TOWARDS POST-DEMOCRACY: SHIFTING RESPONSIBILITIES AND FACILITATING DISPUTE RESOLUTION UNDER THE BRITISH NEOLIBERAL STATE

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MPHIL IN LAW

TRINITY TERM 2020

Abstract

This thesis investigates the State's responsibility to facilitate dispute resolution and the extent to which this duty is upheld. This investigation is approached through Hobbesian social contract theory, which contends that the State must enable its citizens to resolve their conflicts through the public legal system. The primary function of the courts is to uphold the law, provide remedies for wrongs, and enforce rights. A central claim of this thesis is that citizens require lawyers to reach just outcomes. Most people, however, cannot afford lawyers. In the absence of affordable lawyers, this thesis asserts that the State must provide access to lawyers through legal aid to uphold its duty to facilitate dispute resolution. Providing legal aid, however, increases the State's costs. Using political theory, this dissertation considers how rising costs conflict with the State's neoliberal ideology. It argues that, to reduce costs, the British neoliberal State has diminished its role in facilitating dispute resolution by restricting the availability of legal aid and has sought to shift its responsibility onto charities, volunteers, and the private dispute resolution sector. Doing so reduces people's ability to resolve their disputes within the public courts justly. This dissertation then explores the consequences that this has for democracy. By enabling people to hold the State accountable and using dispute resolution to lead to developments of the law, litigation provides a way for people to engage in self-government. This thesis contends that, in undermining people's ability to resolve their disputes through the public courts, the State's attempts to shift its responsibility of facilitating dispute resolution pushes society towards 'post-democracy'. Post-democracy is a situation where society maintains the façade of democracy, but its democratic institutions are hollowed out of their substantive value.

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1. Introduction

Political campaigns in the United Kingdom largely revolve around three main issues: the economy, the NHS, and the education system.[1] While other concerns such as climate change and immigration commonly feature, these three issues tend to dominate the debate. Issues of law, however, are less likely to form the central matter which political parties build their manifestos around. When the law is mentioned in manifestos, it is often about being 'tough on crime' or dealing with our overcrowded prisons. In an election run the economy, the NHS, education, immigration, and crime become the battlefields upon which political power is fought, won and lost. Resolving disputes and enforcing rights are, however, rarely considered important enough to be at the centre of political campaigns or are deemed to be society's primary concern. Is this an oversight, and should conflict resolution be recognised as one of society's principle needs? If so, then it must be clear who is responsible for providing the means to achieve this conflict resolution peacefully.

This thesis explores the importance of dispute resolution and the extent to which the State should facilitate it. An initial obstacle here is that there is no unanimity between academics as to what 'the State' means. Theorists differ on what it is, what it does, and who runs it.[2] To avoid confusion, this thesis uses the term to denote the polity that has governing authority over its territory. The State is made up of various

[1] Andrew Caplen, 'Access to Justice: The View from the Law Society' in Ellie Palmer and others (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016) 13.

[2] Erika Cudworth, Timothy Hall, and John McGovern*, The Modern State: Theories and Ideologies* (Edinburgh University Press 2007) 1; Clyde W. Barrow, *Critical Theories of the State: Marxist, Neomarxist, Postmarxist* (University of Wisconsin Press 1993) 9-10.

apparatus, departments, and institutions, and is 'a differentiated, specialized form of rule' that is 'distinct, both from those who happen to occupy it, the rulers, and from those over whom rule is exercised, the ruled'.[3] It is therefore separate from the government, which is the assembly of people in control of the State and who exercise its authority.

Since Britain is a democracy, 'the State' has traditionally been interpreted through a democratic lens. In an age of increasing globalisation and neoliberal policies, however, Cudworth, Hall, and McGovern suggest that 'we are witnessing some kind of transformation of the State'.[4] To better understand this transformation, it is important to illuminate the consequences that neoliberalism has on the State's duty to facilitate dispute resolution. Chiefly, that under neoliberalism, the State has eroded people's ability to access legal services and resolve their disputes peacefully. The effect of this may be that the State is failing to fulfil its core responsibilities, which may undermine democracy. Whilst the concept of 'the State' is something too broad to fully explore within the allotted space. This thesis hopes that by interrogating the overarching levels of the State, chiefly the executive and leading policy makers, it will be the start of an embarkment on an important field of study.

Three main questions underpin this research. Firstly, what is the State's role in facilitating dispute resolution? Secondly, to what extent has the British State, or rather, the successive governments in control of the State, been successful in carrying

[3] John McGovern, 'The State' in Ian MacKenzie (ed) *Political Concepts* (Edinburgh University Press 2005) 275.

[4] Cudworth (n 2) 1.

out this role in recent years? Thirdly, if the State has not been successful in carrying out its role, what are the consequences of this and how can they be mitigated?

It is imperative to ask these questions for several reasons. Firstly, in comparison to other jurisdictions, there has been little written on British civil procedure, or at least within England.[5] While Bentham wrote on legal procedure in the 19th century,[6] the subject remained overlooked for most of the 20th century. In 1997, Genn stated that civil procedure 'has attracted relatively little interest or attention either by scholars or policymakers which leaves us with a field that is under-researched and under-theorized'.[7] Although Jacob wrote on the subject in the 1980s, interest in civil procedure only gained significant traction with the genesis of the Civil Procedure Rules 1998 and its later revisions. Much of this work has, however, utilised a doctrinal methodology to provide a systematic exposition of what civil procedure is. Texts are often written by practising lawyers for practising lawyers with the intention of navigating the law.[8] When literature has applied a normative approach, the focus

[5] American legal philosophers have written much over a more considerable period, such as Samuel Issacharoff, *Civil Procedure* (4th edn Foundation Press 2017); Robert S. Summers, 'Evaluating and Improving Legal Processes: a Plea for "Process Values"' (1974) 60 Cornell Law Review 1; Martin H. Redish and Lawrence C. Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 Yale Law Journal 455; Kenneth E. Scott, 'Two Models of the Civil Process' (1975) 27 Stanford Law Review 937
British works include Sir Jack Jacob, *The Fabric of English Civil Justice* (Sweet & Maxwell 1987); John A. Jolowicz, *On Civil Procedure* (Cambridge University Press 2000); Adrian Zuckerman, *Zuckerman on Civil Procedure* (3rd edn Sweet and Maxwell 2013); Stuart Sime and Derek French, *Blackstone's Guide to the Civil Justice Reforms 2013* (OUP 2013).

[6] Jeremy Bentham, *The Works of Jeremy Bentham, Vol 2* (William Tait 1843).

[7] Hazel Genn, 'Understanding Civil Justice' in Michael Freeman (ed) *Law and Public Opinion in the 20th Century, Current Legal Problems Vol. 50* (OUP 1997) 115, 158.

[8] Kevin Brown and Margaret Catlow, *Civil Litigation: 2019/20* (College of Law Publishing 2019).

has been on the idea of justice.[9] Analysing how the political backdrop of Britain has shaped civil procedure has achieved somewhat less attention.[10] This thesis helps to contribute to this relatively new area of academic study by analysing some external forces which influence civil procedure, namely political ideology.

Secondly, there has been an expanding body of literature critiquing neoliberalism, especially since the 2008 financial crisis.[11] These critiques, though, often concern economic, political, and social consequences and provide less of a focus on the law. This thesis hopes to fill this gap by using contemporary neoliberal literature as a framework with which to analyse the law.

Thirdly, it is essential to evaluate the extent to which the State upholds its duty to facilitate dispute resolution. Attitudes towards the law may change if people begin to perceive that the legal system is ineffective.[12] Appreciating the political influences on dispute resolution helps to advance the idea that law is a social phenomenon.

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[9] Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010); Stuart Hampshire, *Justice is Conflict* (Princeton University Press 2000); Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Harvard University Press 2019); Adrian Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 OJLS 353.

[10] Dominic De Saulles, *Reforming Civil Procedure: The Hardest Path* (Hart Publishing 2019).

[11] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books 2015); Jamie Peck, *Constructions of Neoliberal Reason* (OUP 2010); John Clarke, 'Living With/in and Without Neo-Liberalism' (2008) 51(1) *Focaal-European Journal of Anthropology* 135; Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso 2013); Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press 2011); Mark Blyth, 'The Austerity Delusion: Why a Bad Idea Won Over the West' (2013) 92(3) Foreign Affairs 41; Mark Blyth, *Austerity: The History of a Dangerous Idea* (2nd edn OUP 2015); Damian Grimshaw and Jill Rubery, 'Reinforcing Neoliberalism in crisis and austerity in the UK' in Steffen Lehndorff (ed) *A Triumph of Failed Ideas: European Models of Capitalism in the Crises* (European Trade Union Institute 2012).

