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**THE ROLE OF LEGAL EDUCATION, REGULATION & GOVERNMENT IN**  
**PROTECTING ACCESS TO JUSTICE**

*SIMAO PAXI-CATO\* and YVONNE MCDERMOTT\*\**

The Legal Services Act 2007 introduced “improved access to justice” as one of eight regulatory objectives.<sup>1</sup> The term “access to justice” is difficult to define,<sup>2</sup> but at its most basic level, there are clearly two components. The first, the “access” part of access to justice refers to the possibility of vindicating one’s rights through court or other processes if needed.<sup>3</sup> In order to make court processes and other dispute resolution mechanisms accessible to all, the barriers to such processes – including financial, psychological, technical, and informational barriers – must be recognised and ameliorated.<sup>4</sup> The second, the “justice” part, may refer to procedural justice – where like cases are treated alike, and in accordance with due process;<sup>5</sup> to distributive justice – where resources are distributed equitably,<sup>6</sup> or to substantive justice – where the outcome is fair and legitimate.<sup>7</sup> Our focus in this paper is principally on the first prong – the “access” part of access to justice, but will address the second prong where relevant.

Of course, the two components of access to justice are not necessarily easy to separate – procedural justice, for example, touches on issues pertaining to accessibility of court procedures to litigants. In many ways, procedure is normatively prior to substantive rights,<sup>8</sup> insofar as a right becomes illusory unless there are proper means to enforce and vindicate those rights. As Michael Mansfield QC has pointed out:

Access to justice is a much broader concept than access to the courts and litigation. It encompasses a recognition that everyone is entitled to the protection of the law and

that rights are meaningless unless they can be enforced. It is about protecting ordinary and vulnerable people and solving their problems.<sup>9</sup>

In this paper, we argue that legal education, regulation and government each have an important role to play in protecting access to justice. We examine the place of law school initiatives in promoting access to justice, and how attitudinal approaches within legal education can have a lasting and very real impact on litigants' access to justice mechanisms. We also discuss how regulation, including the so-called 'cab rank rule' can promote access to justice, as well as the role of governmental policies on individuals' abilities to vindicate their rights and/or resolve disputes through proper legal remedies.

This study is particularly timely, given the cuts to legal aid imposed by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 and changes to the costs regime for civil litigation. In 2014, the Law Society estimated that up to 600,000 litigants could not access civil legal aid as a result of these changes, and that lawyers were more reticent to become involved with low-value, complex cases.<sup>10</sup> The areas that were worst affected by these changes included family law (with the exception of domestic violence cases); welfare law; immigration law and housing law, and as such, some of the most vulnerable members of society were affected.<sup>11</sup> *Pro bono* legal services, such as citizens' advice bureaux and law centres, have been expected to do more with less.<sup>12</sup>

### ***Legal Education***

The role of legal education, at its most basic, is to provide students with the foundations of legal knowledge and the skills that will stand them in good stead in their later professional

lives, regardless of their ultimate career paths. The Legal Education and Training Review (LETR), completed in 2014, identified the need for legal education to provide students not just with academic and research skills, but also to ‘clinical skills’, defined as ‘a general familiarity in law with professional legal processes and office skills and ... a broader understanding of the professional context within which a task is located’.<sup>13</sup> The report noted a general lack of knowledge of what ‘real legal work in an office environment’ entailed.<sup>14</sup> Access to justice requires access to the legal professionals who will ultimately defend the claimant’s right to justice. Without competent lawyers, test cases could not be identified and individuals may not be made aware of any legal remedies that might be available to them, and the time limit to bring cases in, if applicable. Thus, legal education plays a key role in ensuring access to justice by creating the skilled legal professionals of the future who will represent litigants.

Moreover, perhaps, legal professionals must be willing to represent litigants from a broad range of backgrounds. There is a danger, however, that students may not be aware of training opportunities outside of the commercial legal sphere or with the largest city law firms. While law schools have a role in informing students about alternative legal careers,<sup>15</sup> and professional legal training could do more to teach future practitioners about the funding of litigation, there is a broader issue on the cost of education. The average law graduate can expect to have to repay over £90,000 of student loans, not including any commercial loans that they may have taken out at less favourable rates to pay for professional training.<sup>16</sup> Young Legal Aid Lawyers, in their 2013 *One Step Forward, Two Steps Back* report, found that high levels of debt made legal aid work unsustainable for lawyers from lower socio-economic backgrounds.<sup>17</sup> Unlike the United States of America, where new graduates can avail of loan

waivers if they take on public interest work,<sup>18</sup> graduates from British law schools are not incentivized to carry out *pro bono* activity in exchange for a fee waiver.

