HART

Access to Justice

Beyond the Policies and Politics of Austerity

Edited by
Ellie Palmer, Tom Cornford,
Audrey Guinchard and Yseult Marique

With a Foreword by the Rt Hon Sir Stephen Sedley

BLOOMSBURY

ACCESS TO JUSTICE

Building on a series of ESRC-funded seminars, this edited collection of expert papers by academics and practitioners is concerned with access to civil and administrative justice in constitutional democracies, where, for the past decade, governments have reassessed their priorities for funding legal services: embracing 'new technologies' that reconfigure the delivery and very concept of legal services; cutting legal aid budgets; and introducing putative cost-cutting measures for the administration of courts, tribunals and established systems for the delivery of legal advice and assistance. Without underplaying the future potential of technological innovation, or the need for a fair and rational system for the prioritisation and funding of legal services, the book questions whether the absolutist approach to the dictates of austerity and the promise of new technologies that have driven the Coalition Government's policy, can be squared with obligations to protect the fundamental right of access to justice, in the unwritten constitution of the United Kingdom.

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This book is dedicated to Ellie's grandsons, Jacob, Callum and Arturo; Sally Weatherill, Oliver Cornford and William Cornford; Audrey's husband Stuart; and Yseult's parents Etienne and Anne-Marie Marique.

FOREWORD

THE RT HON SIR STEPHEN SEDLEY

2015 was the year in which Britain celebrated the eight-hundredth anniversary of Magna Carta, with its ringing promise that the Crown would neither sell nor delay nor deny justice to anyone. It was also a year in which an austerity programme initiated by a Labour government and developed by a Conservative–Liberal Democrat coalition began to bite so deeply into the accessibility of justice as to call into question whether Magna Carta any longer meant anything.

Running parallel to the steady erosion, at least in England and Wales, of what we had come, perhaps complacently, to regard as an entrenched human right, the seminar series on which this book is based looked carefully and realistically at both sides of the issue: the shrinking availability of public funds and the practical possibilities of doing more with less. The volume seeks in particular to distinguish between those inroads into access to justice which are unacceptable on any principled view and those which are either unavoidable or at least negotiable. Wherever possible it does so, in contrast sometimes to central government, from an ascertained evidence base. Even if some of the alternative ways of delivering services which the latter part of the book considers, and perhaps other ways of delivering justice too, have been prompted by the swing of the fiscal and political wrecking-ball, something positive may emerge.

The political Achilles' heel of legal services has arguably been legal aid. The 1949 Act which brought it into being eschewed a national legal service in favour of publicly bank rolling the private legal profession. The Treasury disliked it from the start: all it could ever see was an annual haemorrhage of public money; the return on it—public justice—didn't show up on the state's accounts. The exploitation of legal aid by parts of the private profession made it ripe for reform; but the result has been a series of amputations which are now leaving major sectors of the population without access to legal advice or representation. The Treasury, meanwhile, has woken up to the fact that access to justice can be not merely self-financing, but a source of profit: increasingly unaffordable court fees are now set at a level which pays for the entire court system with money over.

It is easy but unproductive to watch in despair as justice becomes an item on a profit and loss account and the privilege of the prosperous. But austerity is still a political reality, and justice is still the cement of a civilised society. The ecumenical participation in the seminars from which these chapters are drawn—policymakers,

judges, practitioners, academics, advisers—gives the book a sobriety and an authority which political argument may lack. Is it too much to hope that the Secretary of State for Justice, who as Lord Chancellor bears constitutional responsibility for the undertaking given at Runnymede, will read it?

Stephen Sedley
Oxford

ACKNOWLEDGEMENTS

This edited collection is born of a series of seminars comprising a dedicated team of academics and practitioners from both sides of the Scottish border: advisers, distinguished speakers, including senior members of the judiciary and a core group of expert discussants who so generously gave of their time to ensuring the continuing success of the *Access to Justice* seminars beyond the life of the series. We wish to extend our gratitude to everyone who participated, for their unstinting commitment to our project.

We would also like to express a particular debt of gratitude to Sir Nicholas Blake, then President of the Upper Tribunal Immigration and Asylum Chamber, Shona Simon President of Employment Tribunals Scotland and the dedicated members of our strategic planning committee—Mike Adler, Nony Ardill, Varda Bondy, Tom Cornford, Mavis Maclean, Martin Partington, Alan Paterson, Maurice Sunkin, Carol Storer, David Williams and Nick Wikeley—whose diverse experiences and accomplishments in the academic, judicial, practitioner and administrative spheres have contributed greatly to the breadth, profundity and creative energy of this volume.

It is also notable that a number of contributors to this volume have paid tribute to influential seminar papers by Alan Patterson, Richard Susskind and Roger Smith, whose ideas continue to shape past and present debates about the impact of legal aid rationing and technological innovation on the accessibility of justice and the future of professional legal services, including the provision of legal education in the United Kingdom. We would also wish to pay tribute here to seminal evidence- based papers by Stephen Cobb QC, Professor Graham Cookson of the University of Surrey, Guy Mansfield QC, Colin McKay, then Deputy Director in the Justice Directorate Scotland, Assistant Professor Nell Munro of the University of Nottingham, James Sandbach and Sarah Veale CBE (Head of the Equality and Human Rights Department at the TUC) whose authoritative contributions for a variety of reasons, including the passage of time, have not appeared in this volume.