[12] Richard Merelman, 'Learning and Legitimacy' (1966) 60 American Political Science 548; Tom Tyler, *Why People Obey the Law* (Yale University Press 1990); Tom Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 Law and Society Review 103; Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988); Tom Tyler and Yuen Ho, *Trust in the Law: Encouraging Public Cooperation with the Police and the Courts*

Fourthly, analysing the State's role in facilitating dispute resolution may inform public policy on using procedures outside of the conventional court system. In recent decades, there has been a shift towards resolving disputes through private means.[13] Whilst this thesis does comment on private dispute resolution, the subject is too broad to be covered fully within the space provided. Nonetheless, it is crucial to analyse the State's obligations towards facilitating public dispute resolution within the context of a growing private dispute resolution sector, as well as understand how political ideology can alter the relationship between the two. Moreover, analysing the State's role may inform public policy regarding the implementation of the proposed online court.[14]

The purpose of this thesis is to critique the current State by providing an overview of recent changes in legislation and policy, framed within the context of democratic political theory. Approaching this task requires an interdisciplinary methodology through the incorporation of legal, social, and political theory to analyse the State. McCrudden highlights that when conducting legal research, projects often adopt an internal or external approach. An internal approach 'is the analysis of legal rules and principles [by] taking the perspective of an insider in the system'.[15] It uses case law, legislation, and other legal sources to uncover the rules of the legal system.

(Russell-Sage Foundation 2002); Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283.

[13] Shirley Shipman, Ben Waters, William Wood, *Brown & Marriott's ADR Principles and Practice* (4th edn Sweet & Maxwell 2019); Susan Heather Blake, Julie Browne, Stuart Sime, *The Jackson ADR handbook* (2nd edn OUP 2016).

[14] Lord Justice Briggs, *Civil Court Structure Review: Final Report* (2016) Ch 6.

[15] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632, 633.

Meanwhile, an external approach studies 'the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum'.[16] Since this thesis engages with multiple disciplines and situates civil procedure within a political context, it largely adopts an external approach. Nevertheless, at times, there is an examination of cases and statutes, evidencing usage of an internal perspective towards the law. Both approaches are necessary to pay adequate attention to the different disciplines used to analyse civil procedure and contextualise it within political theory.

In employing this methodology, the analysis proceeds as follows. Chapter 2 utilises political philosophy to explore the purpose of the State. Social contract theory will uncover the State's core function of protecting its citizens from external and internal harm. Protecting citizens from internal harm requires the State to implement a legal system. Through the mechanisms of a legal system, the State can exercise authority over resolving civil disputes and ensure that this resolution is peaceful. For this to occur, the State must allow people to bring their disputes before this legal system, requiring access to both courtrooms and lawyers. Whilst it is not incumbent upon the State to provide lawyers, it must nevertheless ensure that people can reasonably afford them. Chapter 3 analyses how expensive legal costs prevent many from litigating, despite the attempts made by Lord Woolf and Lord Justice Jackson to mitigate this. If the State cannot make litigation reasonably affordable for individuals, then it must cover these costs to uphold its core duties. State provision occurs chiefly

[16] David Ibbetson, 'Historical Research in Law', in Mark Tushnet and Peter Crane (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 863, 864.

through legal aid. Legal aid, however, merely shifts the costs from the individual to the State.

Chapter 4 explores how increasing costs to the State conflicts with its neoliberal ideology and its drive for austerity. To reduce its costs, the State has sought to devolve its responsibility onto private entities.[17] By shifting responsibilities, 'Authority and rule are exercised by individuals acting upon their selves, rather than giving way to some externally enforced agent (such as a democratic state)'.[18] One area which the State has devolved its role is in facilitating dispute resolution. Chapters 5, 6, and 7 explore three ways in which the State has achieved this. Namely, by cutting legal aid, increasing the role of the voluntary sector within the public legal system, and outsourcing dispute resolution to private fora wherever possible. Since cutting legal aid has been the most direct and significant way in which the State has reduced its costs, this thesis devotes more attention to it than the other two methods. Chapter 8 explores the problems of devolving processes of dispute resolution, and whether this is undermining one of the State's fundamental duties and moving society towards 'post-democracy'.[19] Chapter 9 identifies some potential ways the State can fulfil its democratic duties and resist the trend towards post-democracy.

[17] Nikolas Rose, 'Governing the enterprising self' in Paul Heelas and Paul Morris (eds) *The values of the enterprise culture: The moral debate* (Routledge 1992) 141–164; Michael Peters, 'Education, enterprise culture and the entrepreneurial self: A Foucauldian perspective' (2001) 2(2) Journal of Educational Enquiry 58; Lois McNay, 'Self as enterprise: Dilemmas of control and resistance in Foucault's The Birth of Biopolitics' (2009) 26(6) Theory, Culture & Society 55.

[18] Jarkko Pyysiäinen, Darren Halpin, and Andrew Guilfoyle, 'Neoliberal Governance and "Responsibilization" of Agents: Reassessing the Mechanisms of Responsibility-Shift in Neoliberal Discursive Environments' (2017) 18(2) Distinktion: Journal of Social Theory 215, 216.

[19] Colin Crouch, *Post-Democracy* (Polity Press 2004).

2. The Functions of the State

2(a). The Authority and Role of the State

The State has a fundamental duty to facilitate dispute resolution for everyone in society. To demonstrate this, it is necessary to understand the purpose of the State. One way to conceptualise the role of the State is through social contract theory. Although there are many versions of social contract theory, what unifies them all is the idea that 'justifiable terms of social cooperation are to be understood on a model of a contract that each individual would have reason to make with other individuals, all taking due regard for their own prudential interests'.[20] The theory does not provide an exploration of how people ought to behave in society, but it helps to justify and articulate why social relations arise in any given State, its configuration, and its balances of power.

The theory advances the idea that citizens voluntarily submit themselves to the State for society to flourish. People voluntarily submit to the State on two conditions. The first condition is that the State will uphold peace within its borders. The second condition is that it will protect citizens from external forces.[21] There are other theories which conceptualise the State's purpose. However, by requiring the voluntary submission of the people to the State, social contract theory upholds the democratic need for the people to consent to executive authority. Social contract

[20] Albert Weale, *Democratic Justice and the Social Contract* (OUP 2013) 5.

[21] Thomas Hobbes, *Leviathan* (first published 1651, OUP 1998).

theory is, subsequently, ideal for analysing the role of the State through a democratic lens.

Understanding why the State has these two primary functions of protecting its citizens from internal and external harm necessitates imagining what life would be like without the existence of the State. Doing so involves envisioning the hypothetical 'state of nature', a condition where people exist before the creation of civil society. Since there is no State or civil society in the state of nature, there are also no laws. While some philosophers such as Hobbes and Locke believed that the state of nature historically existed before humanity entered society, this assertion is debatable. Nevertheless, it remains a useful hypothetical thought experiment which conceptualises what people might do if the state of nature did exist and identifies the core functions of the State to provide a benchmark for evaluating existing States.

Many philosophers present different conceptualisations of the state of nature. Due to the limited space within this thesis, however, only one account can be examined in significant depth. Since Hobbes' theory focuses on analysing the role of the State, his work is perhaps most appropriate for present purposes. Although Rawls is arguably the most recent and influential philosopher to utilise social contract theory, he uses it to develop a theory of justice.[22] The present aim of using social contract theory within this thesis is not to theorise justice, but instead to examine the role of the State. This makes Rawls' version less applicable for present purposes. Nozick's version of social contract theory may also be appropriate, given his exposition

[22] John Rawls, *Justice as Fairness: A Restatement* (2nd edn Harvard University Press 2001); *A Theory of Justice* (Harvard University Press 1971).

of the 'minimal State'. However, Nozick explores the social contract to put forward a theory of justice in opposition to Rawls, and so suffers from the same problem.[23]

As shall shortly be explored, the Hobbesian state of nature treats pre-societal humanity in a negative light, arguing that people enter society to escape the hardship of the state of nature. Rousseau, instead, sees humanity's pre-societal stage as inherently good. However, Rousseau theorises that inequality and society's increasing focus on commerce and luxury corrupts humanity and leads to its downfall. Douglass notes that this analysis is limited in its application for modern capitalist society. This is because Rousseau's proposals are only suitable for nations which have not yet progressed irreversibly down the path of commercialisation.[24] Even if Hobbes' account of human nature is misguided and Rousseau's version is a more accurate account, Douglass argues that current society is distinctly Hobbesian and that there is great difficulty in applying Rousseau's 'ideals amongst the fallen, Hobbesian, men of modernity'.[25]

Locke also conceptualises a state of nature.[26] His version, however, is based upon a theory of natural law rooted in theology, both of which might be contestable. Hobbes' version, meanwhile, allows us to conceptualise the functions of the State and society without drawing upon rights or natural law theory. Instead, Hobbes draws upon principles of human nature to rationalise the creation of society and the State.