While access to justice may not form part of the curriculum in many undergraduate law degrees,<sup>19</sup> a new wave of extra-curricular student projects and co-curricular activities play a crucial role in ensuring justice for all, as well as providing students with invaluable practical experience. Many Law Schools in the United Kingdom are home to ‘Street Law’ projects, which aim to inform members of the public of their rights under the law. Students deliver presentations to community groups to provide information about the law to members of the public who would not otherwise have access to legal education.<sup>20</sup> A large number of UK Law Schools also host miscarriages of justice projects, which carry out reviews into cases of alleged wrongful convictions. In recent years, there has been an astronomic rise of legal clinics within law schools, providing free legal advice to members of their local communities.<sup>21</sup> Courtroom closures may see an increase in trials being held in University courtrooms designed for mock trials.<sup>22</sup> Law Schools have become increasingly responsive to the needs posed by cuts to legal aid – Keele University, for example, founded the Community Legal Outreach Collaboration Keele (CLOCK) project in 2012, which trains students to become legal companions to litigants in person.<sup>23</sup> While legal companions do not offer legal advice, they can signpost further avenues for legal support, and also provide practical support to litigants in person, by assisting them with form-filling, note-taking, and practical support. The CLOCK initiative has now been rolled out across the United Kingdom, with partner law schools in Brighton, Liverpool, Essex, Birmingham, and elsewhere.<sup>24</sup> Clinical legal education can also be developed to address specific unmet legal needs – for example, the Children’s Legal Centre at Swansea University was developed in recognition of the fact that Wales was

the only nation in the United Kingdom to not have a dedicated children's rights law advisory service, despite significant developments in devolved Welsh legislation on children's rights.<sup>25</sup>

### *Regulation*

Early legal positivist philosophers argued that the normativity of law derived from its essential coercive features.<sup>26</sup> Whilst others have argued that coercion plays a marginal role in law fulfilling its social function,<sup>27</sup> it is clear that (assuming that justice is inherent in laws, customs and practices), laws must be followed, and this where the regulation of lawyers plays an important part.

The role of legal regulation in ensuring access to justice is clear from the forward to the Bar Standards Board Handbook:

Justice requires that people appearing before a court should have a fair hearing. This in turn means that they should be able to have their case presented by skilled advocates who will do so fearlessly, independently and in the best interests of their client.<sup>28</sup>

To this end, the Handbook contains a number of Core Duties expected of barristers, including the duty to act with honesty and integrity;<sup>29</sup> to provide a competent standard of work and service,<sup>30</sup> and to observe their duty to the court in the administration of justice.<sup>31</sup> These duties are also incumbent on solicitors, and are reflected in the Solicitors Regulation Authority handbook.<sup>32</sup>

The so-called ‘Cab Rank Rule’ plays an important part in ensuring that even unpopular clients can secure legal representation. Akin to the manner in which a cab driver cannot (subject to limited exceptions) refuse to carry a passenger, lawyers may not withhold their services on grounds that are “inherently inconsistent with their role in upholding access to justice and the rule of law”.<sup>33</sup>

This rule is particularly pertinent today, where traditional media and social media alike can be used to vilify particular defendants or litigants.<sup>34</sup> The Bar Standards Handbook makes it clear that a barrister must not withhold his or her services on the grounds that the case is somehow objectionable to the barrister or to the public, nor can such services be withheld solely because the client’s views, opinions, or conduct are deemed objectionable either to the individual barrister or to the wider public.<sup>35</sup>

The sole difference between the Cab Rank Rule as it applies to cab drivers and to barristers is that, in the legal context, the Rule does not operate to limit client choice. While the customer waiting for a cab must take the first driver in the queue at the cab rank, and the cab driver cannot refuse his or her services, the client searching for a lawyer may choose any competent lawyer to represent them. The Cab Rank Rule denies individuals and organisations exclusivity to the best talent at the Independent Bar simply because of their greater financial resources.

The requirement not to discriminate between clients goes much further than the general duty under equality legislation not to discriminate on the grounds of age, disability, gender reassignment, marital status, pregnancy and maternity, race, religion, sex, or sexual orientation.<sup>36</sup> The obligation not to discriminate in the provision of legal services applies regardless of whether or not the client is a member of one of those protected groups under the

Equality Act. It means that barristers cannot deny their services on the grounds that they somehow find the client, case, or legitimate source of funding for the case objectionable in some way.<sup>37</sup>

A further benefit of the Cab Rank Rule to lawyers themselves is the fact that it provides some degree of immunity for those barristers representing unpopular clients. Regardless of whether in fact the barrister is happy to represent the client, he or she can always rely on the mandatory nature of the rule to justify taking on a case to third parties who might not understand why it is important that there should be access to good lawyers to everyone going through the court process. Despite the number of high-profile miscarriages of justice over the years, these cases are very quickly forgotten in the public consciousness, and the public may be quick to judge the intentions of those barristers who provide a robust representation of clients who are not broadly popular. The Cab Rank Rule means that lawyers do not have to justify their motivation in representing a particular client.<sup>38</sup>

### *Government*

In view of the above comments on the role of legal education and regulation in securing access to justice, it is clear that government has a very large role in protecting access to justice. There are three main ways in which the actions and motivations of government can impact upon access to justice.