Furthermore, despite the passage of time we would also like to acknowledge our debt to the most stalwart members of the core discussion group: Nony Ardill, Varda Bondy, Audrey Guinchard, Anna Hardiman-McCartney, Steve Hynes, Morag McDermont, Tom Mullen, Paul Yates, Yseult Marique, Richard Miller and James Sandbach, whose diverse legal, socio-political and socio-legal backgrounds were key to the quality of the informed discussions on which we have built.

And finally, we would wish to thank our dedicated graduate student reporters, Joanne Easton, Stephen Sondem and Laura Wrixon, whose enthusiasm and commitment to the ideals of access to justice were not only evident in their participation at the seminars, but shine through the excellent recording of the speaker papers which they so generously found time to produce for our dedicated website.

Turning then to the present, I would like to acknowledge my gratitude to Tom, Audrey and Yseult for their perseverance and hard work, our expert contributors for their patient good humour, and to Richard Hart for insisting, that, despite the passage of time, this timely and important collection of academic and practitioner speaker papers should not be allowed to escape the light of day.

Ellie Palmer
25 September 2015

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LIST OF CONTRIBUTORS

Andrew Brookes is Deputy District Judge and Head of Housing and Property Dispute Resolution at Anthony Gold Solicitors. Andrew spent six years as chair of the Housing Law Practitioners' Association and is ranked as a leading individual in the field of social housing in *Chambers 2015*. He is currently on the editorial board of the *Journal of Housing Law* and regularly writes and lectures on housing law. Andrew's clients include tenants and other private individuals, residents' associations, social landlords, private landlords and commercial organisations. He also has wide ranging experience of judicial review cases of all kinds. His reported cases cover such matters as the scope of a local authority's duty towards intentionally homeless persons, decisions in the Lands Tribunal relating to residential service charges, the enforcement of a mortgage over commercial property and a successful judicial review of a local authority's decision to increase parking charges.

Nicole Busby is Professor of Labour Law at the Strathclyde Law School. Her research focuses on the effect of legal interventions on individuals' working lives and she is particularly interested in exploring the wider socio-economic environment in which the labour market operates, including the impact of state regulation. Her current work relates to the relationship between paid work and unpaid care, the constitutionalisation of labour rights (with particular reference to the EU constitution post-Lisbon) and claimants' experiences of the UK's Employment Tribunal system. She is the author of *A Right to Care? Unpaid Care Work in EU Employment Law* (Oxford University Press, 2011), co-author (with Grace James) of *A History of Regulating Working Families: Strategies and Stereotypes, Strains and Solutions* (Hart Publishing, forthcoming 2016), co-editor (with Grace James) of *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011) and (with Douglas Brodie and Rebecca Zahn) *The Future Regulation of Work* (Palgrave Macmillan, 2016).

Andrew Caplen is the immediate Past President of the Law Society of England and Wales. During his year as President he took the question of 'Access to Justice' as his major theme. In September 2014 he launched, alongside the Lord Chief Justice, the Law Society's 'Access to Justice' campaign and in June 2015 assisted in the launch at Chancery Lane of Oxfam's 'Lawyers against Poverty' initiative. Andrew has both written and spoken widely on these issues. In 2015 he co-authored *Speaking Up—Defending and Delivering Access to Justice Today* (published by Theos). He also presented the annual Beckly Lecture at the 2015 Methodist Conference.

Andrew Caplen's involvement with Legal Aid and Access to Justice issues has continued throughout his legal career. He was a Duty Solicitor for many years and has been involved in a number of pro bono initiatives. He was also Chair of the Law Society's Access to Justice Committee from 2008 to 2012 and one of the co-authors of the Society's 'Access to Justice Review'. Andrew is a Consultant with Heppenstalls Solicitors Limited of Lymington and New Milton.

Tom Cornford is a senior lecturer in the School of Law, University of Essex where he teaches public law, tort law and various courses in legal and political theory. He is the author of writings on administrative law and the tort liability of public authorities, notably *Towards a Public Law of Tort* (Ashgate, 2008).

Audrey Guinchard established the LLB English and French Laws with Master 1/Maîtrise at the University of Essex and co-directed it for 12 years. Her current research focuses on cybercrime and how new technologies affect criminal law and human rights. Since April 2013, she has been the co-investigator responsible for the legal aspects of a project funded by the EPSRC on the 'Digital prosumer—Establishing a "Futures Market" for Digital Personhood Data'. The project notably reflects on the issues of privacy, data protection and commercialisation of personal data. Her interest in human rights and access to justice stems from her own research in criminal law and on the concept of legal certainty and predictability at common law, as well as from her teaching of French law, which covers the French justice system, its concept of law and access to law and justice.