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[23] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

[24] Robin Douglass, *Rousseau and Hobbes: Nature, Free Will, and the Passions* (OUP 2015) 199-201.

[25] ibid 202.

[26] John Locke, Two Treatises of Government (first published 1689, ed Peter Laslett, 3rd edn University of Cambridge 1989)

For Hobbes, the 'state of nature' is a position of perpetual conflict. He arrives at this conclusion based on several inferences. The first inference is that all people are 'equal in the faculties of both body and mind'.[27] This does not refer to equality in any sense of right but refers to physical and mental capabilities. While some may be stronger or more intelligent than others, these differences are mostly inconsequential. For instance, Hobbes writes that 'the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others'.[28] Because everyone is more-or-less equal, everyone is equally susceptible to being subdued by another.

The second inference is that people are self-interested and pursue their interests as much as possible. Because all are equal in ability, everyone has an equal chance of successfully claiming resources which are in their best interests. Most resources are, however, in scarce supply. Due to the problem of scarcity, if 'two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies'.[29] As there are no laws in the state of nature to resolve disputes, people may use force to dominate and subdue one another. In Plato's *Republic,* Plato's Socrates highlights that when resources are low, 'if we are to have enough... we must take a slice from our neighbours' territory'.[30]

[27] Hobbes (n 21) 82.

[28] ibid.

[29] ibid 83.

[30] Plato, *The Republic,* Book 2 (first published c. 375 BC, Heron Books 1946) 53.

In Hobbes' state of nature, there is no way to secure oneself from the violence of others except by relying on one's strength. Long term cooperation is impossible because of the constant fear and distrust between people. To demonstrate this distrust, Hobbes highlights that even with laws and law enforcement officers, people still lock their doors at night. The distrust that exists outside the state of nature also exists within it.

Hun Chung's use of Bayesian game-theory analysis supports this theory of human nature. He suggests that a state of nature would lead to universal conflict because people are uncertain about how others will behave without a government, creating fear and removing any chance for cooperation.[31] Due to the issue of scarcity and distrust for one's fellow neighbour, the condition of humanity is perpetual conflict, 'where every man is enemy to every man'.[32]

Hobbes recognises that the primary self-interest that people have is self-preservation. Since people fear death and wish to preserve themselves, it is rational to seek an escape from the state of nature and establish a civil society. Escaping the state of nature is possible through the two 'laws of nature'.

The first law of nature dictates that everyone endeavours to obtain peace to secure their safety as much as possible. The second law of nature is that to prevent violence and secure peace, people must be willing to give up certain rights and be 'contented with so much liberty against other men as he would allow other men

[31] Hun Chung, 'Hobbes's State of Nature: A Modern Bayesian Game-Theoretic Analysis' (2015) Journal of the American Philosophical Association 485.

[32] Hobbes (n 21) 84.

against himself'.[33] In other words, people collectively agree to limit their actions and renounce their right to commit violence in order to acquire peace. This agreement, or contract, establishes a society and provides the way out of the state of nature.

However, there must be a way of ensuring that the social contract is maintained and enforced. To achieve this, people place power in the State to ensure that it has 'a monopoly of the legitimate use of violence'[34] in the hope that they will not face harm from others. The social contract therefore has two distinguishable contracts.[35] The first contract is between individuals who agree to forgo violence to pursue peace. The second contract is between the individual and the State, whereby the individual submits to the State's authority so long as the State enforces and maintains peace.

Because there are many conflicting interests within society, the State cannot meet every need, nor is it expected to do so. Nonetheless, it must meet the basic needs required to form and maintain a society. Hobbes' social contract reveals what these basic needs are - that all can 'live peaceably amongst themselves, and be protected against other people'.[36] From this, the State has two fundamental duties and functions that it must provide. The 'first duty of the sovereign', Adam Smith writes, is to protect people 'from the violence and invasion of other independent societies'. The second duty is 'of protecting, as far as possible, every member of the

[33] ibid 86.

[34] Max Weber, 'Politics as a Vocation' in Hans Gerth and Charles Wright Mills (eds) *From Max Weber: Essays in Sociology* (Routledge 2009).

[35] Michael Lessnoff, *Social Contract Theory* (Basil Blackwell 1990) 11.

[36] Hobbes (n 21) 115.

society from the injustice or oppression of every other member'.[37] This thesis will focus on the second duty.

2(b). The State's Power to Resolve Disputes

If the State is to secure peace within the nation, it must have certain powers. One of these is the 'whole power of prescribing the rules' that govern society.[38] Laws prohibit certain undesirable conduct and clarify what actions people may do. The law also dictates what goods and services people may enjoy, the arrangements between individuals, and what rights they have.[39]

Not only must the State have the power to make laws, but it must also be able to enforce its laws and adjudicate on any legal dispute.[40] If the State does not enforce its laws, then people may instead rely on force to resolve their disputes or reconcile any wrong. This would bring about a state of nature. To prevent this, the State must 'make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights'.[41]

Peaceful resolution of disputes occurs through the judicial system. As Bayles puts it, the 'justification of a legal system and procedures must be one of lesser evils,

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[37] Adam Smith, *The Wealth of Nations* (first published 1776, OUP 1976) 708-709.

[38] Hobbes (n 21) 119.

[39] Joseph Raz, *The Authority of Law* (OUP 1979) 163-179.

[40] Hobbes (n 21) 119.

[41] *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp.* [1981] AC 909 HL, 976.

that legal resolution of disputes is preferable to… violence'.[42] For the legal system to function properly, people must comply with the law and any decision made through legal adjudication. This has not always been easy. Couture writes that only at the 'cost of mighty historical efforts has it been possible to supplant… the idea of self-obtained justice by the idea of justice entrusted to the authorities'.[43]

If individuals are to comply with legal adjudication, they must recognise the authority of the courts and the law. Legal authority arises from individuals respecting the law. Raz highlights that for the 'one who respects the law, his respect itself is a reason for obeying the law'.[44]

On its own, deterrent measures which punish people for breaking the law are not enough to ensure compliance and respect for the law. These measures are costly, and there are often insufficient resources capable of enforcing every single rule. For instance, police officers cannot be everywhere at once.

Respect for the law is, instead, founded upon trust. For, if an individual places 'absolute trust in the law then he will acknowledge the authority of law'.[45] Trust in the law arises from a normative belief that the law is legitimate. Tyler highlights that 'legitimacy means obeying the law because one feels that the authority enforcing the law has the right to dictate behavior'.[46] This authority can be an individual in a position

[42] Michael Bayles, 'Principles for Legal Procedure' (1986) 5(1) Law and Philosophy 33, 57.

[43] Eduardo Couture, 'The Nature of the Judicial Process' (1950) 25 Tulane Law Review 1, 7.

[44] Raz (n 39) 260.

[45] ibid 261.

[46] Tyler, *Why People Obey the Law* (n 12) 3.

of power, such as a police officer. Alternatively, it can be an institution such as the legal system. When people believe that legal institutions are legitimate, they feel that they have a responsibility to obey the law.

Tyler's research has demonstrated that people believe that legal institutions are legitimate when the legal procedure is just and fair. To ensure procedural justice, individuals must feel that they have an opportunity to play an active role in the adjudicatory process. This involves the opposing parties presenting their arguments before a judge who then impartially considers the merits of each party's case.[47] The need for contrary claims to be heard, known as the principle of 'hearing the other side', is an essential element for procedural justice. This is because it presents both sides with an equal opportunity to present their case. When a court provides this equal opportunity, those who feel involved in proceedings are 'typically much more accepting of its outcome, irrespective of what the outcome is'.[48]

People also expect judges to deal with cases fairly. Judges treat cases fairly when they base their decisions objectively on the information presented before them by the parties. The public nature of judges helps to maintain this judicial impartiality. As Resnik highlights, 'Judges are agents of the state, charged with implementing its law through public decision making'.[49] According to Wilmot-Smith, the only reason that judges exist is because society requires a State-provided legal system.[50] Due to

[47] Hampshire (n 9) 8.

[48] Tyler, *Why People Obey the Law* (n 12) 163.

[49] Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private of Courts, and the Erasure of Rights' (2015) 124 Yale Law Journal 2804, 2806.

[50] Wilmot-Smith (n 9) 97.

their public role, judges can be considered as shared resources, providing a 'co-created benefit, one that should be shared equally'.[51] Because judges are of equal benefit to everyone and act as agents for the State, they are primarily seen as unbiased, allowing them to deal with cases fairly.