Firstly, Parliament drafts laws and legal reforms are typically driven by the ministerial agendas of the executive branch. The judicial branch of government also has a role in holding the other branches to account. This is perhaps best illustrated by the Court of Appeal

judgment in *R (Gudanaviciene) v The Director of Legal Aid Casework and The Lord Chancellor*,<sup>39</sup> where it was held that the Lord Chancellor's guidance on exceptional case funding was unlawful, and that three of the five litigants who had been denied legal aid had been wrongly deprived of such funding. More recently, the Supreme Court found that the Lord Chancellor acted *ultra vires* in introducing a residence test for civil legal aid, which meant that only those who had been lawfully resident in the United Kingdom for a continuous period of 12 months could be eligible for civil legal aid.<sup>40</sup> The Court found that s. 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 did not give the Lord Chancellor the power to exclude whole groups of people from legal aid eligibility based on circumstances that had nothing to do with the nature of the case or the claimant's individual need, or ability to pay, for the services.<sup>41</sup> These, and other similar cases,<sup>42</sup> highlight the judiciary's role in upholding access to justice when the impact of legal reforms hit those most in need of effective legal representation.

Secondly, government's role in funding education and deciding on such issues as tuition fees for University courses can have wide-reaching consequences, as highlighted by the Young Legal Aid Lawyers *One Step Forward* report.<sup>43</sup> Because Law graduates are less likely to go straight into employment upon completion of their University degree,<sup>44</sup> largely because further professional training is needed to practice law, all students, particularly those from lower socio-economic backgrounds, may well be less inclined to amass a large amount of debt to follow a career path in the legal profession. Those that do opt to study law may be more likely to seek more financially stable legal careers with large commercial firms or as in-house counsel for companies, meaning that there is a smaller pool of qualified legal professionals available to disadvantaged claimants relying on legal aid.

Thirdly and perhaps most importantly, the law-making power of parliament shapes the structure of legal services, as can be seen from the impact of changes to legal aid and civil litigation funding. This, in turn, can have a knock-on effect on training opportunities,<sup>45</sup> and can drive providers to focus their practice on certain, more profitable, areas of law. In the words of one barrister, cuts to legal aid have driven talented barristers away from publicly-funded cases:

Which means that people that require the best representation ... are not necessarily going to get it because many chambers are saying well let's look at disciplinary work, let's look at branching into other areas of work. I think that is a threat to the Bar in the sense that the Bar should be seen as providing the best representation for the most vulnerable members of society. It should be able to say to the public: that's what we are here for. And unfortunately there are only certain sets with a particular ideological view that are actually willing to say we'll take the hit and just do publicly funded work.<sup>46</sup>

More broadly, such decisions impact upon the efficiency of the justice system, because a higher number of litigants in person can lead to less efficient cases, and that in turn can cause delays in accessing court processes. Without legal aid, a large number of high-profile cases could never have reached the courts, but aside from those *causes célèbres*, the biggest casualty of legal aid cuts are probably those rather mundane or everyday cases, such as housing, benefits and family cases, which are now being left to claimants without legal training or skills to fight for themselves as litigants in person.<sup>47</sup>

*Conclusion*

It is clear that accessing justice is as, if not more, difficult today than at any stage in recent legal history. Some of the difficulties faced by claimants in accessing justice noted in this paper reinforces the point that the fact that rights exist under the law is insufficient unless there are adequate means in place for individuals to vindicate those rights. The role of legal education, regulation, and government cannot be underestimated in this respect. All three aspects, working together and individually, can ensure greater accessibility, not just to legal processes by litigants, but also to the legal profession by the next generation of lawyers who will continue to strive to protect the right to justice of some of the most vulnerable people in society.

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\* Barrister and Head of Legal Practice, Black Antelope Law Group. Email: simao@the-ba-group.com.

\*\* Associate Professor, Hillary Rodham Clinton School of Law, Swansea University. Email: Yvonne.McDermottRees@swansea.ac.uk.

