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Agents and agency in the face of austerity and Brexit uncertainty: the case of legal aid

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Introduction

An ‘age of austerity’ – a term used previously only to describe the UK austerity programmes in the years immediately following the First and Second World Wars – was cited as the answer to what Prime Minister David Cameron called ‘the age of irresponsibility’. The task, he said, was to ‘identify wasteful and unnecessary public spending’ (2009). The UK’s ‘fiscal crisis’ created space for the re-birth of austerity politics (see O’Connor, 1973), and the (re-)framing of policy discourses, such as fiscal responsibility aligned to the new predicament (Prince, 2001). Referring to UK public services, Clarke would call this particular context ‘the financial crisis of the state and fiscalization of policy discourses’ (2005, p. 213).

A rise in austerity politics can generally be said to incite new government policies which impact upon our daily lives. In ‘Austerity Britain’, the contested policies that cut legal aid funding and court system financing threaten justice and the rule of law, which are the very foundations of the British judicial system. The British legal system is admired and respected worldwide for its strength and robustness. This good reputation is now at risk of decline. Thus, it is necessary firstly to identify and then to critically analyse policies that affect law and justice, the impacts of such policies and resistance to them. The growing body of literature on austerity policies which scope wide-ranging areas of public life has identified a worrying trend: the clear reversal of policies designed to be enabling and inclusive into policies which constrain and exclude.

Offered as a case study of the wider debate on austerity-through-policy in Britain, this chapter reviews legal aid reform, which previously has been described as ‘discount justice’ in other common law jurisdictions, as now threatening England and Wales as well (see Baum, 1979; Greenberg and Cherney, 2017). Particular focus is given to the impacts, or likely impacts, austerity policies have on the availability of legal aid, on the one hand for civil disputes involving citizens – including family, employment and immigration matters linked to the UK’s exit from the European Union; and on the other for criminal cases. In light of Brexit uncertainty, the quantum of future public spending on justice is uncertain to boot. Taken together, austerity and uncertainty lead us to query whether the British judicial system is in crisis, and to identify the impacts of and resistance to legal aid cuts.

This chapter will provide details on changes to legal aid and justice financing in England and Wales, and policy reversals, government justifications for changes, and the response of agents (citizens) on the one hand, and professional actors (lawyers) on the other. This is proposed as a basis for the chapter’s reflective narrative on the risk of ‘discount justice’ in Britain, declining faith in British justice and the current state of the British judicial system. As the debate is contextualised by the relationship between austerity and agency, this chapter will also consider

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the relationship between austerity and agency in economic, legal and social contexts. The aim is to think contextually as a means to study the forms of agency that arise where the act (or omission) is giving and receiving legal advice (or not).

Legal aid, its reform and a system in crisis?

Article 40 of the celebrated bill of rights, the *Magna Carta Libertatum*, states: ‘To no one will we sell, to no one will we refuse or delay, right or justice’ (1215). It is widely accepted that the public’s right to legal advice is a long-standing cornerstone of the British justice system. The public’s right of access to the courts has also long been recognised as a constitutional right in the UK. In addition, the provision of assistance to members of the public who cannot afford legal representation, ‘legal aid’, can be traced as far back as the Tudor and Stuart eras (Brookes, 2017). Thus, the right of individuals as citizens to receive legal advice and adequate representation are fundamental aspects of the British justice system.

The contemporary legal aid system has its foundations in the work of the Rushcliffe Committee, which was established by the Coalition government in 1944. At the end of the Second World War in 1945, the Committee reported on what would become the crucial four pillars of the new, post-war welfare state: The National Health Service (NHS), universal housing, state security benefits and universal education. Notably, legal aid was not among them. The Rushcliffe Committee did recommend and the post-war Labour Government accept, however, that new legislation in the field of legal aid should be proposed. The government published a White Paper in 1948, in which it set out a new objective: ‘to provide legal advice for those of slender means and resources, so that no one would be financially unable to prosecute a just and reasonable claim or defend a legal right; and to allow counsel and solicitors to be remunerated for their services’ (Brookes, 2017, p. 5). This in turn led to the enactment of the Legal Aid and Advice Act 1949, under which legal aid was to be made available in available in ‘all courts and tribunals where lawyers normally appeared for private clients. Eligibility should be extended to those of small or moderate means, and above a free limit there should be a sliding scale of contributions’ (Brookes, 2017, p. 5).

