Poor laws - a history

It has taken two thousand years, but legal service to the poor is now an obligation on lawyers and the state, not a charity.

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When in Rome

The Roman law's attitude to the provision of legal services to the poor was callous, and depended on the effectiveness of the *clientela* system of patronage.

The effectiveness of the Roman client-patron relationship should not be underestimated. 'The wheels of Roman society were oiled – even driven, perhaps– by two notions: mutual services of status-equals and patronage of higher status to lower'.[1] Everyone, no matter how high in the social ladder, save the Emperor, had someone above them to whom homage was owed. Daily life was full of the comings and goings of clients calling upon patrons. In the scale of duties, those to clients came below none but parents and wards. There was, above all, the patron *par excellence*: the Emperor.

The Roman citizen, no matter how humble in station in life could, like Paul in his battles with the Jewish state, utter the words 'I appeal to Caesar'. The Emperor could even on occasions be severely overworked by his judicial role. His tribunal has been said to suggest

> the familiarity and popular tumult which surrounds the justice of an Eastern pasha seated on his divan in the patio of his seraglio; but it is endlessly complicated in addition by the subtleties and sonorities of the long-drawn-out Roman procedure.[2]

The qualification of citizenship was a real bar. Although at the height of the Empire there was increasingly an attitude of liberality and openness to slaves, even to the point of manumission of slaves becoming fashionable, two things darken this picture. First, much of this liberality was due to the Roman's hard-headed self-interest, not true compassion. Second, if slaves were to be called on to fill gaps in the classes above, there was an increasing need to fill the ranks of the slaves themselves.

Despite the fluidity of social classes, there were still the free and non-free. Save to determine their status, slaves could not sue. The costs of litigation were high – not only an advocate's fees but also, in many cases, legal security in the form of a promise of a fine, or a substantial friend as surety, was required prior to commencement of proceedings.

The reality of Roman legal justice may have been that money was able to buy a better brand of justice. Thus Petronius sums up the discrimination evident in the Roman legal system in a poem about the lower classes:

> Of what avail are laws
> where money rules alone
> and the poor suitor can never succeed?
> So a lawsuit
> is nothing but a public auction,
> and the knightly juror who listens to the case
> gives his vote as he is paid.[3]

Lawyers do not escape the criticism. Apuleius asks of Paris:

> Why then do you marvel, if the lowest of the people, the lawyers, the beasts of the courts, and advocates that are but vultures in gowns, nay if all our judges sell their judgements for money?[4]

Meanwhile, in England

The common law's attitude to the provision of legal services to the poor was founded on the quite different medieval concepts of chivalry and Christian charity. Originally, legal aid was given by the church under canon law. The Council of Chalcedon (451 AD) allowed an exception to the prohibition of clergy engaging in the secular practice of law where the assistance was given to widows, orphans and those who lacked resources of their own. Aid was given in legal matters as general charitable assistance and other pious works such as honouring the Peace of God during war, building hospitals and furnishing bread during famines.

The medieval law obligation also arose directly out of the relationship of dependence of the vassal on the lord, in a court of law as much as in war. Medieval society was constituted by such ties of dependence. These relationships entered into history as a sort of substitute for, or complement to, the solidarity of the family which had ceased to be fully effective. The lord 'was indeed a foster-father as well as protector'.[5]

The king's jurisdiction extended to cases involving the poor. The royal courts tolerated the extension of ecclesiastical jurisdiction to cover litigants who were really poor or disadvantaged. From the middle of the 13th century there are instances of towns and cities (mainly and first in the north of Italy) also making provision for legal services for the poor. These municipal statutes derived the duty to provide this assistance from canon law, but shifted responsibility from the clergy to members of the city's legal guild.

There are instances in England, as early as 1290, of justices in Eyre assigning serjeants to the service of poor clients and 'perhaps requiring them to provide gratuitous service'.[6] The serjeant's special position in pleading at Common Pleas was influential in this regard. Serjeants had a monopoly of practice in the court of Common Pleas, although they were also allowed to practice in any other courts of common law, as well as before the chancellor and the council. Their fees were perhaps double those paid to an apprentice although, alas!, they dealt directly with their lay clients. The position of sergeant was a title or degree, competing with knighthood or a doctorate, not merely a professional qualification. The serjeants had to take an oath pledging to serve the king's people. The serjeant's obligation to serve the poor was thus derivative of the king's.