<sup>1</sup> Legal Services Act 2007, s 1(1)(c). See further, Nick Robinson, 'When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism' (2015) 29 *Georgetown Journal of Legal Ethics* 1, 18-19; John Flood, 'The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation' (2011) 59 *Current Sociology* 507.

<sup>2</sup> The term "access to justice" is attributed to Mauro Cappelletti, *Access to Justice* (Sijthoff/Noordhoff: Giuffrè Editore/Alphen aan den Rijn, 1978).

<sup>3</sup> Mauro Cappelletti and Bryant G. Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181, 182.

<sup>4</sup> Gary Blasi, 'Framing Access to Justice: Beyond Perceived Justice for Individuals' (2009) 42 *Loyola Law Review* 913, 935.

<sup>5</sup> HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn., Oxford: Oxford University Press, 2012) 164.

<sup>6</sup> John Rawls, *A Theory of Justice* (revised edn., Cambridge, MA: Harvard University Press, 1999), 4-7

<sup>7</sup> D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996).

<sup>8</sup> Paul Roberts, 'The Priority of Procedure and the Neglect of Evidence and Proof' (2015) 14(2) *Journal of International Criminal Justice* 479; Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford: Oxford University Press, 2016) 26.

<sup>9</sup> Jon Robins, 'Access to justice is a fine concept. What does it mean in view of cuts to legal aid?' *The Guardian*, 6 October 2011.

<sup>10</sup> Access to Justice Day - breakfast speech by Law Society president Andrew Caplen, 8 September 2014, available online at

<http://www.lawsociety.org.uk/news/speeches/access-to-justice-day/>, last accessed 14 May 2018.

<sup>11</sup> Justice Select Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 4 March 2015, available online at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>, last accessed 14 May 2018, Conclusions and Recommendations, para. 11

<sup>12</sup> *Ibid.*, para. 5

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<sup>13</sup> Legal Education and Training Review, *Setting Standards: The future of legal services education and training regulation in England and Wales*, June 2013, available online at <http://www.lettr.org.uk/wp-content/uploads/LETR-Report.pdf>, last accessed 14 May 2018, para. 478.

<sup>14</sup> *Ibid.*

<sup>15</sup> A number of Universities host ‘Alternative Law Fairs’, where law firms, *pro bono* organisations and charities talk to students about alternative legal careers.

<sup>16</sup> Claire Crawford and Wenchao Jin, *Payback Time? Student debt and loan repayments: what will the 2012 reforms mean for graduates?*, Institute for Fiscal Studies, IFS Report R93, April 2014, available online at <http://www.ifs.org.uk/comms/r93.pdf>, last accessed 14 May 2018, pp. 38-42. At the time of writing, fees for the Bar Professional Training Course varied from between £13,800 and £18,500, depending on the provider. The Legal Practice Course typically costs between £10,000 and £15,000, again depending on the provider.

<sup>17</sup> Young Legal Aid Lawyers, *Social mobility & diversity in the legal aid sector: One step forward, two steps back*, October 2013, available online at <http://www.younglegalaidlawyers.org/sites/default/files/One%20step%20forward%20two%20steps%20back.pdf>, last accessed 14 May 2018, paras. 36-51.

<sup>18</sup> Deborah L. Rhode, ‘Access to Justice: An Agenda for Legal Education and Research’ (2012-2013) 62 *Journal of Legal Education* 531, 539-540.

<sup>19</sup> *Ibid.*, 545.

<sup>20</sup> For more information on the Street Law project, see further, Richard Grimes, ‘Legal Literacy, Community Empowerment and Law Schools—Some Lessons from a Working Model in the UK’ (2003) 37(3) *The Law Teacher* 273.

<sup>21</sup> Orla Drummond and Grainne McKeever, *Access to Justice through University Law Clinics*, Ulster University Law School with support from The Legal Education Foundation, October 2015, available online at [https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0003/132654/Access-to-Justice-through-Uni-Law-Clinics-November-2015.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0003/132654/Access-to-Justice-through-Uni-Law-Clinics-November-2015.pdf), last accessed 14 May 2018.

<sup>22</sup> Tom Whitehead, ‘Criminal trials to be held in universities after closure of one in five courts’, *The Telegraph*, 11 February 2016, available online at <http://www.telegraph.co.uk/news/uknews/law-and-order/12152716/Criminal-trials-to-be-held-in-universities-after-closure-of-one-in-five-courts.html>, last accessed 14 May 2018.

<sup>23</sup> Keele University, ‘Legal Outreach Collaboration’, available online at: <https://www.keele.ac.uk/law/legaloutreachcollaboration>, last accessed 14 May 2018.

