in criminal cases are granted by the courts. These criminal provisions apply even to the Magistrates' Courts, which deal with the less serious offences, but in the past far too little use has been made of the provisions by these courts. In the House of Lords, the final court of appeal, there are provisions for remitting the very considerable fees payable in ordinary cases, but there is no power to appoint solicitors and counsel nor is there any fund for meeting printing and other out-of-pocket expenses, which may be very expensive in a House of Lords appeal.

County Courts

The most serious, however, of all the omissions from the legal aid schemes is the absence of any legal aid whatever for County Court cases. It is in the County Court that most civil claims are brought, including some highly technical and important proceedings. The omission to provide legal aid for these courts is probably due to the fact that they were originally intended to be courts in which the procedure was simple and informal, but this ideal has not been maintained. The work of the County Courts has become steadily more important, wider in its scope and more complicated, until all but the simplest cases require trained lawyers if they are to be handled properly. At present, however, the only way of securing legal representation in these courts is to pay for it, and court fees

and out-of-pocket expenses have to be met by the litigant. The position is exactly the same in certain quasi-civil cases brought in the Magistrates' Courts, such as separation, maintenance and affiliation proceedings. The provisions relating to criminal cases in the Magistrates' Courts do not apply to these very common types of civil cases, and the persons affected are dependent upon their own resources for any legal assistance.

Legal Advice

Another extraordinary omission is that no official steps had been taken up to the last war to provide legal *advice* for poor people. It is obvious that far more poor people need legal advice than legal aid in litigation. It is also obvious that a great deal of litigation could be avoided, to the benefit of all concerned, if the parties were able to obtain proper advice and professional assistance in good time.

The only facilities of this kind which were available before the last war were provided by voluntary organisations, such as social service societies and settlements and religious and welfare societies. There were many of these little local schemes, known as Poor Man's Lawyers, many of them of very uncertain continuity and all with their own idiosyncrasies in the way of means tests and methods of procedure. The great development in this direction, which occurred during the last war, was the provision by the Army, and subsequently by the Air Force and Navy of official, though voluntary, Legal Aid Bureaux, at which advice on civilian matters was given free to members of the Services up to the rank of sergeant. Another development was that the Social Service Settlements in London turned from holding advice sessions on one or two nights during the week, staffed by lawyers who were doing other work during the day, to full-time Legal Advice Bureaux, dealing with vastly more cases and staffed by permanent salaried lawyers. Also, largely as the result of the pressure exerted by the Citizens Advice Bureaux, which gave non-professional advice on all kinds of matters, the assistance of many more Poor Man's Lawyers was secured.

Legal Aid in Other Countries

A great deal can be learned from the study of the provisions which have been made in other countries for legal aid, but the material for study is not easily available and would require at least a separate article. There are, however, certain points to which reference might be made.

There are very few civilized countries in which no provision is made for both legal advice and legal aid in litigation for poor persons. It is also very rare for the aid to be limited to any particular types of cases or particular courts. There is almost invariably a requirement that the applicant must not be able to afford the cost of bringing proceedings or taking advice in the usual way, but fixed means tests such as we have in England are rare. The certificate of legal aid is usually granted by the court, and very rarely by members of the legal profession. In some countries provision is made for the applicant to provide something towards the cost of the case if he is able to do so. Under most systems representation is provided, the advocate either acting free of charge or receiving some payment from the state. Court fees are remitted, and in a great many countries some assistance is given to enable the poor person to meet the out-of-pocket expenses with which he may be faced in fighting his action, such as witnesses' fees and expenses, the cost of copies of documents, advertisements and so on. Tasmania appears to be the only country, apart from England, where the poor person's opponent is exempted from paying the costs if a case goes against him. In some cases a successful poor person becomes liable to pay his own lawyers' and court fees if he recovers sufficient to do so.

One very interesting feature of legal aid, more particularly in the United States, is the way it can be used to further legal education. This is a separate topic, and its possibilities have hardly been explored at all in England. It is, however, easy to see that legal aid bureaux run in conjunction with educational courses at the universities or law schools could be of great value to students.

Legal Aid in the Future

During the war a considerable agitation grew up against the inadequacy of the facilities for providing legal advice and legal aid in litigation for people who had insufficient means. This movement was supported, and to some extent led, by the Law Society itself. A committee was appointed by the Lord Chancellor to report on the position and make proposals, and an impressive amount of evidence was submitted showing that practically all the responsible organisations concerned were convinced of the need for wider and better provisions. The committee, known as the Rushcliffe Committee, reported in May 1945 and endorsed the view that the existing provisions were inadequate in these words:

> It feels that a service which was at best somewhat patchy has become totally inadequate, and that this condition will become worse.