An early and succinct statement of the king's responsibility for the poor is found in *Leges Henrici Primi* (c.1116-1118):

> The king must act as kinsman and protector to all persons in holy orders, strangers, poor people, and those who have been cast out, if they have no one else at all to take care of them.[7]

Failure to plead for the poor might lead to disbarment and possibly discipline. If he refuses to plead 'we cannot make him no longer a serjeant, if he has title given by the King, but we may exclude him from the bar, so that he shall not be received to plead' (Chief Justice Brian, 1471).[8]

The royal courts had long provided means for the utterly poor person to be a plaintiff in legal action, by the *in forma pauperis* procedure. By 1774 a counsellor's or JP's certificate of good character, worthy cause and slender means was required.

If this application were approved, the court would assign the litigant counsel to act without fee. Such grants were not uncommon, and the practitioners involved were by no means the most junior or inexperienced members of the bar, even if hostile contemporary comment suggests that the lack of fee made pauper clients 'as welcome as Lazarus to Dives' as far as most lawyers were concerned.[9]

Although the *in forma pauperis* procedure was limited, the king's prerogative was frequently exercised to remove injustice from poverty. The informal procedures of the travelling justices in Eyre largely relieved much of this injustice. The exercise of the prerogative was continued in the practice of the Chancery Courts, including the Star Chamber and the Court of Requests.

The 'poor laws'

The first statute specifically dealing with *in forma pauperis* proceedings was passed in 1494 (11 Henry VII c.12). The comprehensive nature of this statute is marred only by its limitation to plaintiffs, not rectified in England until its repeal in 1883. The encouragement to poor plaintiffs to sue was no doubt diminished by a statute in 1531 (23 Henry VIII c.15) providing that, although not liable for costs if losing, the plaintiff was liable to such 'other punysshment as shall be thought reasonable'. In the time of Elizabeth I this consisted of a good whipping and the pillory.

Some early examples of *in forma pauperis* cases concern members of the bar who themselves required assistance:

see the case *Anonymous* (1702) 88 ER 1535 concerning Trevanion – 'an antient decayed gentleman at the Bar, having brought false imprisonment against an attorney of the Court ... none would voluntarily appear for him; and the Court appointed one at his own nomination'. The legal profession always did close ranks to look after its own.The origin of the provision of legal services to the poor is summarised by J.A. Brundage:[10]

> What the evidence seems to show, then, is that during the century between the time of Gratian and about 1250 Western jurists viewed legal aid for the poor and disadvantaged primarily as a religious concern. The burden of furnishing legal assistance fell mainly on the Church, which dealt with the problem in two ways. First, the Church in effect granted widows, orphans, and poor persons the benefit of clergy by extending ecclesiastical jurisdiction over them. Second, the Church expected canon lawyers (virtually all of whom at this time were clerics) to furnish their services free of charge to at least some litigants who could not afford to pay them.

Around the middle of the 13th century new approaches to the problem began to appear. Canonical legislators and commentators, notably Pope Innocent IV, commenced to restrict the kinds of situations in which the legal claims of poor and disadvantaged people were justifiable in ecclesiastical courts. At roughly the same time, towns and cities, at least in north Italy and possibly elsewhere, began to assume responsibility for furnishing legal assistance to indigent litigants in municipal courts. Legal aid to the poor became increasingly thereafter a civic, as well as a religious, obligation.

The position remained much the same until last century. In the latter half of the 19th century there were major and comprehensive reforms in the provision of legal aid, starting in France in 1851, where lawyers were appointed without fees to cases of the poor. In Italy, following unification, legal aid was declared an 'obligatory and gratuitous duty' of the legal profession. The same developments occurred in Germany. In England, in 1883, the *in forma pauperis* proceedings were liberalised by the repeal of 11 Henry VII c.12 by the *Statute Law Reform Act* and the introduction of court rules governing the proceedings. The *in forma pauperis* proceedings were replaced in England by statutory procedures in 1949 by the *Legal Aid and Advice Act*. In Australia legal aid is also now governed by statutory procedures.