Caroline Hunter is a Professor at York Law School, University of York. She is currently Head of the Law School. After working in practice as a barrister at the start of her career, she has since developed an academic profile combining teaching, research, training and legal practice, focusing in particular on the interaction of housing law, policy and practice. She has led a number of socio-legal projects on housing law, relating in particular to possession proceedings, anti-social behaviour and homelessness and has published widely on these subjects. She is deputy general editor of the *Journal of Housing Law* and is currently co-authoring a book with Professor Helen Carr (University of Kent) provisionally entitled: *Governing the Homeless*: *Law, Governance and Plurality at the Margins* (Palgrave Macmillan, forthcoming). She sits as a part-time fee paid judge of the First-tier Tribunal (Property Chamber).

James Kenrick is an expert on young people's legal advice needs. He works at Youth Access, the national membership organisation for youth advice and counselling services, where he is responsible for developing the quality and quantity of youth advice services. He has authored numerous reports and articles, including 'The Advice Needs of Young People—The Evidence (2009), 'Young People's Access To Advice—The Evidence' (2009) and 'The Outcomes And Impact Of Youth Advice—The Evidence' (2011). More recently, he has worked to integrate legal advice services with health, housing and social care services. James is also

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Mavis Maclean CBE is a Senior Research Fellow of St Hilda's College Oxford and a Founding Director of the Oxford Centre for Family Law and Policy (OXFLAP) at the Department of Social Policy and Intervention, Oxford. She was a panel member of the Bristol Royal Infirmary Inquiry, and Academic Adviser at the Ministry of Justice for many years. Recent books include 'Family Justice: The Work of Family Judges in Uncertain Times with John Eekelaar (Hart, 2014) and *Delivering Family Justice in the 21st Century* edited with John Eekelaar and Benoit Bastard, (Onati International Series, Hart, 2015).

Yseult Marique is a Senior Lecturer at the University of Essex. Her comparative research in the area of European administrative law is concerned with administrative justice and the regulation of public contracts in Europe. Her recent research has focused on the interplay between administrative law, contract law and regulation, in shaping how public money is spent and controlled in the modern European 'economic constitution'. This growing body of comparative work raises important questions about the distinctiveness of the UK's legal framework of economic governance, which have gained heightened significance in the context of continuing austerity. Yseult's research has been widely published in English, French, Belgian and international journals; she has published chapters in edited collections and reports for public and commercial bodies in the UK and other European jurisdictions. Her monograph *Public-Private Partnerships and the Law: Regulation, Institutions and Community* (Cheltenham, Edward Elgar, foreword by Professor John S Bell) was published in 2014. Yseult holds a law degree from the Université libre de Bruxelles (ULB), and a D Phil from the University of Cambridge (with a PhD by equivalence from the ULB). She holds a postgraduate degree in notariaat from the Vrije Universiteit Brussels (VUB).

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She has written extensively on both. Since 2009, when her leading monograph *Judicial Review Socio-economic Rights and the Human Rights Act* (Hart, 2007) was reprinted in paperback, the theme of austerity has brought new dimensions to her constitutional and administrative law teaching and research. She is currently contributing to a number of national and international research projects concerning the socio-economic implications of austerity on the lives of vulnerable individuals and groups, especially in mainland Europe. She is also working on her latest monograph, *Welfare Human Rights and States Protection,* based on research-led undergraduate and post-graduate teaching, which she introduced at Essex in the wake of the economic downturn.

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Albert Weale is Emeritus Professor of Political Theory and Public Policy at University College London. Prior to taking up his post at UCL, he was Professor of Government and co-editor of the *British Journal of Political Science* at the University of Essex. Before that he was Professor of Politics at the University of East Anglia (1985–92), Lecturer in Politics (1976–85) and Assistant Director of the Institute for Research in the Social Sciences (1982–85) at the University of York, and Sir James Knott Fellow at the University of Newcastle upon Tyne. He graduated in Theology from Clare College Cambridge in 1971 and was awarded a D Phil in Social and Political Sciences at the University of Cambridge in 1977. His research and publications have been concentrated on issues of political theory and public policy, especially the theory of justice and the theory of democracy, health policy and comparative environmental policy. His principal publications include *Equality and Social Policy* (Routledge and Kegan Paul, 1978), *Political Theory and Social Policy* (Macmillan, 1983), *The New Politics of Pollution* (Manchester University Press, 1992), *Democracy* (Macmillan, 1999 and 2007 rev), *Democratic Citizenship and the European Union* (Manchester University Press, 2005), *Democratic Justice and the Social Contract* (Oxford University Press, 2013) and, with Shaun Heap, Martin Hollis, Bruce Lyons and Robert Sugden, *The Theory of Choice* (Blackwell, 1992) and with Geoffrey Pridham, Michelle Cini, Dimitrios Konstadakopulos, Martin Porter and Brendan Flynn, *Environmental Governance in Europe* (Oxford University Press, 2000) as well as a number of edited books, journal paper and chapters.