Legal procedure will also be considered fair if it consistently produces fair results.[52] If judges consistently reach unfair outcomes, people will lose faith in the idea that legal procedure is fair. It is this need for fairness and procedural justice which establishes trust in the law. 'Only if people can trust authorities, rules, and institutions', writes Tyler, 'can they believe that their own long-term interests are served by loyalty towards the organisation'.[53]

As litigation often involves competing private rights, many perceive that dispute resolution is a private concern and one of little interest to the public. Accordingly, many believe that private forms of dispute resolution are appropriate substitutes for resolving disputes. However, to consider the courts as merely an alternative means of dispute resolution is to 'debase its constitutional function in a system governed by the rule of law'.[54] When people come before a court, they are not merely settling their disputes; they are enforcing what is due to them – their rights provided under the law. Dispute resolution is, therefore, more than just settling a conflict. It provides remedies for wrongs and enforces rights which have been

[51] ibid 97-98.

[52] Tyler, *Why People Obey the Law* (n 12) 164.

[53] ibid 172.

[54] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 3.

afforded to people by the State. Without effective remedies, there are 'no rights and without enforceable rights there is no rule of law'.[55] It is 'precisely because the upholding of rights is in the interest of the community as a whole that binding adjudication is a monopoly of the state and is not left to private enterprise'.[56] Resolving disputes and the protection of people's rights is, therefore, a fundamental duty of the State and should not be left to others.

Resolving disputes between individuals should also be considered a public concern because it has broader implications for everyone in society. When a court develops the common law and establishes new rights, everyone gains the benefit of having these new rights, not just the person bringing the claim. The law is, therefore, a public good in a way that surpasses private interests because it benefits the community and not just those in the courtroom.[57] Ultimately, the 'system of civil justice is of transcendent importance… for the people of every country',[58] not just the individual.

[55] ibid.

[56] ibid.

[57] Hazel Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice' (2013) 24 Yale Journal of Law & the Humanities 397.

[58] Jacob (n 5) 1.

2(c). Facilitating Dispute Resolution

If the State has a fundamental responsibility to decide claims to ensure peace, it follows that the State must also enable people to bring these claims.[59] The State therefore has a responsibility to facilitate dispute resolution. Bringing a dispute involves a three-stage process. The individual must first identify and name the harm done against them. Next, they must assign blame to someone or some organisation. Then, they must then bring their claim before an independent arbiter, namely a judge.[60] Since it is the claimant who 'names' and 'blames', the State has little control over these stages. However, the State does have a role to play in allowing people to bring their claims before a judge. It is through this 'claiming' stage that the State can facilitate dispute resolution.

To enable the resolution of conflicts, the State must provide people with access to the courts and the judicial system. Lord Diplock recognises this principle, stating that 'every citizen has a constitutional right of access' to the courts of justice.[61] Not everyone wishes to bring their disputes before a court. This does not mean, however, that the State should prevent those who do. There should not be any material restrictions on access to the courts. This principle is recognised by the Magna Carta, which provides the constitutional maxim that 'We will not sell, or deny, or delay right or justice to anyone'.[62]

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[59] *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp.* [1981] AC 909 HL, 976.

[60] William Felstiner, Richard Abel, Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1981) 15(3) Law and Society Review 631.

[61] *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp.* [1981] AC 909 HL, 976.

[62] Magna Carta 1215, Clause 40.

If a legal system is to operate for the good of the people, it must enable the 'effectuation of rights'.[63] For, 'rights are valueless if they cannot be realised'.[64] Lord Reed held in *R (Unison) v Lord Chancellor* that, for courts to uphold the rule of law, 'people must in principle have unimpeded access' to courts.[65] In *Unison*, the court held that tribunal fees for employment law cases were unlawful because they prevented people from accessing legal institutions.

It is not enough, however, for the State to simply provide access to the courts. When people come before the court, they must be able to resolve their disputes *justly*. For, as mentioned in chapter 2(b), if legal proceedings consistently produce unjust results, the legitimacy of the legal system will be undermined.

There are three fundamental requirements to resolve a dispute justly. Firstly, judgements must be 'well-grounded in the law and in fact'.[66] An important point to note here is that judges can only take account of the law and the facts presented before them by the parties. Secondly, judgements must be given within a reasonable time. Thirdly, judgements must be obtained at an affordable cost.[67] Accuracy, time, and affordability all have, however, competing demands. Delivering more accurate decisions grounded in law and fact may require a greater deal of time. Greater time spent on a case often increases the cost of proceedings or creates a situation where

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[63] Bentham (n 6) 24.

[64] Lord Neuberger, 'Justice in an Age of Austerity' (Tom Sargant Memorial Lecture, 2013) [28].

[65] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 Lord Reed [65].

[66] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 4.

[67] ibid.

'justice delayed is justice denied'. Given that all three factors conflict with each other, courts must strike a balance between them. Inevitably, compromises between these factors are made across all legal systems.

To resolve disputes justly, individuals must also have a reasonable access to lawyers.[68] Without lawyers, individuals may struggle to base their claims on the relevant law. Given that judges can only decide on what the parties present before them, this may obstruct the judge's ability to ground their decision in the law and the facts, and undermine the first requirement for resolving disputes justly.

The claim that individuals need lawyers to resolve their disputes justly may, at first glance, seem erroneous. The common law tradition has long held that self-representation is an individual's fundamental right. Many often choose to self-represent, commonly referred to as litigants in person. Due to this belief, one could make an argument that the State does not have a fundamental duty to ensure that individuals have access to lawyers. Assy, however, reveals that this perception conflates the right of self-representation with the right of access to a court. Historical, conceptual, and empirical factors have contributed to this conflation. For instance, examining 'legal history reveals that the entrenchment of self-representation derives more from accepted practice... than from any deliberate recognition of its normative value as a right'.[69] While this explains why the right of self-representation has been taken for granted, it fails to justify it.

[68] Wilmot-Smith (n 9) 15.

[69] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 16.

Another reason for the conflation is the ‘intuition that rights are personal and should therefore be available for exercise by their possessors directly, not only by proxy’.[70] Conferring litigants with procedural rights gives the impression that they have a right to exercise these rights in person. ‘Understanding the right of access to court as a personal right’, writes Assy, ‘makes it hard to disentangle self-representation from access to court’.[71]

It would be a mistake to believe that self-representation is the fundamental pathway for accessing courts and that legal representation is merely an alternative option. Neither legal representation or self-representation are 'specifically warranted by the right of access to court'.[72] Whilst procedural codes bestow obligations and rights onto ‘parties’ and not onto their ‘legal representatives’, this is done on the basis that it is the parties who are ultimately affected by the legal outcome.[73] This, however, does not necessarily provide an additional right to conduct litigation through self-representation. 'As legal entities’, argues Assy, ‘litigants can still be accorded full access to court when they are required to exercise this right through lawyers’.[74] The assumption that self-representation is a fundamental right of access to the court is presumed, but not justified. It is therefore not reasonable to accept that a right of access to a court intrinsically confers an unqualified right to self-representation.

[70] ibid 17.

[71] ibid.

[72] ibid 18.

[73] ibid 19.

[74] ibid.

In practice, self-representation negatively impacts the individual's case. Legal representation, meanwhile, is far more effective at allowing individuals to resolve their disputes justly and gain favourable outcomes. The legal system has largely developed in a way without a focus on self-represented litigants.[75] Due to the adversarial nature of legal systems, particularly within common law systems, the ability to argue and persuade the judge or jury is crucial to winning a case. Persuading the judge requires comprehensive knowledge of the law and an ability to navigate its complexities. Grasping these complexities necessitates recognizing and accumulating relevant legal facts and compartmentalising them into relevant legal categories. It requires individuals to identify appropriate legal principles and create arguments based upon particular interpretations of these principles. All of this requires legal expertise and training, which most people do not have.

While some believe that simplifying legal language and procedure can solve the problems unrepresented litigants face, this is largely misguided. Simplifying the language, from 'plaintiff' to 'claimant', or 'writ' to 'claim', does not ease the law's complexity. The ability to effectively wield the law requires more than merely understanding the legal lexis. It is difficult to simplify the law in a way which everyone can understand. This is because the law must remain sufficiently detailed to identify legal rights and obligations, which invariably has the consequence of creating complexities that only legal experts can navigate effectively.[76]

[75] Natalie Cambrell, 'Self-Represented Litigants - Balancing Impartiality and the Right to a Fair Trial: The Judge's Duty' (2019) 38(2) Civil Justice Quarterly 232.

[76] Assy (n 69) 73.

Without lawyers, many people struggle to wield the law successfully. The Equality and Human Rights Commission report that individuals often find it hard to represent themselves effectively and have difficulty providing the evidence that courts need to reach a fair decision.[77] Due to this, the chances of gaining an unfavourable result may increase without legal representation even though they may deserve to win their case.

The importance of having legal representation is, therefore, a crucial requirement for resolving disputes justly. Wilmot-Smith argues that if litigants can obtain just outcomes 'without the use of lawyers, that is a good thing'.[78] However, given the need for detail and the nature of the adversarial process, this is unlikely to be achievable. Lawyers will always be needed to resolve disputes in a way that provides substantial justice for their clients.