The Committee further stated that under an adequate system barristers and solicitors could not be expected to provide the necessary assistance as a voluntary service. The conclusion was also reached that the system should provide, not only for completely free assistance, but for partial assistance to people who had some, but not sufficient, means. The fundamental principle of the scheme proposed was that the state should be responsible for its financing but, in order to avoid too close a connection between the state and the administration of justice, it should be administered by the Law Society, this organisation being responsible to the Lord Chancellor. The more detailed provisions of the Report may be summarized as follows.

Criminal Courts

The requirements proposed here are largely matters of detail: more generous use of the provisions and more publicity so that more certificates for legal aid would be granted, and better remuneration for the lawyers doing the work. Perhaps the most important innovation suggested is that the provisions should in future cover those cases of a civil nature which in England are dealt with by Magistrates' Courts, in particular certain matrimonial cases and bastardy cases, as well as proceedings under the Guardianship of Infants Act.

Civil Cases: Means

The class of people eligible for free legal aid is considerably extended. Free aid would be granted to a single man whose income was not more than £3 a week, and to a married man whose income did not exceed £4 a week after making allowances for each child. In order to ascertain whether a man is eligible a considerable number of deductions from his income are made before applying the prescribed limits. In addition to free aid, legal aid would be granted to the vast majority of the population, subject to the liability of the applicant to make a contribution based on the amount by which his income exceeds the free limits, and taking into account also his capital.

The above provisions would apply to all courts in the country (apart from the criminal courts which are covered by a separate scheme) and to statutory tribunals where representation is customary.

Administration

The scheme would be administered by the Law Society with the collaboration of the Bar if desired. Applications for the certificates for legal aid would be made to legal aid committees, who would refer the application to the Assistance Board in order to calculate the means of the applicant, and who would then grant a certificate on being satisfied that the applicant had a *prima facie* case. When the certificate had been granted the applicant would be entitled to choose a firm of solicitors from all those firms which had offered to take on cases of this particular kind and, apart from a few questions such as payment, the firm of solicitors would deal with the case in the ordinary way. The remuneration of the solicitor would be 85% of his normal fees. The position of an assisted person who lost his case is dealt with by giving the judge discretion to take into account a person's financial circumstances before awarding costs to his opponent. A person who lost his case against an assisted person would normally be subject to the same liability for payment of his opponent's costs as in any other case.

The Services Divorce Department referred to earlier in this article would still function in cases where only a very small contribution was being paid by the applicant.

Legal Advice

Offices for providing advice would be set up wherever there was sufficient need and, by and large, any person would be entitled to get advice on payment of the small fee of 2/6d, there being power to remit even this fee in the case of a very poor person. These Offices would provide nothing but advice. In order to obtain further assistance the procedure applicable to the civil or criminal courts, as the case might be, would have to be followed.

The Committee was unable to estimate the total cost of the scheme, but anticipated that the administrative machinery which would be necessary would cost rather less than £200,000 a year.

Since the Report was published the Law Society, at the request of the Lord Chancellor, has worked out a scheme in detail, but, due to the shortage of parliamentary time, no legislation has yet been embarked upon. The scheme has been welcomed in all quarters because it undoubtedly represents a tremendous advance on anything previously known in this

country, and indeed in any other country. Although there are naturally points which can be criticized in the proposals, both the legal profession and the public are anxious to see the scheme working as soon as possible; in fact considerable pressure has been brought to bear on the Government to give the necessary legislation high priority. The Government has recently stated that it intends to place a Bill before Parliament at the beginning of next session, but, even if this is done and the Bill is passed, as it undoubtedly will be, it will take many months to set up the necessary organisation. A recent forecast given by the Secretary of the Law Society was that the scheme would be in full operation by January 1st, 1950.

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It is hoped that this outline, and particularly the summary of the Rushcliffe Report, will assist those in other countries who are concerned at the inadequacy of legal machinery where people of small means are concerned. As long as there are people who cannot reasonably afford the cost of legal assistance whenever it is necessary, there is the danger of a denial of justice and a source of justifiable grievance at being kept from the courts. That is a problem that cannot be concealed indefinitely and one that no democracy can afford to ignore.

II. JUSTICE UNDER THE ENGLISH REGIME

22. And Whereas frequent Complaints have heretofore been made of Great Delays and undue proceedings in the Courts of Justice in several of Our plantations, whereby many of Our Good Subjects have very much Suffered, And it being of the greatest Importance to Our Service and to the Welfare of Our Plantations that Justice be every where speedily and Duly administered, and that all Disorders, Delays and other undue practices, in the administration thereof be Effectually prevented; We do particularly require You to take Especial Care, that in all Courts, where you are Authorized to preside, Justice be Impartially administered, and that in all other Courts, established within Our said Province all Judges and other persons therein concerned do likewise perform their several Duties without any Delay or partiality. (Instructions to Governor Guy Carleton, 1768)