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Stewart Wright was called to the Bar in 1993. He was appointed as a Legally Qualified Panel Member of the Appeal Tribunals in 2002 and became a Judge of the First-tier Tribunal, Social Entitlement Chamber in 2008. Before coming to the Bar he worked in a law centre for 7 years in the late 1980s and early 1990s. He was then at the Bar from 1993 to 1999. From 1999 to 2007 he was the Child Poverty Action Group's legal officer. This job meant he was responsible for running CPAG's test case strategy and in that role important social security cases. In October 2012 he was appointed Judge of the Upper Tribunal (Administrative Appeals Chamber).

Paul Yates runs Freshfields' London pro bono practice. Freshfields acts for a wide range of pro bono clients, from some of the world's largest international NGOs to individual victims of human trafficking. Paul appears as an advocate at the asylum support tribunal, and is vice-chair of the Asylum Support Appeals Project (ASAP). He also acts for victims of human trafficking in civil enforcement proceedings, and is closely involved in developing the firm's third-party intervention practice. Paul was previously seconded to the legal team of human rights group Liberty.

Introduction

TOM CORNFORD, AUDREY GUINCHARD,
YSEULT MARIQUE AND ELLIE PALMER

The millennium began with ambitious proposals by the New Labour Government to transform the justice system; driven, as in the case of other publicly funded services, by the goals of efficiency, and underpinned by market principles introduced for the commissioning of legal services. However, throughout the following decade there were growing concerns among legal professions, pressure groups and charities about the level of unmet need for *appropriate* services, especially for socially disadvantaged individuals and groups. Moreover, since 2011, the 'absolutist' approach to austerity that marked the tenure of the Coalition Government has done little to allay these concerns. Introduced at the same time as a complex opaque and contested reconfiguration of the welfare system, sweeping reforms of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), have coincided with increased pressures on courts, tribunals and advice agencies, leaving many vulnerable individuals without access to the kind of help that they need.

Furthermore, at a time of unprecedented need for protective public interest challenges and independent oversight of government decision-making in relation to the fair distribution and regulation of basic public services, shortly before the end of its tenure, the Coalition Government placed punitive restrictions on a court's powers to limit costs liabilities for organisations wishing to bring challenges; requiring them to order 'interveners' (NGOs and charities) to pay for any work done by another party, arising from their involvement in the case.[1]

A number of the chapters in this collection have focused directly on the implications of the Coalition legal aid reforms and other austerity measures for vulnerable individuals in need. Others have focused more broadly on theoretical issues of privatisation and government approaches to public services funding, investigating the need for a distinctive approach to state financing of *legal services* in the unwritten constitution of the United Kingdom. Thus, whether focusing on abstract notions of justice as fairness, or the exigencies of a safe system to deliver it, the chapters in this collection are universally concerned with fundamental questions about 'access to justice', a concept which, in contemporary legal and

[1] The Criminal Justice and Courts Act 2015, s 86.

socio-legal discourses, and in human rights and democratic political theory has acquired the status of a fundamental constitutional right.

As noted above, this collection of chapters builds on the investigations of a series of ESRC funded seminars, *Access to Justice in an Age of Austerity: Time for Proportionate Responses* (2011–13)[2] which brought together a core group of up to 40 discussants—senior civil servants from the Ministry of Justice and the Scottish Justice Department, members of the judiciary, representatives from the legal professions, Citizens Advice, law centres, members of consultative bodies, NGOs, academics and research students—to reflect on and discuss reforms of the past decade, proposals for 'proportionate' responses in the current crisis, and to identify future research directions and questions.

However, since our proposal had been written and our grant awarded shortly before the appointment of the Coalition Government, it became necessary to make some changes of substance and focus, especially to the later 2012–13 seminars. Thus, as well as investigating 'proportionate' responses to the reform of legal services and the funding of the justice system more generally, the focus of seminars 3, 4 and 5 shifted to a more practical examination of the proposed legal aid cuts and other austerity measures introduced by the Coalition Government. Moreover, participants had the opportunity to discuss and suggest practical solutions to very real cuts in budget and services that had taken place, or were shortly to be implemented under LASPO. Throughout the seminars, we adopted the broadest definition of what is entailed in the concept of access to justice. It was also understood that emphasis would be placed on solutions as well as problems created by cuts; and where possible, proposals for reform would be based on rigorous evidence-based research.

Of course, we had no illusions about the likely severity of the cuts, or their impact on both providers and recipients of legal services. For some time expenditure on legal aid has been recognised as unsustainable. It was also clear that under New Labour, policies of outsourcing, cost cutting, and a culture of blame in relation to providers of legal services would have continued. However, there was nothing to predict the scale of the legal aid cuts introduced by the Coalition Government in the LASPO Act, or the arbitrariness of blanket institutional measures adopted in the name of austerity, including self-representation in court; restriction to telephone advice—even for the most vulnerable groups in society; limited court office opening hours and ad hoc relocation of courts across England and Wales. Nor were stakeholders prepared for the Coalition's refusal to engage with economic evidence-based research that might point to different conclusions, or their indifference to concerns that many of the proposed cost-cutting measures would impact most severely on the vulnerable in society. One of the most fiercely fought political campaigns, highlighting the potential dangers of leaving