The costs associated with the administration of the legal aid system increased significantly in the decades that followed, with ‘unprecedented rises in cost’ documented from about the mid-1980s and onwards. While the rising costs solicited responses from governments to amend rules relating to eligibility, and to restructure the provision of criminal legal aid, the most significant changes have transpired after the 2008 global financial crisis, when the relevant budgets have been consistently and incrementally reduced as austerity measures. This can be evidenced by direct cuts to the justice budget: ‘In 2010, the Ministry of Justice controlled a £10.9bn budget to administer the courts, legal aid, prisons and probation service. By 2017-18 the budget was down to £7.6bn; for 2019-20 the budget is projected to be £6.3bn ... a fall of more than 40 per cent’ (Croft and Thompson, 2018b).

There have also been major changes made as to the designated responsible bodies and oversight structures for provision of legal aid. For instance, the Legal Aid Board, which was founded in 1949, holding over half a century’s mandate, was dismantled and ‘replaced’ by the Legal Services Commission in 2000. This was a modification by way of the Access to Justice Act 1999. The Legal Services Commission was established as a non-departmental public body, which funded the Civil Legal Advice Service. The Legal Services Commission was then abolished under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LAPSO) and replaced

with a new body, the Legal Aid Agency, which continues to exist today as an executive agency of the Ministry of Justice (MOJ). Notable here is the change in status from non-departmental public body to executive agency; this means its management and budget is separate from that of the MOJ. It is nonetheless of interest to recognise some consistency within the Agency even if six different justice secretaries have sat at the MOJ's helm over the past eight years or so.

LAPSO, which came into force in 2013, 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 eligible for funding unless they are of a specified type (James and Forbess, 2011). According to Croft and Thompson (2018b), LAPSO 'removed aid for entire areas of civil disputes overnight ... taking divorce [which was the original impetus for contemporary legal aid cases] and child custody, immigration, parts of debt and housing, employment and welfare benefit out of the legal aid net'. Owing to such sweeping changes, it is perhaps not surprising that the LAPSO legislation has come under significant scrutiny owing to its real effect on the public and access to justice. 'Many law firms across the country have given up their provision of various legal aid services entirely because it is so unprofitable' (Croft and Thompson, 2018b). This has yielded a new phenomenon: parties representing themselves.

At the same time, there has been a push to resolve family disputes through alternative dispute resolution (ADR) mechanisms, such as mediation, whereby diverting such disputes, parties to the dispute and the associated expenditures in time and financial cost, away from the courtroom. Increasingly, ADR is adopted in other jurisdictions as a non-adversarial precursor or pre-requisite to resolution of family disputes by litigation. The idea is that ADR should fill the gaps following cuts to legal aid budgets for civil disputes. Although ADR may be less expensive and more expedient than following traditional litigation in the courts, this depends on the complexity of the case and willingness of the parties to agree to this alternative route.

In the face of Brexit, and the feeling of uncertainty this has created for the future of immigrants to the UK from the European Economic Area and beyond, the number of difficult legal questions around immigration status, employment and settlement rights is rising. In 2018, the Law Society, which represents solicitors in England and Wales, claimed Britain's legal aid system to be 'broken' following the release of statistics by the MOJ. The figures revealed, alarmingly, that only three individuals received legal aid to challenge their immigration status in 2016, compared with 22,000 in 2012 (Croft, 2018). Following implementation of LAPSO, non-asylum related cases are excluded from eligibility for legal aid. Voluntary work (so-called 'pro bono' legal advice) offered by lawyers, community organisations and law schools are helping parties to disputes that are no longer eligible for legal aid and who are unable to afford legal representation otherwise, though time and resources are limited.

While legal aid is still available for criminal cases, the income threshold has been reduced for defendants seeking legal aid advice. According to Andrew Walker QC, chair of the Bar Council of England and Wales, 'The simple effect [of LAPSO] is that people are not able to secure the advice and representation they need to make sure that we are getting the right outcome in every case' (Croft and Thompson, 2018b). Therefore, it is argued that, with the fundamental rights to legal advice and adequate representation at risk of becoming less or not at all accessible, the foundations of justice are crumbling. If this is so, then the British justice system is indeed in crisis – but with respect to whom?

