

legis austeritate
(the law of austerity)

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The rise in austerity politics and culture in Britain and elsewhere prompts us to query all aspects of austerity, including austerity from a legal perspective. What effect do austerity policies have on law and justice? And to what extent are the policies ‘legal’?

THE CUTS

Firstly, one must consider the economy of legal practice – that is legal rights, welfare and law, and legal aid advocacy. The origins of austerity in legal practice may be seen in attempts by government to cut budget deficits, leading to cost-cutting in legal services. The core austerity policy in this area, ‘legal aid reform’ in England and Wales, is on-going. Led by the Lord Chancellor and Justice Secretary, there have been significant changes to the availability of legal aid for criminal and civil trials.

Crucially, the Legal Services Commission was abolished under the Legal Aid, Sentencing and Punishment of Offenders Act 2013 (‘LAPSO’).¹ LAPSO also reversed the previous position under the Access to Justice Act 1999, whereby civil legal aid was available for any matter not specifically excluded. Some types of cases were taken out of the scope for legal aid funding altogether; the legislation provides that cases are not be eligible for funding unless they are of a specified type.²

Additionally, LAPSO makes various provisions in respect of civil litigation funding and costs, taking forward recommendations of the Jackson Review³ and the government’s response to it.

The UK government’s announcement in February 2014 of plans to cut the number of contracts for duty solicitor work in magistrates’ courts and police stations from 1600 to 525, representing a more than 67 per cent reduction, may be seen as development of this agenda.⁴

¹ The full statute is available at: www.legislation.gov.uk/ukpga/2012/10/contents/enacted [accessed 14 January 2015].

² See D James and A Forbess, ‘Rights, Welfare and Law. Legal Aid Advocacy in Austerity Britain’, London School of Economics, available at: www.lse.ac.uk/anthropology/JamesForbes.pdf [accessed 14 January 2015].

³ On the review of civil litigation costs, available at: www.judiciary.gov.uk/publications/review-of-civil-litigation-costs/ [accessed 14 January 2015].

⁴ See ‘Q&A Legal Aid Challenges’, *BBC (online)*, available at: www.bbc.co.uk/news/uk-21668005 [accessed 14 January 2015].

THE CHALLENGE

The austerity policies have not gone without social challenge. For instance, the London Criminal Courts Solicitors' Association and the Criminal Law Solicitors' Association brought legal challenge against the cuts, vis-à-vis an application for judicial review, in September 2014. The applicants argued that the cuts are ideologically driven and would push the courts and justice system to 'breaking point'. The judge overturned the change to legal aid. In the High Court ruling it was held that the government's consultation process had failed to let lawyers comment on two reports and was 'unfair as to result in illegality'.⁵

The widely-publicised message was that 'not even Justice Secretary Chris Grayling is above the law', thus challenging the legality of this instance of austerity politics. It was said that the reforms to legal aid advocacy were being 'sold in the name of austerity' and were effectively railroaded by Grayling, who was determined to push through an ideology. This has subsequently opened debate in the UK on whether this constitutes an 'assault on justice' – or if the £1.5 billion/year legal aid system is, on the balance of things, 'generous' as is also argued by government.⁶

Without a doubt what is most worrying are the cuts at the criminal bar – owing to the measure and effect on anyone facing criminal trial. Criminal legal aid fees have so far been cut by 8.75 per cent – and an additional 8.75 per cent cut will be made this spring. Here, the claimants failed on the fee cut challenge brought in the application for judicial review discussed above.

In the short-term, the effect of the cuts is that more and more litigants stand up to represent or defend themselves – which calls into question access to a fair trial and justice – not to mention the long-term consequences.

There is also an undeniable risk of damage with respect to the civil courts as well. Most critically in this regard are naturally the family courts. With that said, there have been proposals of guiding parties to a dispute firstly to mediation, where appropriate – and a feeling that this represents a sort of 'compromise' situation on austerity.

More generally and potentially shamefully, one can view the law as a 'tool' of austerity. Parliament legislates for budget cuts – so the 'austerity budget' becomes 'law', and therefore part of the UK constitution. The legality of this – and the extent to which justice may prevail – are questionable and deserve further attention by scholars.

A recent article in *The Economist*, aptly entitled, 'Austerity and the law: Justice in a cold climate', seems to sum it up: cuts to legal aid in England and Wales are affecting the justice

⁵ 'Chris Grayling's legal aid cuts "so unfair they are illegal", rules High Court', *The Independent (online)*, available at: www.independent.co.uk/news/uk/crime/chris-graylings-legal-aid-cuts-so-unfair-they-are-illegal-rules-high-court-9745175.html [accessed 14 January 2015].

⁶ C Baksi, 'High Court slaps down legal aid reform', *The Law Society Gazette*, 19 September 2014, available at: www.lawgazette.co.uk/law/high-court-slaps-down-legal-aid-reform/5043378.fullarticle [accessed 14 January 2015].

system.⁷ The article refers to Sir James Matthew, an Irish judge at the turn of the 20th century, who is rumoured to have said, ‘that justice in England is open to all, “like the Ritz Hotel”.’⁸

Without the assistance of legal aid available to many claimants and defendants in England and Wales, the resulting situation can be viewed as no better than, *legis austeritate* – the law of austerity.

⁷ ‘Austerity and the law: Justice in a cold climate’, *The Economist*, 1 November 2014.

⁸ *Ibid.*