[2] See: www.essex.ac.uk/atj/.

vulnerable 18- to 25-year-olds 'out of scope' at the last hurdle made little impression on the Bill's promulgators.[3]

Over the two years of the seminars, discussion frequently returned to legal aid and the LASPO Act—its institutional and societal implications—especially for the most vulnerable members of society. However, by continuing to focus on our broader research agenda (systemic funding issues and pressure points on the justice system, including family, housing, immigration, employment and administrative tribunals and mental health) we had the benefit of speaker papers that were not only diverse in subject matter, but also unique in providing experiential commentary, evidence-based research, suggestions of solutions and useful comparators with other devolved nations (most notably Scotland and France).

Those in practice were able to offer insights into work which has improved community engagement, demonstrating the value of combined services. Lorna Reid (Islington Law Centre) presented the experience of several decade-long projects provided in partnership with Islington local authority services; highlighting their success in removing experiential barriers to the justice system for some the most vulnerable members of the community. James Kenrick (Youth Access) provided first-hand evidence of the importance of early intervention, in terms of advice for young people and the present lack of appropriate services for this vulnerable group.

At the same time, academics, judges and practitioners were able to share solid evidence-based research which often challenged the Government's justifications and contradicted their aims. Stephen Cobb QC, formerly Chairman of the Family Law Bar Association and recently appointed to the High Court bench, demonstrated the additional costs likely to arise due to extra burdens on the family law system which would outweigh any savings made by LASPO cuts. Nigel Balmer and Marisol Smith (both of the Legal Services Research Centre) presented a paper entitled 'Just a Phone Call Away: Is Telephone Advice Enough?' which suggested that, all things considered, the move to telephone advice would not benefit all users and the substantive benefits would be significantly lower than when receiving face-to-face advice.

Evidence-based presentations of this kind afforded a unique opportunity for the seminars to consider different models for improvement of services across the board. Furthermore, the engagement of policymakers and professionals on both sides of the Scottish border (CAB and Scottish Legal Aid Board)[4] as well as academics, judges and practitioners from both jurisdictions, contributed to fully informed debate. Practical solutions were discussed without overlooking the realities of problems arising in different institutional contexts, or in demographically disadvantaged localities with unwieldy numbers of vulnerable clients, most likely

[3] See: www.guardian.co.uk/law/2012/apr/23/lords-block-legal-aid-again.

[4] At the time of the seminars Colin McKay was Deputy Director in the Justice Directorate of the Scottish Government. His responsibilities included government policy on courts, access to justice, EU justice liaison and the Government's relationship with the judiciary and the legal profession. Colin Lancaster was Director of Policy and Development, Scottish Legal Aid Board.

to present with multiple problems that put them and their families at greatest risk. Several papers and discussions focused on the need for better initial decision-making, suggesting that appropriately trained decision-makers, in command of relevant evidence (supported by advice-givers and caseworkers) could effectively relieve the growing burdens on many courts and tribunals. Moreover, it was suggested that the currently high success rates in appellate courts and tribunals may be indicative of systemic failures to resolve basic problems much earlier in the decision-making process.

In a number of seminars, Scottish speakers provided important insights into alternative approaches, notably in relation to reducing the legal aid budget, and to avoiding duplication in work of appellate courts and administrative tribunals. However, Scottish presentations did not merely offer *theoretical* alternatives to LASPO. These expert presentations, of approaches already in place in Scotland (and subject to monitoring), satisfied one of the central objectives of the series: to highlight the importance of rigorous evidence-based research as a *sine qua non* for constitutionally appropriate reforms of the justice system. Colin McKay began by explaining how, since devolution, the Scottish system of legal aid had diverged from the English: the Scottish system had remained predominantly a judicaire one and had managed to retain the existing scope of legal aid without increasing per capita spending. It had done this by an integrated approach which involved pursuing structural efficiencies. With greater budgetary constraints, the pressure on the system was increasing, however.[5]

Nowhere more clearly was the contrast between the Scottish and Westminster approaches to fiscally responsible legal aid spending demonstrated than in Graham Cookson's paper, 'Analysing the economic justifications for the reforms to social welfare and family law legal aid'[6] which drew on the findings of his study commissioned by the Law Society of England and Wales: *Unintended Consequences: the Cost of the Government Legal Aid Reforms*.[7] Thus, challenging the Government's unscientific approach to the reduction of the UK budget deficit, the aim of his research had been to identify the potential impact of the reform to legal aid scope on the public purse; focusing in particular on the areas of law where the proposed cuts to legal aid were required to generate the largest savings: family law, social welfare law and clinical negligence.

It had been made clear that as part of the Coalition's fiscal plan to reduce the UK deficit, the Ministry of Justice was expected to save £2 billion per annum from its budget in the year 2014–15; a target to be achieved by substantial reforms to the legal aid system, estimated to deliver savings of £450 million per annum; and this was to be achieved by the crudest of strategies: to remove significant categories

[5] C McKay, 'The Scottish Government Response to Austerity', paper for ESRC Access to Justice Seminar Series, Seminar 2, *Revaluing a Market Based Approach to Legal Services* (14 July 2011) 2.