Agency and the agents: lawyers and citizens

The challenges presented by austerity and Brexit in the context of declining justice have been set out above. It is necessary now to identify the agents within the classical agency matrix arising where civil and criminal legal aid and other advice and representation contracts are made between government, advisers and legal representatives, and the public (citizens). At the same time, citizen disengagement may be witnessed. Seemingly, this is owing to frustration over restrictions on agency, where ‘agency’ is accepted as the freedom and capacity to perform an act or omission, consciously and intentionally (Hay, 2002, p. 94). In a legal sense, agency is created where one party acts on behalf of another, called the principal, with his consent. An agent in law, whether citizen or professional actor (lawyer), has the authority to act – and to bind the principal. This is interesting to elaborate upon as regards the current topic of legal aid as lawyers may be seen as acting for citizens, on their instruction, and as independent from the state. As Clarke (2013, pp 19-20) puts it: ‘Front-line workers – and those at other organizational tiers – are rarely ‘just’ workers’. Yet lawyers are also agents of a particular ‘social zone’ as regards social class and certain freedoms and availability of options when choosing to act. The next section will provide some brief remarks on ‘agency’, and then move on to consider the relationship between austerity and agency with reference to legal actors (striking lawyers) and agents (disruptive citizens).

Agency

The notion of ‘agency’ and ‘agent’ and theories of agency are not uniform across all disciplines; in fact, they can be quite different. This chapter recognises that the relationship between austerity and agents – the focus of which here are lawyers as professional actors distinguished from citizens as agents – could be examined in different disciplinary spaces: political science, economics, law and sociology. In the interest of providing clarity, and to defend the complexity of the subject of legal aid cuts in the context of austerity and Brexit, this section provides a brief account on each.

While theories of agency emerged in political science and economics at about the same time, agency theory in economics developed rapidly (see Mitnick, 1973; Ross, 1973). Shapiro suggests that agency in political science ‘borrows heavily from the economics paradigm rather than the more sociological conception’ (2005, p. 271). She goes on to clarify that ‘[p]rincipals delegate to agents the authority to carry out their political preferences. However, the goals of principals and agents may conflict and, because of asymmetries of information, principals cannot be sure that agents are carrying out their will’ (2005, p. 271). The spectrum of agents and actors in the political science space includes citizens, nation states, elected officials, lawmakers, courts, and so on. Shapiro identifies that

[p]olitical principals also face problems of adverse selection, moral hazard, and agent opportunism. So principals contrive incentives to align agent interests with their own and undertake monitoring of agent behavior, activities that create agency costs [...] The literature also considers the matter of agency costs; when they are too high, principals may decide not to squander resources on them. (Shapiro 2005, pp 271-72; see also Banfield 1975; Mitnick 1998)

Relevant to this chapter's focus on legal aid cuts, political science gives more attention than economics to the role of sanctions (for example budget cuts). Principals in this instance are 'in the driving seat', so to speak.

In law, agency is

the fiduciary relationship which exists between two persons, one of whom expressly or impliedly assents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation [...]. (American Law Institute Restatement (Third) on Agency, 2006)

Therefore, the law of agency addresses the legal consequences of consensual relationships. A principal can never be entirely sure what act or omission his agent makes. Nonetheless, the relationship is one of trust. In a legal sense, agency theory may therefore provide a framework for the provision of, in keeping with the thrust of this chapter, what are or have traditionally been government-funded (advice) services; alternatively, it may be a means to legitimise what are in reality only cuts to funding (Reynolds, 1997).

Lawyers

Before discussing lawyers, the role and importance of other advice providers must be given due consideration. Alongside volunteer advice organisations, government also 'contracts out' service delivery to different advice organisations as providers. Examples include Citizens Advice Bureaux, debt advice agencies, employment tribunal advice, and benefits, disability and housing services. While it is widely recognised that as individual demand for advice services outstrips supply, advice agencies are even more seriously challenged in this age of austerity. As Evans puts it:

We know that scantily resourced services struggle to meet demand, and that economic 'austerity' has delivered a double blow to those seeking advice, stripping away much-needed services whilst also adding to the problems of the advice seekers, afflicted with poverty, worklessness, debt and homelessness. (2017, p. 23)

To paint a picture of how austerity has affected advice organisations, Kirwan et al (2017) provide a series of useful case studies and reflections on the challenges experienced by advisors and advisees in austerity, which could also serve as powerful evidence of the unhealthy state of affairs for advice agencies. Reflecting on the case studies, Clarke remarks: 'The future is perilous, both for those who would use Citizens Advice and for the service itself. The experience of constantly striving to do more with less is not sustainable – either for the organisations or the people who work in them' (2017, p. 162). For advisers themselves, the typical problem of 'mediating professions' should also be considered (see Johnson, 1973). The work of advisers and other front-line public services 'is always framed by the potentially conflicting demands of their organization (and the state polices it enacts) and those of public/users/clients of the service' (Clarke, 2013, p. 30).