<sup>24</sup> Keele University, ‘Keele’s legal outreach initiative goes national to tackle Legal Aid cuts’, 17 February 2015, available online at <http://www.keele.ac.uk/pressreleases/2015/keeleslegaloutreachinitiativegoesnationaltotacklelegalaidcuts.html>, last accessed 14 May 2018.

<sup>25</sup> The Rights of Children and Young Persons (Wales) Measure requires Welsh Ministers, whenever they exercise their functions, to have due regard to the requirements of the UN Convention on the Rights of the Child. More information on the Children’s Legal Centre and Swansea University’s clinical legal education initiatives can be found online at <http://www.swansea.ac.uk/law/legalcentre/>, last accessed 14 May 2018.

<sup>26</sup> John Austin, *The Province of Jurisprudence Determined* (first published 1832, revised edn. London: Weidenfeld & Nicolson, 1954).

<sup>27</sup> HLA Hart, *The Concept of Law* (2<sup>nd</sup> edn., Oxford: Oxford University Press, 1994) 82.

<sup>28</sup> Sir Andrew Burns, Chair of the Bar Standards Board, ‘Foreword’, *The Bar Standards Board Handbook* (2<sup>nd</sup> edn., April 2015), available online at [https://www.barstandardsboard.org.uk/media/1731225/bsb\\_handbook\\_sept\\_2015.pdf](https://www.barstandardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf), last accessed 14 May 2018.

<sup>29</sup> ‘The Core Duties’ in *ibid.*, p. 22, Core Duty 2.

<sup>30</sup> *Id.*, Core Duty 7.

<sup>31</sup> *Id.*, Core Duty 1.

<sup>32</sup> Solicitors Regulation Authority, *SRA Handbook* (Version 16, 1 April 2016), available online at <https://www.sra.org.uk/handbook/>, last accessed 14 May 2018, Part 1: SRA Principles.

<sup>33</sup> *The Bar Standards Board Handbook* (n 25), p. 43, ‘Guidance on Rule C28’.

<sup>34</sup> Ray Surette, *Media, Crime, and Criminal Justice: Images, Realities and Policies* (5<sup>th</sup> edn., Stanford, CT: Cengage Learning, 2015); Yvonne Jewkes, *Media & Crime* (3<sup>rd</sup> edn., London: Sage Publications, 2015).

<sup>35</sup> *The Bar Standards Board Handbook* (n 25), pp. 43 & 44, Rules rC28 and rC29.

<sup>36</sup> Equality Act 2010 s. 4.

<sup>37</sup> By contrast, solicitors’ duty not to discriminate is construed more strictly, in line with the Equality Act: *SRA Handbook* (n 32), ‘Code of Conduct – Equality and Diversity’.

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<sup>38</sup> Michael McLaren QC, Craig Ulyatt and Christopher Knowles, *The “Cab Rank Rule”: A Fresh View*, February 2012, available online at [https://www.barstandardsboard.org.uk/media/1460590/bsb\\_-\\_cab\\_rank\\_rule\\_paper\\_28\\_2\\_13\\_v6\\_final\\_.pdf](https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6_final_.pdf), last accessed 14 May 2018, paras. 16-20.

<sup>39</sup> [2014] EWCA (Civ) 1622, 15 December 2014.

<sup>40</sup> *R (on the application of The Public Law Project) v. Lord Chancellor* [2016] UKSC 39, 13 July 2016

<sup>41</sup> *Ibid.*, [29].

<sup>42</sup> See e.g. *R (on the application of London Criminal Courts Solicitors Association) v. Lord Chancellor* [2014] EWHC 3020 (Admin), on legal aid for criminal cases.

<sup>43</sup> (n 17).

<sup>44</sup> Statistics from the Destinations of Leavers from Higher Education (DLHE) survey reveal that graduates from courses such as medicine, dentistry, veterinary science, and education to have higher rates of employability for graduates after six months (77-81% in sustained employment) than law graduates (66% in employment). See further, Higher Education Statistics Agency (HESA), ‘Free Online Statistics – Destinations of Leavers’), available online at <https://www.gov.uk/government/statistics/graduate-outcomes-by-degree-subject-and-university>, last accessed 14 May 2018.

<sup>45</sup> Legal Education and Training Review, *Setting Standards: The future of legal services education and training regulation in England and Wales* (n 13), para. 3.27.

<sup>46</sup> *Ibid.*, p. 86.

<sup>47</sup> Gabrielle Garton Grimwood, *Litigants in person: the rise of the self- represented litigant in civil and family cases*, House of Commons Library Briefing Paper Number 07113, 14 January 2016, available online at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113>, last accessed 14 May 2018.