In the United States, in 1892, judges were authorised by a statute to assign attorneys to represent poor people with sufficiently meritorious cases. In 1910 this was extended to criminal as well as civil proceedings, to defendants as well as plaintiffs. The United States has now at federal level (and also in various States) a statutory form of *in forma pauperis* civil proceedings. The state may 'request' that a lawyer act, although that does not apparently require the lawyer to act for no fee. In *Federal Trade Commission v Superior Court Trial Lawyers Association* 493 US 411 (1990) a boycott by trial lawyers who represented indigent defendants until compensation for the groups was increased was held to be an illegal restraint of trade in violation of the antitrust laws; the public interest justification was rejected.

At the end of the 19th century a further form of legal assistance to the poor developed – the provision of legal advice. Very often the position of the poor is made intolerable not because of lack of access to the court system but because of ignorance of their legal rights and obligations. The first community legal advice centres sprang into existence in England in the 1890s. Although there was a right to go to magistrates for advice, not all magistrates were lawyers. The first 'Poor Man's Lawyer Centres' arose from the profession in England first and shortly after in the United States.

When in England in 1913 reforms to the 1883 Rules of the High Court were being debated, the Law Society called a Conference of Poor Man's Lawyers, believing that an extension of the work of these centres would solve many legal problems before litigation. A constitution and regulations for the 'Poor Man's Lawyer Association of London' was drawn up. It is a matter of regret that official support for this was not forthcoming and the new measures introduced related only to litigation.

The role of counsel

The position with criminal trials was quite different. The distinction between crime and tort is one of those clarifications it is futile to press upon medieval law. It is obscured in another distinction between pleas of the Crown and common pleas, mainly concerned with private adjustment of rights but the Crown being likely to step in to exact fines and amercements of a punitive nature. It was an ancient principle that no counsel was allowed to persons charged with treason or felony against the Crown, although counsel was allowed in the case of misdemeanours, many cases of misdemeanours being what today would be regarded as civil or regulatory matters. Counsel was allowed in an appeal as this was brought by a private person and not the Crown. A slight relaxation occurred in the late 15th century when it became generally allowed to have counsel argue points of law. This rule lasted until 1696 (7 & 8 Will III c.3) in the case of treason and 1836 (6 & 7 Will IV c.114) in the case of felony.

The rule against counsel was justified on the basis that there was little technical knowledge required. The accused could argue himself and the jury were probably old hands at the criminal trial, many jurors sitting often and one jury hearing many cases on end. In any event, it was said, the court itself took an active role in the prosecution. A largely unarticulated reason was that trials would be lengthened if advocates took part. If counsel were allowed, it was pointed out in 1602, every prisoner would want it. When the use of witnesses became better understood, however, the disadvantage of not having counsel became obvious, although perhaps judges sought to err in the accused's favour.

The system of 'dock briefs' which later arose was a custom of the Bar whereby the judge, if it was thought necessary, could call on any barrister who was in court and gowned to undertake the prisoner's defence free of charge. The system was often evaded and accepted with bad grace. Egerton, reports the statement of J.H. Thorpe, KC, on 14 April 1944: 'The general scuttle of counsel to get out of court when a prisoner expresses a wish from the dock to be represented is neither seemly nor in the public interest'.[11] The counsel were sometimes, but not always, inexperienced. Even if competent, the barrister was expected to do the work normally undertaken by a solicitor. The system was ineffective and largely replaced by statutory means modelled on the English *Poor Prisoner's Defence Act* 1903.

Conclusion

The modern solutions to representation of the poor, although founded on medieval concepts of charity and dependence, depart in some fundamental ways from their historical roots. In common with general political ideas of the 19th and 20th centuries legal aid is no longer expressed in terms of charity. The relevant concepts are now those of social and political rights. It is a serious misreading of legal history and political theory to deny that such rights exist.

It is not rights, however, but *obligations* which must be the focus for the legal profession. The rise of the social welfare state has led to new modes of thought as to the reasonable expectations of life in a civilised society. It would be strange indeed if in this modern society lawyers' professional obligation to the poor was less than in centuries past – unless lawyers surrender that responsibility to the state. But if lawyers do that, they surrender their professional standing as well.

References

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10. 'Legal Aid for the Poor and the Professionalisation of Law in the Middle Ages' (1988) 9 *Journal of Legal History* 169 at 174-5. Compare Shapiro, D.L., 'The Enigma of the Lawyer's Duty to Serve' 55 *NYULRev* 735 (1980).
11. Egerton, *Legal Aid* 1946, p.20.

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