Ultimately, 'Self-representation is not effective'[79] and its value as a right is 'insufficient to outweigh the consequences'.[80] This leads Assy to the conclusion that 'legal representation [should] be formally required when litigants are unlikely to be able to present their cases effectively'.[81] Many civil law systems impose obligations and require legal representation in most cases to reflect this. Whilst the British State

[77] James Organ and Jennifer Sigafoos, *The Impact of LASPO on Routes to Justice* (Equality and Human Rights Commission, Research report 118, September 2018) Available at https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf.

[78] Wilmot-Smith (n 9) 15.

[79] Assy (n 69) 4.

[80] ibid 1.

[81] ibid 2.

does not have this requirement, having access to a lawyer is nonetheless vital to resolving disputes justly. Since the State is responsible for facilitating fair and just dispute resolution, it must ensure that its citizens have reasonable access to legal representation.

3. The Costs of Litigation

3(a). The Cost of Lawyers

Some lawyers may choose to work for free by providing pro bono services. Most of the time, however, lawyers will not. Instead, lawyers sell their services privately on the market. It is not necessarily the State's duty to provide everyone with a lawyer. However, since the State has a responsibility to facilitate dispute resolution, it must ensure that people can afford their services. Unfortunately, the costs of lawyers are often unaffordable. Moreover, since the early 1990s, everyday disputes have become prohibitively expensive[82] and the British legal system is 'beset by excessive costs, delays, and complexity'.[83] This has prevented almost all but the very wealthy from resolving their disputes within the courts.

Litigation, and a lawyer's services, are so expensive due to the combination of two types of legal costs that litigants incur. The first type of cost is the party's actual costs. Actual costs are the fees that litigants pay towards their lawyers for their legal services. This includes such things as the lawyer's basic fee and any success fee, their expenses, and any disbursements they need to make on behalf of their client. Disbursements often include the court fees, expert fees, and the cost of obtaining relevant records to be used as evidence in the case.

[82] Issacharoff (n 5) 203.

[83] Paul Michalik, 'Justice in Crisis: England and Wales' in Adrian Zuckerman (ed) *Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 117.

A lawyer's actual costs are often charged on an hourly fee basis. An important factor in determining actual costs is the principle that 'economic activity follows the most rewarding path'.[84] Those who provide services have an economic incentive to maximise their profits. In a free market, the interest that service providers have in maximising their profits is offset by the consumer's interest to obtain the service at the lowest possible price.

When the market is working efficiently, the price that the consumer pays reflects the interests of both parties. This, however, requires market transparency, something often unobtainable in the legal market. While individuals can compare the hourly fees of different lawyers, some lawyers may take longer to provide a legal service than others. Because litigation can go on indefinitely, it may be hard to calculate how many hours each lawyer will take, or even which hours lawyers will decide are billable. There is also no standard way of comparing the quality of lawyers, meaning that transparency in terms of skill can also be hard to gauge. Moreover, lawyers have a monopoly on legal services because they have rights of audience at court. The market imbalance means that it can be hard for the consumer's interests to be accurately reflected in the price of services, allowing lawyers to seek to maximise their billable hours unassailably. Zuckerman highlights that 'forensic litigation practice has evolved accordingly, with the result that a culture of leaving no stone unturned has become normal practice'.[85]

[84] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1304.

[85] Adrian Zuckerman, 'The Law's Disgrace' (UK Constitutional Law Blog, 27th Feb 2017).

The second type of cost that an individual faces are recoverable costs. These are costs that can be recovered from the other party. The cost-shifting rule determines the amount of recoverable costs that a party can obtain.[86] Under this rule, the loser pays the winning party's costs.

A claimant is classified as a winning party if they obtain any order that goes in their favour, even if it is only a fraction of their claim. This rule gives rise to a 'winner takes all' approach.[87] Recoverable costs are therefore different from actual costs given that actual costs involve individuals paying their own lawyers, whereas recoverable costs are payable to the other side. The general cost-shifting rule, however, does not apply in all circumstances. For instance, the Civil Procedure Rules exclude proceedings in the Court of Appeal that concern probate or family law issues.[88]

The justification for the cost-shifting principle is that the losing party has a 'moral and legal obligation to compensate the winner for successfully enforcing their legal rights or defending their legal position'.[89] In bringing a case, a claimant incurs legal costs. However, they also impose costs upon the defendant who must engage in the litigation and perhaps pay for legal representation.[90] Whether it is the claimant or

[86] Civil Procedural Rules 1998 r. 44.4(3).

[87] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1322.

[88] CPR 1998 r. 44.2(3).

[89] Andrew Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37 Oxford Journal of Legal Studies 687.

[90] Avery Katz and Chris Sanchirico, *Fee Shifting in Litigation: Survey and Assessment* (University of Pennsylvania Law School Research Paper No. 10-30 2010) 3.

the defendant who ought to be vindicated, no individual should be out of pocket for having to enforce or defend their rights.[91] In this way, corrective justice rationalises the cost-shifting principle.

The cost-shifting principle is, however, a 'recipe for runaway' costs.[92] By incorporating the other party's legal costs as part of the potential damages, cost-shifting increases the stakes of litigation.[93] Higgins writes that permitting litigants to 'enter into fee agreements with their lawyers which can be shifted to a third party – their opponent – depending on the outcome of the case, gives litigants the power to dramatically "ratchet up" the potential liability of their opponent'.[94] A party may increase their spending to make the risk of litigating too high for their opposition. By raising the potential liability, the litigant forces their opponent to either settle or spend more on their legal resources to not lose the case.[95]

Within England and Wales, recoverable costs are open-ended. Disputes concerning a legal issue can escalate indefinitely into attempts to avoid paying the other party's costs, often surpassing the sum of the initial claim. In these instances, litigation continues not on the claim's merit but on the desire to avoid paying costs. While a litigant can seek to control their legal fees, the fact that they cannot control

[91] *Arkin v Borchard Lines Ltd (costs order)* [2005] EWCA Civ 655 [23].

[92] Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (July 2017) 9 Available at https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf

[93] Katz and Sanchirico (n 90) 6.

[94] Higgins (n 89) 711.

[95] ibid.

their opponent's fees makes recoverable costs unpredictable and problematic. 'The mass of litigation in England dedicated to the costs of litigation', writes Higgins, is 'testament to the distorting effects of full cost shifting'.[96]

The incentive of lawyers to maximise their actual costs, combined with the ability to pass these costs onto the other party through the cost-shifting principle, drastically increases the amount spent on legal services. Due to this combination, many cannot afford legal representation and are less likely to resolve their disputes justly.

Compounding this problem is the uncertainty surrounding the result of the case. Lord Justice Jackson's 2009 preliminary report highlights that for anyone 'uncertain about the outcome (and many litigants are uncertain, even if they have apparently strong cases) the cost-shifting rule may inhibit, rather than promote, access to justice, because the litigant fears having to pay both sides' costs'.[97]

3(b). Reducing Litigation Costs

Reducing litigation costs requires managing actual and recoverable costs effectively. The State could manage actual costs by bringing lawyers into a centralised scheme in a similar way to doctors in the NHS. The State has, however, decided not to do this on the basis that it would be an 'unacceptable interference with freedom of

[96] ibid.

[97] Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (TSO 2009) 16.

contract' of lawyers to decide how much to charge.[98] Instead, policy has aimed at restricting recoverable costs.

Lord Justice Jackson highlights that 'the only way to control costs effectively is to do so in advance' of the case.[99] He identifies two ways to control recoverable costs in advance of a case.[100] One possibility is to introduce a fixed recoverable costs scheme. This allows parties to identify from the outset what the maximum recoverable amount is. The alternative is to impose cost budgets at the start of the legal dispute. Reform has primarily occurred through this second policy of cost budgeting by judicial case management. This approach, as will be demonstrated, has failed at reducing litigation costs. Lawyers remain largely inaccessible.

3(c). Lord Woolf's Reforms

In 1994, the Lord Chancellor instructed Lord Woolf to explore possible reforms for civil procedure. Lord Woolf recognised that a 'system of justice which a very substantial section of its own citizens cannot afford, is a system which contains a fundamental flaw and leaves them vulnerable to exploitation'.[101] In acknowledging

[98] Lord Justice Jackson, *Supplemental Review* (n 92) 11.

[99] ibid 9.

[100] ibid.

