LEGAL AID

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Legal aid in the United States provides lawyers for poor persons in civil matters. The principal subjects for legal aid are family law, landlord and tenant relations, consumer transactions, and social security and other public entitlements.

Legal aid in the United States is relatively independent of government and of the legal profession. The clients of legal aid have a say in the use of legal aid resources. Most legal aid lawyers are full-time specialists in law for the poor. Legal aid lawyers are independent, committed and skilled advocates. They have reformed American law to provide a larger share of economic and social justice for disadvantaged persons.

In Australia legal aid is controlled by the government and the legal profession. There is no collective deliberation by poor people to decide the uses to which this public money should be put. There is more concern for the welfare of the legal profession than for enforcement of the law and reform of the law to protect poor people. The development of a cadre of specialists devoting their full time to law for the poor is discouraged. The largesse of legal aid is spread around among a legal profession more sympathetic to and allied with interests that are not sympathetic to poor people.

In legal aid, history shapes the present and the future. Four events shaped legal aid in the United States.

Legal aid was begun by German immigrants who established a legal aid society and employed lawyers to protect them from exploitation. Two modern characteristics of legal aid follow from that beginning. Legal aid is access to law for protection of disadvantaged people. Second, most legal aid lawyers devote their entire practice to legal aid and are skilled specialists in law for poor people without real or apparent conflicts of interest.

In 1920 Charles Evans Hughes, later a great Chief Justice of the Supreme Court, became the first chairman of the American Bar Association's committee on legal aid. The most prestigious national leaders of the legal profession have consistently supported aggressive legal aid.

The third event was the beginning of Federal Government support in President Johnson's War on Poverty in 1965. That funding brought to legal aid a novel concept fundamental to the philosophy of the War on Poverty. The poor, the clients of legal aid, would have a significant voice in formulating the policies of legal aid societies that received grants from the federal agency.

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The fourth and most recent mark on legal aid in the United States is the formation of a private, non-governmental corporation to receive the funds appropriated by the Congress and to grant those funds to private, non-profit, local, autonomous entities that employ lawyers to represent the poor in their communities.

In legal aid, as in art and architecture, form follows function. The function of legal aid is to provide the poor with access to the law and the courts. Access for what purpose? Access to enforce laws enacted to protect and benefit the poor. Access to influence the development of law to provide a fairer share of justice for the poor.

Legal aid is the most conservative approach to redress the imbalances that oppress the poor. We have enacted statute upon statute to protect tenants from unscrupulous landlords, to protect borrowers from usurious lenders—to protect the vulnerable from the exploiters. Too often in my country, and in Australia as well, those laws are not enforced because people are not informed of their rights and government agencies charged to enforce the laws lack staff or zeal or both. Lawyers for the poor advise their clients of their law-given rights and invoke the power of the courts to enforce the law.

Our nations share the promising heritage of the evolution of the common law. We are not resigned to say that the law was, is, and ever shall be—that the law is fixed and immutable. We look to precedent—to earlier decisions of courts—not to be bound but for principles to guide our conduct in a changing society. As society becomes more complex, the common law fits rules to achieve what is right and just. That developmental process in the courts is directed by an adversary system. We left behind trial by ordeal, by battle and by oath for the clash of the advocacy of sharpened intellects before an impartial arbiter seeking a just resolution of conflicting claims. When disadvantaged citizens do not have advocates, that process is distorted to the further advantage of the wealthy and the established. Legal aid lawyers present the case for the poor so the common law made by judges develops fair rules for all.

The principles brought forth by the history of legal aid in the United States are not in conflict with the principles that must govern if the form of legal aid is to fit the function. We cannot derive common principles of legal aid from our dissimilar histories. If we agree upon the function of legal aid, as I believe we do, then we will adopt similar principles to design the form to accomplish the function.

The first principle of a form, to follow that function, is to put as much distance as possible between the government that appropriates funds for legal aid and the lawyers for the poor. Lawyers for the poor will create controversy and change the established order. Legal aid lawyers who represent persons and causes that have not been represented before will be transfer agents of social, political and economic power and will effect social change. Established interests that find their position threatened by successful advocacy for the poor will exert pressure upon government to withdraw support of legal aid.