[6] A version of Cookson's seminar paper was later published in the *Journal of Social Welfare and Family Law.* See G Cookson, 'Analysing the Economic Justification for the Reforms to Social Welfare and Family Law Legal Aid' (2013) 35(1) *Journal of Social Welfare and Family Law* 21.

[7] See: www.lawsociety.org.uk/policy-campaigns/research-trends/research-publications/unintended-consequence-of-legal-aid-reforms/.

of law from the scope of legal aid. Moreover, since £941 million (approximately a quarter of legal aid expenditure) was for civil and family cases, the most significant savings were required to be made in those areas. It was axiomatic, however, that if the Coalition reforms were to make any meaningful contribution to reducing the fiscal deficit, the required savings needed to be weighed against the potential knock-on or consequential costs to the public purse.

Nonetheless, as reported by the Justice Select Committee and acknowledged by the Ministry of Justice, the magnitude of these knock-on effects had simply not been estimated. Indeed, the Government's *own* impact assessment had indicated that the reforms could generate significant knock-on costs, including 'reduced social cohesion, increased criminality, reduced business and economic efficiency, increased resource costs to other and increased transfer payments from other Departments'. Thus, relying on data from the Civil and Social Justice Survey combined with data from the Legal Services Commission and other publically available data, Professor Cookson's research had not only generated a crucial debate around the proportionality of the Coalition proposals in designated areas (family justice, welfare and clinical negligence) it had also laid the foundations for further in-depth research to establish the true economic magnitude of the predicted areas of costs. As explained in his seminar paper, Cookson's analysis had demonstrated that knock-on costs could be in the region of £139 million per annum, realising a net saving of significantly less than half (42 per cent) of the Government's prediction within the targeted areas.

Shortly before the LASPO Act came into force, Lord Neuberger had publicly voiced his concerns over the legal aid cuts, stating that he feared court costs would rise and that those facing legal challenges would begin to feel that the Government was not giving them access to justice, taking matters into their own hands.[8] Thus, from the beginning of the Coalition tenure, the seminars provided an important space for multidimensional and sustained dialogue with experts on access to justice issues, across academic and practitioner boundaries. Indeed, it soon became clear that growing concerns about the likely societal impact of the legal aid cuts, and the Government's indifference to rational argument and constructive policy debate, would not be allowed to undermine the commitment of stakeholders to seeking innovative and client-centred solutions, within systems already showing signs of chaos.

The seminars were organised around three interlocking themes which have been replicated in the three parts of this book.[9] The first was the nature of 'access

[8] See: http://bbc.co.uk/news/uk-21665319.

[9] The essays in the book are either updated versions of papers given at the seminars or, in some cases, newly solicited contributions. With two exceptions, they were submitted between November 2014 and July 2015. Each chapter states the law as it stood at the date of its completion. The date of completion of those chapters whose content is date-sensitive is as follows: Caplen—May 2015; Peers—June 2015; Mullen—May 2015; Thomas—December 2014; Reid—February 2015; Wright—May 2012; Brookes and Hunter—December 2014; Busby and McDermont—September 2014; Maclean—December 2014; Kenrick and Palmer—April 2015; Stephen—November 2014; Yates—July 2015; Wesley and Guinchard—July 2015; O'Neill—February 2015.

to justice' as an ideal and the question of what is necessary, in general terms, to achieve it. The second was the concrete reality of access to justice in England and Wales today, particularly in light of the changes wrought by the LASPO Act. Here the focus was on the parts of the law that impact most directly on the lives of ordinary citizens (and non-citizens in the case of immigrants), especially the poorest who stand to suffer most as the result of the Government's cuts to legal aid. Many of the contributions on this theme drew on empirical research. The third theme focused on methods for improving access to justice, including new economic models of service delivery and the increased use of technology.

Part I

The first part of the book, 'Access to Justice: Theoretical, Legal and Policy Background' begins with a contribution from Andrew Caplen, President of the Law Society. This provides a succinct and critical overview of the current state of access to justice in this country. It thus affords a useful rehearsal of the themes that are taken up in the rest of the book.

The following two chapters take a more theoretical turn. In his chapter, Tom Cornford considers the different meanings that have been assigned to the expression 'access to justice' and concludes that the core meaning is the requirement that each citizen be equally able to protect her legal rights. A corollary of this is that there is equality in the provision of legal services. In other words, wealth or social position should confer no advantage in legal matters and only the importance of the interests at stake should determine the level of legal assistance given. One way of ensuring this would be to provide a legal equivalent to the National Health Service, a state-funded system that furnished advice and representation in legal matters to every citizen on the basis of need rather than ability to pay. This notion that legal services could be treated in the same way as medical ones is taken up in his chapter by Albert Weale, who carefully plots the similarities and differences between the two types of service. In the case of health care, he concludes there is no reason in principle why citizens should not pay for services, the strongest arguments for state provision being based on market failure rather than on a right to equal health care services. In the case of legal services, by contrast, the right to equal provision is inherent in the notion of justice.