[101] Lord Woolf, 'Access to Justice: The Bentham Club Presidential Address' (1994) 47(2) Current Legal Problems 341, 344.

that the British legal system fits this description, his report concluded that reform was needed to appropriately and proportionately resolve disputes.[102]

The Woolf Reforms were 'intended to ensure that all litigants have fair access to the courts and a fair opportunity to proceed to judgment'.[103] In particular, Lord Woolf recognised that high costs raised three problems. Firstly, that litigation is 'so expensive that the majority of the public cannot afford it unless they receive financial assistance'.[104] Secondly, that the costs incurred during litigation are disproportionate to the issues involved. Thirdly, that the uncertainty surrounding costs makes it difficult for parties to predict what their maximum potential liability might be if they lose.[105] For Lord Woolf, rectification required a 'fundamental shift in the responsibility for the management of civil litigation… from litigants and their legal advisers to the courts'.[106]

Lord Woolf's report led to the Civil Procedure Rules 1998, referred to as the 'CPR'. CPR 1.1 sets out the overriding objective, which originally aimed to '[enable] the court to deal with cases justly'. CPR 1.4(1) establishes a duty on the court to 'further the overriding objective by actively managing cases'. This duty involves, among other things, encouraging cooperation between the parties, identifying the relevant issues early on and deciding which issues require a full investigation, fixing

[102] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

[103] Lord Dyson, 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (District Judges' Annual Seminar, Judicial College, March 22 2013).

[104] Lord Woolf, *Access to Justice: Final Report* (n 102) chp 7.

[105] ibid.

[106] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 18.

timetables to control proceedings, and considering whether the benefits of any particular step justifies its costs.[107]

Lord Woolf's report also desired to streamline and reduce delay. The report promoted settlement as early as possible, advocating that litigation ought to 'be avoided wherever possible',[108] and that alternative dispute resolution should be sought wherever possible and appropriate to do so.

The report also introduced fast track claims.[109] The fast track aims to enable dispute resolution 'for litigants with modest cases by providing a strictly limited procedure designed to take cases to trial within a short but reasonable timescale at a fixed cost that litigants can afford'.[110] The aim of this is to help individuals estimate in advance of their case their maximum liability for costs if they lost. By doing so, individuals can have greater certainty over their case, enabling greater access to courts.

Lord Woolf's report also emphasised the role that conditional fee agreements and legal insurance policies can have in providing greater access to dispute resolution. Conditional fee agreements are no-win no-fee agreements made between clients and their lawyers. If the party loses their case, the lawyer will not charge their client. However, if they win, the lawyer charges a success fee on top of their standard fees to compensate for the risk of not being paid if they lost. Lord Woolf hoped that the

[107] Civil Procedure Rules 1998 r. 1.4(2).

[108] Lord Woolf, *Access to Justice: Final Report* (n 102) Section 1.

[109] CPR 1998 r. 28.

[110] Lord Woolf, *Interim Report* (n 106) 41.

significant monetary sums enabled by success fees would incentivise lawyers to take up cases where the litigant is unable to afford the litigation costs, in the hope that the rewards would outweigh the risks of not charging fees if they lost. In theory, this would enable greater access to legal representation and enhance people's ability to resolve their disputes effectively.[111] Lord Woolf's reforms, therefore, placed greater responsibility upon lawyers to facilitate dispute resolution by taking up cases which they previously would not have done.

3(d). Lord Justice Jackson's Reforms

Lord Woolf's reforms had little success in reducing litigation costs; the expense of affording lawyers continued to increase.[112] Lord Justice Jackson's 2009 preliminary report recognised that 'some of the cost increases since 1999 do appear to be consequential upon the Woolf reforms'.[113] The use of conditional fee agreements under the Woolf reforms allowed parties to claim more from the other side by increasing their recoverable costs through the cost-shifting principle. Lawyers could, and often did, set success fees as high as 100% of the costs. After-the-event insurance policies were also often priced at substantial amounts. This placed excessive burdens on their opponents, who succumbed to the pressures. As Genn highlights, the Woolf reforms did little to reduce costs and instead did much to remove vast swathes of

[111] Michelle Bramley and Anna George, *The Civil Justice Reforms One Year On* (Butterworths 2000) 37.

[112] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009).

[113] Lord Justice Jackson, *Preliminary Report* (n 97) 1.

cases from the justice system.[114] Further change was needed to reduce the cost of legal representation, manifesting in Lord Justice Jackson's reforms.

Lord Justice Jackson's final report in 2010 aimed to 'deliver the best possible service to civil litigants at the lowest possible cost'.[115] Many recommendations came into effect in 2013, either through changes to the Civil Procedure Rules or through the Legal Aid, Sentencing and Punishment of Offenders Act 2012, referred to as 'LASPO'. Lord Justice Jackson's reforms largely abolished the recoverability of conditional fee agreement success fees, although success fees remain in certain instances such as personal injury claims but are capped.[116] The reforms also abolished the recoverability of after-the-event insurance premiums.[117]

Lord Justice Jackson introduced more extensive case management through cost budgeting, aiming to allow the court to identify and keep track of the litigation costs as proceedings develop. Per CPR 3.13, all parties except litigants in person must file and exchange cost budgets before their first case management conference. Failure to do so will mean that a party's approved cost budget only comprises of the applicable court fees, unless the court orders otherwise.[118] Once the parties have filed their budgets, the court will issue a costs management order. Any costs incurred

[114] Genn, *Judging Civil Justice* (n 9) 57.

[115] Lord Justice Jackson, 'Achieving a Culture Change in Case Management' (5th Implementation Lecture, UCL Judicial Institute 22 November 2011) [5.5] Available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case-management.pdf

[116] Legal Aid, Sentencing and Punishment of Offenders Act 2012 s. 44(4).

[117] LASPO 2012 s. 44-47.

[118] CPR 1998 r. 3.14.

before the cost management order are not subject to the order since the order only considers the costs incurred once the budgets are filed. As budgets are filed after proceedings have been initiated, obtaining a cost management order is only possible after the parties have started litigation.

Courts will only approve the cost budgets if they deem them to be proportionate. The focus of proportionality is central to Lord Justice Jackson's reforms. His reforms amended the CPR's overriding objective to emphasise this, now aiming to enable 'the court to deal with cases justly and at proportionate cost'.[119]

Costs are proportionate if they have a reasonable relationship to the sums in the proceedings, the value of any non-monetary relief in issue in the proceedings, the complexity of the litigation, any additional work generated by the conduct of the paying party, and any wider factors involved in the proceedings such as reputation or public importance.[120]

Per CPR 44.2, courts have discretion to decide whether to order the payment of costs or not, who the costs are payable to and by whom, and the time that payment occurs. Because judges have the power to make cost orders, they can depart from the cost-shifting principle when needed. Judges may depart from the principle by assessing both of the party's conduct, whether the successful party won in whole or in part, or if any settlement offers were made.[121] The court's power to implement this discretion is, however, limited to costs which are 'of and incidental to' the

[119] CPR 1998 r. 1.1

[120] CPR 1998 r. 44.3(5).

[121] CPR 1998 r. 44.2(4).

proceedings,[122] which can include the costs incurred when preparing for the proceedings.

In his 2017 supplemental report, Lord Justice Jackson declared that his reforms had helped reduce the costs of litigation and improved upon the Woolf reforms. He stated that since its introduction 'costs management is now working much better and is reining in the costs of litigation after the first case management conference'.[123]

Despite Lord Justice Jackson's claim, Lord Justice Briggs in his 2016 report pronounced that 'our civil courts... simply do not provide reasonable access to justice' for anyone beyond the wealthiest of individuals and companies, those with access to legal aid or pro bono support, or those in personal injury claims with conditional fee agreements.[124] 'Despite all the efforts made over the last fifteen years', writes Lord Justice Briggs, the costs of affording a lawyer 'coupled with the risk of liability for a successful opponent's costs, still make the conduct through professional representation... disproportionately expensive and therefore unaffordable'.[125] The use of cost budgeting, while a positive step on from the Woolf reforms, has been unable to keep costs to a reasonable level effectively. Consequently, many cannot afford to have lawyers and are unable to resolve their disputes justly.

There are several problems surrounding cost budgeting. Firstly, there is a fault in the initial filing of the budgets. Zuckerman highlights that when lawyers prepare to

[122] Senior Courts Act 1981 s. 51(1).

[123] Lord Justice Jackson, *Supplemental Review* (n 92) 25.

[124] Lord Justice Briggs (n 14) 51.

[125] ibid.

file their budgets they 'base their estimates on the pre-existing standards of reasonable activity and tend to come up with the number of billable hours they would have expected in the past'.[126] Meanwhile, lawyers on the opposing side, have 'no incentive to challenge the opponent's budget as excessive since it provides them with a justification for filing a similarly heavy budget in response'.[127]

Secondly, there is an issue with the use of proportionality. Proportionality provides a flexible test which seeks to assess costs on what is reasonably incurred during standard litigation practice. Whilst this appears commendable on the surface, Zuckerman highlights that 'the prevailing litigation practice has evolved in response to the economic incentives that reward inefficiency and the greatest possible investment of effort in the proceedings'.[128] Due to this, what courts perceive as reasonably incurred expenses are skewed by attempts at profit maximisation. Unsurprisingly, the use of cost budgeting has failed to achieve a significant reduction in costs, especially considering the many hours that are consumed by cost experts who draw up the budgets. Moreover, since the court has the discretion to deviate from its cost management order, there is no certainty that costs will not increase throughout proceedings.