In 'Austerity Britain', the frustration of lawyers – solicitors and barristers – is not without cause. It has also been widely publicised. In February 2014, the government announced plans to cut the number of contracts for duty solicitor work in magistrates' courts and police stations

from 1,600 to 525, a reduction of about 67% (see BBC Q&A Legal Aid Challenges, 2013). Twice barristers have taken to the streets in major protests in 2014 and again in April 2018, striking in the fight for legal aid (Croft and Thompson, 2018a). In protest, criminal barristers have also refused to take new legal aid cases (see Dearden, 2018). These calls for strike and decisions not to take on casework are troubling, particularly for a group typically adverse to strike action. With that said, Bailey et al observe that

a corresponding increase in the presence of refusal-prone materialists is perhaps best illustrated by a number of groups that are typically averse to strike activity beginning to adopt conventional strike action. This includes actions by barristers, lawyers, probation officers, midwives and junior doctors. (2018, p. 19)

Thus, the legal aid cuts have yielded disengagement by lawyers by way of protests and strikes. This reveals a new instance of disruptive agency within what is a rather unexpected space. The decision by criminal barristers to refuse to take on new legal aid cases demonstrates a separate instance of disruptive agency. This rebellious dissent – if it may be termed that – leaves citizens feeling disempowered while barristers may feel more empowered to bring about change by way of their collective agency. While no doubt the intentions of criminal barristers are entirely good, this rebellious act may spur further, more obvious forms of dissent in society. These actions provide evidence of actors exercising resistance to the reversal of policies relating to the provision of legal aid schemes. A greater number of voices demand to be heard on this matter, which represents social protest – and subsequent legal challenge to make a difference to the lives of the affected.

Austerity policies have not gone without legal challenge either. 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' (International Legal Aid Group, 2014). The case was appealed to the Court of Appeal, which ruled in 2017 that the LAPSOS system did not have capacity to fill the gaps following removal of the previous legal aid scheme and that safeguards should have been put in place to ensure prisoners could engage in decisions and processes related to their treatment. While the Ministry of Justice initially stated that the ruling would be appealed to the Supreme Court, this was later dropped.

In August 2018, the High Court ruled that cuts to legal aid fees for lawyers representing criminal suspects at trial were illegal. The challenge against the government policy was brought by the Law Society relating to the Advocates' Graduated Fee Scheme (AGFS). While at the time of writing it is unclear if this decision will be appealed, the ruling demonstrates the dissatisfaction with government austerity policies on legal aid *vis-à-vis* legal representatives and the independent judiciary. Thus, the frustration of advisers and lawyers as manifested through different levels of disengagement surely reveal widening cracks in the British judicial system. As government excludes ever more types of disputes from the scope of legal aid, it is tantamount to call into question the availability of access to justice to those citizens less fortunate in society, thus limiting their individual agency considerably. Challenges to new government policies that trade their origins in austerity politics come under increased scrutiny – within solicitor firms, barrister chambers, in the street and in the courts and advice centres.

Citizens

As posited by Lerch et al, ‘individual agency is a core cultural ideological theme in today’s world’ (2017, p. 39). Agency in social science is the capacity of individuals to act independently and to make their own free choices. This is combined with availability of options or means to achieve intended ends (see Kockelmann, 2007). Lerch et al argue that ‘[i]ndividuals become endowed with a growing range of rights, stemming not just from their national states but also universally, from greatly expanded notions of their inherent entitlement to justice and equality’ (2017, p. 39; see also Therborn, 2000; Skrentny, 2009; Stacy, 2009). If agency means power or control, the cuts in legal services affect citizens and individual agency. Particularly affected are those citizens who are determined by lower social and economic class unable to afford the cost of advice services and legal representation, if required. Agents are thus unable to make their own free choices and feel disempowered as a result; and their decisions are therefore limited by structural determinations. And ultimately, the realities may be devastatingly life-changing for someone who has legal questions or legal charges against them, and does not benefit from access to advice or legal representation.