In the last chapter of the first section, Steve Peers puts UK concerns about access to justice in a wider context by setting out European Convention and EU law on the subject. An understanding of European Convention law in particular is useful in understanding the Coalition Government's reforms considered in the next part as they impose an important restraint on the Government's ability to reduce access to justice.

Part II

The second part of the book, 'Pressure Points on the Justice System', begins with a contribution from Tom Mullen in which he surveys the whole landscape of administrative justice and explains how the Government's reforms have altered it. He describes, inter alia, the abandonment of the movement (exemplified in the adoption of the uniform tribunal structure) towards a holistic approach to the area; the Government's attempts to weaken judicial review; the removal of rights of appeal in immigration matters; the introduction of administrative obstacles to appeal in social security matters; and the effects of cuts in legal aid.

Robert Thomas describes the severe restrictions on access to justice that the Government has imposed in the field of immigration both by reducing the categories of immigration cases for which legal aid is provided and by removing, in most cases, the right to appeal. While these restrictions will lead, Thomas argues, to many cases of injustice they may not reduce litigation as much as the Government hopes. The inability to appeal may increase the incidence of judicial review and the courts have found, in the *Gudanaviciene*[10] and *Public Law Project*[11] cases, certain of the limitations on legal aid to be unlawful.

In their chapters, Stewart Wright, at the time of writing his chapter a Judge of the Social Entitlement of the First-tier Tribunal,[12] and Lorna Reid, a welfare benefits caseworker, address from their different perspectives, the problems of access to justice in the field of social security law. Wright describes the challenges faced by the Social Entitlement chamber, and Reid a number of innovative schemes for providing advice to benefit applicants in the London Borough of Islington. A lesson of Reid's chapter is one that recurs throughout Part II: that advice given early to those in need is key to avoiding disputes and appeals later on.

In their chapter on housing and access to justice, Andrew Brookes and Caroline Hunter emphasise the complexity of housing issues—the way in which they can give rise to multiple forms of proceeding in different courts and tribunals—and their tendency to form part of larger clusters of problems: those suffering difficulties with housing are often afflicted by a variety of other difficulties including difficulties with finance generally, with welfare benefits and with mental health. As in other areas, money can be saved and much trouble avoided by the giving of good advice. In one sense, housing has been less hard hit than other areas of the law, because more housing matters remain within the scope of legal aid. But a

[10] *Gudanaviciene v Director of Legal Aid Casework* [2014] EWCA Civ 1622; [2014] EWHC Admin 1840.

[11] *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC Admin 2365.

[12] He has since been elevated to the Upper Tribunal, Tax and Chancery Chamber.

striking finding of Brookes and Hunter's chapter is that the availability of housing advice has fallen drastically since 2010 not because there is no legal aid for housing matters, but because the cuts in legal aid have wiped out many providers of legal advice. The chapter ends with a number of positive suggestions the boldest of which is for a more interventionist court, on the model of some US criminal courts, which seeks proactively to deal with the clusters of problems suffered by litigants.

Nicole Busby and Morag McDermont situate the Government's exclusion of employment matters from the scope of legal aid and introduction of fees for using the Employment Tribunal in a wider context: that of the change during the last four decades from a conception of the employment relationship as a collective matter (labour law) to one according to which it concerns dealings between private individuals (employment law). The authors find the assumption underpinning the Government's reforms—that much litigation against employers is vexatious—to be unsupported and that the reforms are bringing about an unjustifiable tipping of the balance of power in favour of employers and against employees. The chapter ends by suggesting a radical reform—the creation of a more inquisitorial form of tribunal—and by making more modest proposals aimed at assisting litigants in person and ensuring the enforcement of awards.

In her chapter, Mavis Maclean judges the Government's changes to legal aid in family matters in the light of the set of elements identified by Lady Hale as necessary for equal access to justice: a legal framework; access to remedies for wrongs; and lawyers to facilitate the process. Maclean questions the Government's emphasis on mediation as a substitute for legal assistance and, drawing on empirical work, throws doubt on the assumed dichotomy between rigid, legalistic lawyers and flexible, responsive mediators. Family lawyers, she argues, are often flexible and responsive and their legal expertise is required to ensure the formation and enforcement of public legal norms.

In the final chapter in Part II, James Kenrick and Ellie Palmer examine access to justice for an often neglected group: young adults in the age range 16 to 25.

The chapter canvases familiar themes—the clustering of problems, the importance of timely intervention and the ill effects of LASPO—as well questioning the assumption that disadvantaged young people are easily capable of finding answers to their legal problems online. It ends with a proposal for a service specifically targeted at young people's legal needs.