Another issue with cost budgeting is that reaching the budget stage requires the litigation to have already commenced. Once the budgets have been filed, one of the litigants may assess the liability of paying the other party's budget and discover

[126] Zuckerman, 'The Law's Disgrace' (n 85).

[127] ibid.

[128] ibid.

that this liability is too high a burden. Since the litigation has already commenced, the only way the individual can withdraw is by accepting defeat. Accepting defeat would lead to an adverse judgement against them, where they would have to pay the other party's recoverable costs. By the time a party has realised their potential liability to the opposing side, they have already committed to such an extent that retreating from the proceedings might be 'prohibitively costly and humiliating'.[129] This poses a considerable deterrence for engaging in dispute resolution, as 'persons unwilling to take an unaffordable financial risk will stay away from court, and most of the population is in this position'.[130]

3(e). Further Required Reforms

Further reforms are needed to ensure that dispute resolution is accessible and that lawyers are affordable. Lord Justice Jackson has sought to achieve this by introducing qualified one-way cost shifting, known as 'QOCS'.[131] QOCS orders favour one party but not the other. For instance, if the claimant wins, the defendant may have to pay the claimant's costs, but if the claimant loses, they are not liable for the defendant's costs. QOCS provides a considerable amount of protection against the risks of litigating. To protect it from abuse, it is only available for vulnerable parties in an asymmetric relationship with their opposition, such as indigent litigants claiming

[129] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1450.

[130] Zuckerman, 'The Law's Disgrace' (n 85).

[131] CPR 1998 r. 44.14(1).

against multi-national corporations. QOCS orders are also unavailable for claimants who have misbehaved, possibly by acting fraudulently.

QOCS orders are presently limited to personal injury claims. Lord Justice Jackson has suggested extending the policy to other categories, especially for those where there is an inequality of arms such as defamation cases, or in judicial review. The scope of QOCS, however, remains limited.

In 2020, in *R (On the Application of Leighton) v The Lord Chancellor,*[132] the High Court dismissed the claimant's argument that, in failing to extend QOCS orders to discrimination claims, the Lord Chancellor had acted unlawfully. Leighton claimed that the Lord Chancellor had actively decided not to extend QOCS. The Lord Chancellor, however, contended that consultation to extend QOCS was still ongoing, and that Leighton's claim was mistaken. Evidence for this was found in Part 2 of the Post-LASPO review, which noted that extending QOCS might present harmful consequences by shifting costs back to defendants and causing 'an overall increase in costs and the potential for prolonging rather than settling litigation'. The report concluded that the 'Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further'.[133]

In relying on this evidence, Cavanagh J held that the Lord Chancellor had not yet reached a decision on extending QOCS, and so dismissed Leighton's claim. However, Cavanagh J did not 'exclude the possibility that the time may come... when

[132] *R (On the Application of Leighton) v The Lord Chancellor* [2020] EWHC 336.

[133] David Gauke, *Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (Ministry of Justice, CP 38 February 2019) 37.

inaction on the part of the Defendant might amount to a de facto decision that QOCS should not be extended to discrimination cases'.[134] Extending QOCS, therefore, remains a consideration for future reform, in which a decision is perhaps likely to be made sooner rather than later.

Whilst QOCS may mitigate the problem, it fails to address the fundamental cause of litigation costs.[135] The 'primary cause of the exorbitant cost... is the system whereby lawyers are paid on an hourly basis, without limit and regardless of the value of the subject matter in dispute'.[136] What needs to occur is the decoupling of recoverable and actual costs. Implementing a more extensive regime of fixed costs can achieve this.

The German system is a good example of fixed costs. Germany, like England, uses a cost-shifting principle, but recoverable costs are not open-ended. Costs are instead fixed as a reasonable proportion to the value of the claim, meaning that parties cannot recover more than the fixed amount. Parties can pay their lawyers what they wish. However, because the litigant knows what the fixed amount is, it would be irrational for them to pay their lawyers considerably more than they are likely to receive in costs. If they did, they would be left with a worthless outcome since any money recovered would go towards their lawyers and not themselves.[137] This

[134] *R (On the Application of Leighton) v The Lord Chancellor* [2020] EWHC 336 [65].

[135] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1448.

[136] Adrian Zuckerman, 'Let's Tip the Scales in Lawyer v Client' (1996) 9(413) New Statesman 20.

[137] Zuckerman, 'The Law's Disgrace' (n 85).

system significantly brings down the costs of affording lawyers, allowing people to resolve their disputes justly.

In Lord Justice Jackson's 2010 final report, he recommended implementing fixed costs across the fast track. Fixed costs, however, were only implemented for personal injury accident cases.[138] In light of the failures of cost budgeting, Lord Justice Jackson has renewed his interest, recommending in his 2017 report that the 'time has now come to work on extending [fixed recoverable costs] across those parts of the fast track where costs are still at large and across the lower regions of the multi-track'.[139] Furthermore, he proposes a new intermediate track for claims up to a value of £100,000 which can be tried within three days, with a fixed cost regime applying to this track as well.

Whilst these recommendations are welcomed, caution must be heeded. Attempts to introduce fixed costs at a general level have, for a long time, been unsuccessful. During Lord Woolf's investigation into costs back in the 1990s, he published an inquiry conducted by Zuckerman discussing the possibility of fixed costs.[140] The legal profession presented considerable resistance to this idea. 'The imposition of fixed fees', wrote Lord Woolf, was seen by lawyers as 'unrealistic and as interference with parties' rights to decide how to instruct their own lawyers'.[141] At a seminar given by Lord Justice Jackson before the publication of his final report,

[138] Lord Justice Jackson, *Supplemental Review* (n 92) 79.

[139] ibid 12.

[140] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1449.

[141] Lord Woolf, *Access to Justice: Final Report* (n 102) ch 7 [17]; Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1449.

Zuckerman again proposed the possibility of implementing fixed costs, only to be met with opposition from lawyers.[142] Zuckerman writes that the 'legal profession prevailed and the new budgets system largely preserved the level of income that solicitors and barristers derive from litigation services'.[143]

Given that on each round of reforms, objections to fixed costs from parts of the legal profession have overcome any widespread implementation, caution must be taken to ensure that this does not occur again with Lord Justice Jackson's renewed recommendations. If, like cost budgeting, the fixed limits on recoverable costs merely reflect the pre-existing fees and the protracted nature of the legal practice that currently occurs, then little will change. The costs of litigation will remain prohibitively high. Designing a system that maintains the current fees that lawyers earn would fail to enable individuals to resolve their disputes effectively. As Sime and French highlight, setting 'fixed costs… in a just way remains an extraordinarily difficult project'.[144]

3(f). The Development of Legal Aid

The cost of affording a lawyer remains prohibitively expensive, denying dispute resolution for many. Unless the State introduces fixed costs to decouple the combination of the cost-shifting rule and the incentives to enhance billable hours by

[142] Zuckerman, 'The Law's Disgrace' (n 85).

[143] ibid.

[144] Sime and French (n 5) 8.

protracting litigation, the ability to resolve disputes justly will be unavailable for many. At present, the State has not seriously challenged the power of the private legal profession. Nevertheless, the State still is responsible for facilitating dispute resolution.

If the State cannot provide a legal system where most people can afford to litigate, then facilitating dispute resolution may require the State to pay for an individual's costs of litigation. This may occur through legal aid, which provides financial support for litigants who cannot afford to pay for legal services themselves.

Legal aid either wholly or partially funds an individual's case by paying for their legal fees.[145] In 1945, the Rushcliffe Committee proposed that legal aid should be made available and that there should be a sliding scale of monetary support for litigants dependent upon their financial means.[146] The then Attorney-General Shawcross declared that citizens should have access to courts 'without regard to the question of their wealth or ability to pay'.[147] These proposals led to the Legal Aid and Advice Act 1949, establishing the United Kingdom's first State-funded legal aid system. Around 80% of the population were eligible for legal aid under the Legal Aid and Advice Act 1949,[148] demonstrating that the State enabled most of the population to resolve their disputes effectively.

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[145] Vicky Ling, Simon Pugh, Sue James*, LAG Legal Aid Handbook 2018/19* (Legal Action Group 2018) 5.

[146] Rushcliffe Committee, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (Cmd 6641 May 1945) 23.

[147] HC Deb 15 December 1948, vol 459, col 1221.

[148] John Sorabji, 'Austerity's Effect on English Civil Justice' (2015) 8(4) Erasmus Law Review 159, 163; Lord Justice Jackson, *Final Report* (n 112) ch 7 [3.1].