In the United States, the Legal Services Corporation that receives the appropriation from the Congress does not represent clients. It is a conduit

for the funds to autonomous, private entities that employ the lawyers to speak for the clients. That is about as much insulation from political interference as may be interposed when the government controls the purse.

In Australia the principle is not followed by the major legal aid scheme, the Australian Legal Aid Office. The attorneys are employees of the Commonwealth Government. Their continued existence is threatened by government officials ill disposed to advocacy for the poor against the narrow objectives of government and of established, wealthy, private interests that support the government in power at any particular time.

A second principle is that the organizations of the legal profession should not control the provision of legal aid. Despite protestations of absolute devotion to the public interest, the primary reason for the existence of the organisations of the legal profession is to protect and enhance the privileges of lawyers. Our bar associations and your law societies and bar councils are trade unions of lawyers. The occasional protection of the public interest is a welcome by-product. The major interests of most members of the legal profession are the interests of people and corporations wealthy enough to afford lawyers' fees. Lawyers are more often on the side of the "haves" and opposed to the "have-nots". The legal profession in your country and mine, by and large works for the protection and growth of the propertied, established and powerful, private interests. That is a fact and not put forward as a fault.

It would not be fair and decent to the legal profession or to the poor to allow the organisations of the legal profession to bear responsibility for effective representation of the disestablished poor. A bar association could not honestly and zealously control a legal aid society that was aggressively and effectively challenging the persons and organisations that are the life-blood of most members of the lawyers' association.

Lawyers, not organisations of lawyers, should participate in the governance of legal aid societies. In the United States 60 per cent of the directors of every legal aid society must be lawyers. Their obligations are to the clients of legal aid and not to any organisation of the legal profession or to protect any privilege of the legal profession.

This principle is not followed by the other major provider of legal aid in Australia, the law societies' legal aid schemes. They exhibit more concern about distributing legal aid fees among the profession than about gaining legal advantage for clients who are poor. They could be justifiably characterised as lawyer relief schemes rather than legal aid for poor people.

A third principle is that the clients of legal aid should have an effective voice in the formulation of policy by legal aid societies. Neither Australia nor the United States can now afford to provide all of the legal assistance needed by the poor in our countries. We are not likely to ever be able—or willing—to do so. The most important decision made by the directors and managers of a legal aid society is the allocation of the inadequate resources. How much is to be consumed by uncontested divorces? Are the legal problems of tenants more acute than the anguish of debtors bound to usurious contracts? The poor who live with and in poverty can best answer those questions.

In the United States at least one-third of the directors of every legal aid society are clients or representatives of clients.

With one exception, no major scheme of legal aid in Australia provides legal aid clients an effective, deliberative voice in the governance and disposition of legal aid. Scarce resources are allocated by the chance of applications by clients and solicitors for assistance from legal aid. Millions of dollars may be spent on cases and causes that will not bring any significant benefit to the poor, beyond isolated gains for individual clients.

The exception is the Aboriginal Legal Service. There the clients, Aboriginal people, direct the affairs of legal aid and the efforts of the lawyers to effect the purposes of the client community.

The last principle of form to accomplish function is that most of the legal aid lawyers should devote all of their learning, skills and time to the class of clients who are poor and disadvantaged. The poor need —are entitled to—lawyers as experienced, skilled and committed to their causes as the lawyers for the rich, the corporations and the government. The poor need experienced specialists in social security law, law for consumers, debtors and tenants—as taxpayers need tax lawyers, corporations need corporate lawyers, and banks need specialists in the law of banking.

Our nations share and cherish a common heritage of commitment to a fair and just society and equal justice under law. Our governments are obliged to seek justice for all. In an adversary system we are obliged to assure that the poor have advocates as skilled as those who speak for the rich and established.

I believe with passion that the principles I have espoused are the best guarantees of equal advocacy and justice for the poor. I urge consideration of whether the failure of the Australian legal aid schemes to follow those principles will frustrate the purpose of legal aid.

That purpose of legal aid was stated best in the great commandment articulated by a noble jurist—Judge Learned Hand—"Thou shalt not ration justice".