A number of themes are common to the chapters in Part II: the clustering of legal problems of various types and the need for holistic and targeted approaches to dealing with them; the need to deal with poor initial decision-making and the absence of initiatives on the part of the Government to address this problem; the dichotomy between the private settlement of disagreements, often favouring stronger parties, on the one hand and the application of fair and democratically created public legal norms on the other and the Government's tipping of the scales in favour of the former; the need for more hands-on and inquisitorial courts and tribunals; the devastating nature of many of the cuts made to legal

aid and the way in which they have severely reduced the number of providers of legal assistance; the likely persistence of legal challenges to decisions of public authorities in spite (and sometimes because of) the cuts and restrictions; the lack of adequate justification for much of the Government's programme of reform; and the disturbing phenomenon of the Government's general indifference to evidence.

Part III

The chapters in the third section, 'Alternative Approaches to Funding Legal Services' strike a more optimistic note by either suggesting ways in which access to justice could be improved within the constraints of the current framework or, in the case of the last two chapters, describing the approach taken in other jurisdictions.

Frank Stephen's chapter discusses the effects of an earlier piece of legislation than LASPO, the Legal Services Act 2007. This Act permits legal services to be provided by businesses—referred to in the Act as Alternative Business Structures (ABSs)—as well as by lawyers practising as sole practitioners or in partnerships. The consequences of this for the provision of legal services in welfare matters have often been taken to be deleterious. Stephen argues, however, that ABSs may do a better job of providing such services than traditional legally aided solicitors firms because of economies of scale and greater specialisation.

Paul Yates describes CourtNav, an important initiative set up by the Pro Bono Unit at the solicitors firm Freshfields Bruckhaus Deringer and the Royal Courts of Justice Advice Bureau. The purpose is to provide an online programme to enable litigants in person (of whom there are an increasing number) to fill out court forms without the presence of a legal adviser. Yates' chapter also contains interesting reflections on the relationship between the giving of pro bono legal assistance and the provision of state funded legal aid. In the English courts and in the jurisprudence of the European Court of Human Rights, the availability of charitable or pro bono help is often given as a reason for withholding legal aid. The charitably inclined lawyer must thus take care that in giving help she does not deprive its recipient of the possibility of more reliable publicly funded support. 'A system more corrosive of the natural impulse to help a fellow human being', Yates observes, 'is hard to imagine'.

Audrey Guinchard and Simon Wesley describe the approach taken to access to justice in France. An in-depth empirical study would be required to determine whether the French do a better job than we do in ensuring access to legal services for all. However, the chapter certainly suggests a deeper ideological commitment to the ideal of access for all than exists in this country. Despite recurring difficulties in funding and a significantly lower budget for legal aid than in the UK, France considers all legal matters worthy of legal aid and offers either total or partial legal aid to all those in need.

Last, Sarah O'Neill's chapter describes the strategy adopted by the Scottish Executive for maintaining access to justice in the face of financial stringency. It is a very different strategy from the English one. Where the Westminster government has simply removed many matters from the scope of legal aid while restricting eligibility to the poorest, the Scottish Government has kept all matters in scope for most of the population. It has done this by demanding contributions from the users of legal aid, proportionate to their ability to pay; by creating specialised law centres dealing with the kinds of legal problem not adequately dealt with by solicitors in private practice; by targeting services at those most in need; and by a variety of measures reducing the cost and incidence of litigation. The Scottish approach provides an illuminating example of what can be done where there is a genuine will to preserve access to justice as well as to save money.

Part I

Access to Justice: Theoretical, Legal and Policy Background

1

Access to Justice: The View from the Law Society

ANDREW CAPLEN

General election campaigns in the United Kingdom are generally fought on the battleground of the economy, the National Health Service and education, education, education. Questions of justice rarely come to the fore, although 'Law and Order' may find its way into political manifestos—for example, that a party was intending to be 'tough on crime, tough on the causes of crime'. But matters relating to the administration of our justice system, such as investment in and the efficiency of our courts and tribunals, rarely make the headlines. They are simply not regarded as being 'vote winners'.

The 2015 poll was no exception. Even though two clearly detrimental changes to our system of justice were 'pushed through' in the last days of the old Parliament which, apart from the legal press, were barely mentioned, let alone criticised:

1. The Government made an incredible hike in the cost of court fees for many mid-ranking civil actions of up to 622% (that is in some circumstances 40 times higher than in New York State).
2. The introduction of the Criminal Courts' Charge imposing a non-means tested penalty for those convicted of criminal offences. For example, in 'either way' matters (that is those that can be heard in either the magistrates' court or the Crown Court) heard by magistrates, a 'guilty plea' will mean a mandatory £180 charge irrespective of the financial circumstances of the defendant, without the ability for the Court to consider any mitigating factors. For conviction after a 'not guilty' plea this rises to £900.

'Access to Justice' did not 'hit the mark' either. The changes, cutbacks in legal aid that had been brought in by the outgoing government were barely mentioned. The major political parties 'steered well clear'.

However, a government's prime responsibility is surely to provide for the proper administration of justice within its boundaries and that includes providing adequate and affordable access to that system. This includes both the areas of civil and criminal law, the first regulating conduct between parties, the latter relating to the duty of the state to keep order, to 'keep the peace' within its realm.