One must not turn a blind eye to the risks associated with declining faith in justice amongst citizens which are brought about by direct constraints on individual agency in a sociological sense; take for example ‘disruptive agency’ (Bailey et al, 2018). Indeed, there are plenty of examples of disruptive agency flowing from the relationships between austerity and agency. A feeling of disempowerment leads to disengagement, and possibly rebellious dissent. In the UK geography, ‘[p]erhaps the most visible instance during which everyday forms of disengagement transformed into more open forms of dissent and rebellion came with the 2011 London (and then national) riots. In the words of one of the rioters, ‘We hate the police, hate the government, got no opportunities ...’ (Lewis et al, 2011, p. 20; quoted in Bailey et al, 2018, p. 19; see also Kawalerowicz and Biggs, 2015). Bearing in mind that protestors may be arrested and charged with disturbing the peace, at least, the narrative returns full circle to the rights of citizens to receive legal advice and adequate representation. In light of austerity, these ‘rights’ may not be enforceable – either because eligible citizens cannot find a lawyer to advise or barrister to represent them in court; lawyers and barristers are disengaged professional actors – or citizens ineligible for legal aid feel powerless. And so, agents are disempowered, again. In this structural context, some things become ‘unthinkable, impossible, irrelevant, undesirable and unnecessary’ (Clarke, 2013, p. 24) – and therefore agents become more disengaged, more disruptive, and crying out for someone to listen.

It is worth noting that, ‘[a]gents – being embodied social actors – may bring other contexts with them into the context of action or practice’ (Clarke, 2013, p. 30). The examples provided above give some insight into actions or practices of agents as social actors. These acts are difficult to foretell, however, as ‘agency is simultaneously underdetermined in the sense that how it is enacted/performed cannot be predicted in advance’ (Clarke, 2013, p. 31). We do not always know why one agent performs in a different way to another. With that said, the forms of agency identified in this chapter contain the possibility of ‘acting up or acting out, or just acting’ (Clarke, 2013, p. 31). This leads us to the final ‘act’ of this chapter: Brexit.

If agency is ‘contextually unstable’, then as Clarke posits: ‘Intercontextuality provides a means of pointing to the unpredictably productive intersections of different contexts that enable specific forms of agent, types of agency and action’ (2013, pp 31-32). The opportunity (for some) to exercise the right to vote in the national referendum on UK membership of the EU was given on 23 June 2016. A majority of 51.89% eligible voters gave ‘No’ to the question of: ‘Should the United Kingdom remain a member of the European Union?’

At the time of writing, Brexit is expected to bring with it a raft of immediate upsets and uncertainty, and longer-term rifts in society. No matter which box an agent ticked on the referendum ballot paper, agency achieves, through the exercise of power or resistance where both raise new feelings of empowerment and engagement, the aim of ‘making a difference’. In turn, the difference this engagement makes may impact on agents and the structural contexts around them seen as conditioning their position. Perhaps a link can be made between the cuts in justice funding and the attitudes and understandings which gave rise to the Brexit vote. There is certainly a need for further research in this area.

The general pressures on citizen advice are now multiplied by the known and also the yet uncertain challenges of Brexit, which risks upsetting, as Clarke puts it, ‘the collective infrastructure of being able to think and behave in significant ways’ (2017, p. 162). The changes described in this chapter to the provision of citizen advice services, as compounded by lack of legal aid support and the unknown future environment following Brexit, are performed at what Clarke would likely call ‘a dangerous moment, when the wider dynamics of social and economic dislocation create dangerous times for citizens and citizenly conduct’ (2017, p. 162).

Concluding thoughts

This chapter has explored cuts to legal aid in England and Wales as a case study of the re-occurring British ‘age of austerity’ following the 2008-2009 global financial crisis. Over the past decade, the UK government has delivered sweeping changes to eligibility of citizens for the provision of legal aid, the overall justice budget underpinning such support, and a series of great administrative changes to ‘responsible’ oversight bodies. These unhappy events weaken citizens by reducing or altogether removing the availability of legal advice and representation to those who may need it. Academically, these events create a useful window through which to explore the relationship between austerity and agency, and the impacts on professional actors – advisers, lawyers, barristers – on the one hand, and agents – citizens – on the other; noting that professional actors may and do also seek to exercise collective agency, such as organising strikes.

Acts of resistance are intensified in austerity. Ponder this hypothetical scenario: in 2013, an underperforming company dismisses their employee. The former employee seeks to challenge the unfair dismissal as claimant through the employment tribunal, which is costly in terms of a fee payable by the claimant to bring the claim and the cost of legal advice and representation. A lawyer is ready to assist the citizen, but changes to legal aid mean the citizen is no longer eligible. The citizen feels disempowered; success is unthinkable, impossible. In 2016, Brexit offers an opportunity for empowerment, to make a change. The lawyer feels disempowered, disengaged, resistant. Austerity and Brexit, and particularly where the two intersect as in the example above, play out as impacts on citizen and lawyer and become catalysts for disengagement, resistance, protest, strike and rebellious dissent – disruptive agency. And then? Discount justice and Brexit divisions?

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