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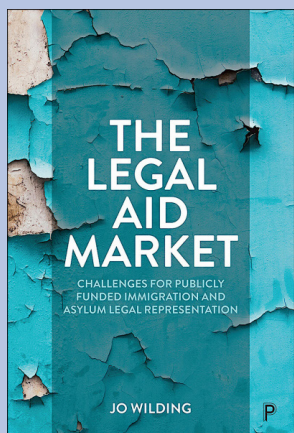
***THE LEGAL AID MARKET: CHALLENGES FOR  
PUBLICLY FUNDED IMMIGRATION AND ASYLUM  
LEGAL REPRESENTATION BY JO WILDING***

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Jo Wilding (2021) *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation* is published by Policy Press/Bristol University Press in hardback, priced at £80 ISBN: 978-1447358497, and epub, £26.99 ISBN: 978-1447358510

More than half a century ago, in the early days of the ‘access to justice’ movement as greatly encouraged by Bryant Garth and Mauro Cappelletti (see, for example, their 1978 essay ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’), the provision of legal aid emerged as a primary solution to the problem of limited access to justice, especially as experienced by poor and other marginalized claimants. The penetrating empirical study by Dr Jo Wilding of the realities of legal aid in England and Wales today, focusing on the immigration and asylum legal aid market and suggesting that her analysis and conclusions also apply to social services more generally, shows how little remains of those original hopes. This declining effectiveness of the legal aid system here is laid out in great detail, based on robust empirical research (as well as her own participatory experiences as an immigration barrister). It is an excellent example of how to combine doctrinal analysis effectively with socio-legal research so as to deliver a compelling statement of legal conditions—one that, in this case, points to the urgent need for

significant legal reform and consideration of how best to deliver necessary change (without reducing access to justice).

The central concern in the book is the impact of reliance on market services for the delivery of legal aid. The present market-based system, Dr Wilding concludes, fails to meet the needs of legal aid applicants, legal aid lawyers, the Tribunals Service and taxpayers. In particular, since the 2006 Carter review, there has been in place a market-based procurement of legal aid services. The intention of this approach has been to keep quality up and costs down through making providers compete for contracts and clients. However, the market-based approach has not worked very effectively and often fails to deliver, forcing some high-quality providers out of the market, while others reduce their market share in order to survive. As a result, large parts of England and Wales suffer from complete unavailability of advice, and in other parts services are in practice inaccessible even when advice for qualified applicants appears to be available. Central to Dr Wilding's analysis is the concept of 'monopsony' drawn from the work of Cambridge economist, Joan Robinson. A counterpart to the notion of monopoly, monopsony is a market situation where there are multiple sellers or suppliers but only one buyer. Like its counterpart, monopsony is an imperfect market, but one in which the imperfections are found on the demand rather than the supply side. The single buyer (in this case, the Legal Aid Agency) has excessive power, such that for example the buyer can secure goods and services at prices below the marginal cost of supplying them. In such situations, suppliers are so disadvantaged that they must often comply with fundamentally unfair terms or leave the market.

In a very well-crafted introductory chapter, Dr Wilding presents the basic features of her examination of the market in legal aid and its imperfections. It is followed in Chapter 2 by a succinct analysis of the history, politics, and context of the market for immigration legal aid. It provides a useful periodized examination of the development of legal aid from an initial phase, in the 1950s and 1960s, of relative autonomy through to the present day's dominant culture of audit and control of the provision of legal aid services. In the same chapter, the author also identifies four aspects of the marketized system of legal aid that are especially important problem-creating factors. These four factors are central themes in her study. First, an important policy driver in immigration legal aid (and social welfare services more widely) has been and still is 'hostility'. A significant impact of this hostility is that the government designs market conditions that are too harsh and/or dysfunctional. A second central theme is characterized as one of 'humans and econs', concepts drawn from the

work of Thaler and Sunstein (2008). Broadly speaking, those who provide legal aid services are pushed by the system into two quite different types: the ‘econs’ who respond to financial incentives and the ‘humans’ who in their decision-making are more likely to consider broader contextualizing factors. In addition, economic assumptions that underpin the current market structure are deficient in particular because they assume that rational economic action infuses the operation of the system, when there is much evidence that many actors do not act in this manner. These two points are elaborated in some detail in Chapter 7. A third central theme is that, in order to understand the workings of legal aid and how best to reform the current maladies, a ‘whole system’ perspective is needed. Reducing legal aid and its provision to demand and supply factors is distorting because essential to any analysis is an understanding of the impact of the contextualizing factors of immigration law and policy and the work of institutions such as the Home Office, the Ministry of Justice, and their subordinate agencies. This theme is particularly well laid out in Chapter 8. Fourthly, there is the problem of policy debris—that is to say, in a system where change is frequent, earlier changes in (or abandonment of) policies still continue to have unintended effects thereby contributing to the dysfunctionality of the system as a whole.

In Chapter 3 there is a micro-level examination of the market primarily through analysis of organizations which engaged in the Business of Asylum Justice study, a three-year research project looking at the immigration and asylum legal aid market in England and Wales across branches of the legal profession, and which is an important part of the book. Chapter 4 goes on to discuss problems of financial viability and the incentives and hurdles that are associated with these problems. In Chapter 5, the analysis moves to examining issues of demand, showing how some practitioners and organizations respond more directly to demand whereas others respond more directly to incentives. This is followed, in Chapter 6, by an examination of providers’ survival strategies. Consideration is given to the impact of these strategies assessed in terms of the access that clients have to legal advice of a proper standard. This chapter also considers why advice ‘deserts and droughts’ emerge (a topic also taken up in her essay for the special part of this issue of *Amicus Curiae* on declining legal aid provision) and why, in some places, there is no provision of legal aid whilst in others many prospective applicants are often unable to gain access to advice despite being eligible. Chapter 7 shows the fundamental inability of the market to maintain both quality and financial viability under the conditions which have been imposed, and in the final chapter, Chapter 8, the author takes up a theme that is also found earlier in the

book, namely that a piecemeal approach to understanding the current situation and to reforming the system is to be avoided. Instead, a whole system perspective should be adopted.

This is an important study, and one which explains the poverty of the present system and cautions us against expectations of meaningful reform. It is a fine, well-written case analysis of a dysfunctional system. The warning stressed by Bryant and Garth has not been heeded in the development of legal aid provision in England and Wales: ‘the goal is not to make justice “poorer,” but to make it accessible to all, including the poor’ (page 292). Dr Wilding’s study details the many ways in which the current legal aid system has, in reality, made justice poorer.

## References

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