3(g). The Costs to the State

Providing legal aid, however, incurs costs for the State. These add to the pre-existing costs that the State incurs when providing for the court buildings and judicial wages. As Gravelle notes, '"Justice" as welfare may be priceless but justice as a service is costly'.[149] Providing the legal services needed for individuals to establish, argue, and enforce their civil rights has an opportunity cost; there are simply not enough resources 'to supply everyone's desires and necessities'.[150]

Some argue that the benefits of facilitating dispute resolution must be weighed against the benefits forgone that could be spent on other things, such as the NHS and education.[151] However, to perceive the legal system as a branch of the State's social welfare provisions is problematic. Social welfare may be a sign of a civilised society, but it is not a fundamental role of the State.[152] As chapter 2 has argued, the State has a fundamental duty to facilitate dispute resolution. While the NHS and education are often afforded greater attention in the public eye, facilitating dispute resolution is central to the purpose of the State. Although it may be difficult for the government to facilitate dispute resolution for everyone, it is nonetheless a goal that the State should aim for because it sets a marker with which people can use to evaluate how effectively the State is performing its fundamental obligations. As

[149] Hugh Gravelle, 'Regulating the Market for Civil Justice' in Adrian Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure* (OUP 1995) 280.

[150] David Hume, *A Treatise of Human Nature* Chapter 3.2.2 (first published 1739)

[151] Adrian Zuckerman, 'A Reform of Civil Procedure – Rationing Procedure rather than Access to Justice' (1995) 22 Journal of Law and Society 155.

[152] John Sorabji, *English Civil Justice After the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press 2014) 140.

Caplen writes, 'Whatever the financial situation, whatever its ideology, whether it likes it or not, the provision of access to justice is ultimately the responsibility of government'.[153]

[153] Caplen (n 1) 24.

4. Neoliberalism and the State

4(a). Political Rationality

Although the State has a fundamental duty to facilitate dispute resolution for those unable to afford it themselves, the issue of the State's costs has played an enormous role in shaping the policy and political ideology of successive British governments. Though, before analysing what the current political ideology is, it is necessary to explore why the State needs an ideology in the first place.

The State needs an ideology to govern successfully. The modern State is a complex network of institutions, organisations, departments, and other forms of apparatus.[154] The vast apparatus that makes up the State is held together and maintained by a government.[155] The government is made up of a group of members and is not solely dependent upon one figure.[156] A group is needed because, as Schattschneider puts it, 'nobody knows enough to run the government'.[157] Instead, public officials specialise in specific areas or departments within the government and the State's broader machinery. In specialising, they become experts in their field. However, due to the opportunity cost of acquiring knowledge, becoming an expert in one area foregoes knowledge in other areas.[158] This specialisation can create

[154] Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43(2) The British Journal of Sociology 173, 176.

[155] Christine Buci-Glucksmann, *Gramsci and the State* (Lawrence and Wishart 1980) 69.

[156] Compare to Niccolo Machiavelli, *The Prince* (first published 1532, Penguin Classics 2003).

[157] Elmer Eric Schattschneider, *The Semisovereign People* (Holt, Rinehart, and Winston 1960) 136.

[158] ibid 136-7.

defragmentation within the State, as each department and public official undertakes tasks without any sense of unified cohesion.

To organise and maintain this complex network, the executive requires a political rationality to keep the State together. A political rationality is a normative form of reasoning or ideology. It encompasses the values, norms, and goals which tie people together and keeps the State stable. Having a political ideology is necessary because it is both 'anterior to political action and a condition of it'.[159] A shared ideology is a reason why people form a political party in the first place. For instance, nations elect a party because voters believe in the ideals and values that that party holds. Having a political rationality is instrumental in enabling an elected party to form a government and control the State.

Since Thatcherism, the political rationality that has been central to every successive British government has been neoliberalism. Peck highlights that many perceive neoliberalism as having no fixed definition, but instead as a 'differentiated' phenomenon.[160] This perception is because the ideology transcends political lines. Both the politically leaning right, such as Thatcherism,[161] and the political left, through New Labour, have implemented neoliberal policies.[162]

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[159] Mitchell Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (Routledge 1994) 181.

[160] Peck (n 11); Clarke (n 11).

[161] Hoon Jaung, 'The rise of neo-liberal revolution in Britain: Thatcherism in the British conservative party' (2001) 30 Global Economic Review 57.

[162] Filippo Belloc and Antonio Nicita, 'Neo-liberalism, Partisanship, and Public Policies' (2012) 49(5) Society 444, 449.

Nevertheless, at the heart of neoliberalism lies the idea that 'political-economic governance [should be] premised on the extension of market relationships'.[163] This extension of market relationships, or 'marketisation', occurs through the idea of 'governance'. Governance refers to how governments operate, referred to as its 'processes of rule'.[164] Governance evaluates the State's processes of rule to find a 'reasoned way of governing best'.[165] Neoliberalism advocates that the best way to govern is through three primary methods - the devolution of authority, the redefinition of State responsibilities, and management through 'best practice'.[166]

Devolution of authority means to transfer the regulation of society away from centralised government. Redefining State responsibilities does not seek to gain obligations for the State but instead, reduce them. The term 'best practice' refers to a management style that endeavours to run the government like a business. By running the government in this way, the use of 'best practice' ignores all 'nonmarket values and aims'[167] which cannot be quantified easily in monetary terms. Through these methods, neoliberal governance focuses on its costs and savings through devolving certain responsibilities.

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[163] Wendy Larner, 'Neo-Liberalism: Policy, Ideology, Governmentality' (2000) 63 Studies in Political Economy 5.

[164] Thomas Lemke, 'An Indigestible Meal? Foucault, Governmentality, and State Theory' (2007) 8(2) Scandinavian Journal of Social Theory 43.

[165] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-79* (Michel Senellart ed, Graham Burchell tr, Picador 2004) 2.

[166] Brown, *Undoing the Demos* (n 11) 124.

[167] ibid 141.

4(b). Neoliberalism and Austerity

The 2008 financial crash has heightened the issue of the State's costs within public policy.[168] To mitigate economic problems after the crash, governments around the world financially supported many international banks to prevent collapse. Supporting financial institutions led to large deficits in fiscal spending and placed governments in significant debt to finance this deficit.[169] In the 2013 Lord Mayor's Banquet Speech, David Cameron declared that the British State's main objective is to pull Britain out of recession and reduce national sovereign debt.[170] To do this, the British government has employed neoliberal policies to build 'a leaner, more efficient state', not 'just now, but permanently'.[171]

The central neoliberal policy that successive British governments have employed since the 2008 crash has been austerity. Austerity is a form of voluntary economic deflation of prices and domestic wages by cutting public spending.[172] It aims to reduce the public spending deficit to meet the nation's sovereign debt obligations.[173]

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[168] Jonathan Joseph, 'Resilience as embedded neoliberalism: A governmentality approach' (2013) 1(1) International Policies, Practices and Discourses 38.

[169] John McHale, 'Why Austerity' in Emma Heffernan, John McHale, and Niamh Moore-Cherry (eds), *Debating Austerity in Ireland: Crisis, Experience and Recovery* (Royal Irish Academy 2017) 43.

[170] David Cameron, 'Lord Mayor's Banquet Speech 2013: Prime Minister's Speech ' (11th November 2013) Available at https://www.gov.uk/government/speeches/lord-mayors-banquet-2013-prime-ministers-speech.

[171] ibid.

[172] Blyth, *Austerity* (n 11) 2.

[173] Sorabji, 'Austerity's Effect on English Civil Justice' (n 148).

Reducing government spending, however, can damage the economy and lead to further recession. To offset this, austerity policies rely upon private investment to maintain economic growth. Reducing budget deficits by cutting public spending aims to stabilise the economy. A stable economy establishes confidence in private investors, encouraging the private sector to invest and stimulate economic growth.

4(c). Devolving the State's Duty to Facilitate Dispute Resolution

The result of austerity is that the State plays less of an active role in society, allowing for private entities to fill the gap. One area where the State has reduced its role is in its obligation to facilitate dispute resolution. While the State maintains the legal system, it has nevertheless devolved significant functions and processes of dispute resolution onto charities, volunteers, and private dispute fora. In doing so, this decentralisation transforms and reconceives the role of the State.

Neoliberalism has transformed the role of the State through the process of 'nondecision-making'. A nondecision is a political process whereby specific issues are either excluded from the decision-making arenas or are simply not recognised by the decision-makers. The decision-maker redraws the lines of what constitutes a relevant political issue and what does not. Decision-makers use nondecisions to exclude or camouflage issues which would undermine their authority if they came to light. In doing so, they refine the 'scope of decision-making to relatively "safe" issues'.[174]

[174] Peter Bacharach and Morton S. Baratz, *Power and Poverty: Theory and Practice* (OUP 1970) 6.

Excluding issues from the political debate allows decision-makers to suppress a 'manifest challenge to the values or interests of the decision-maker'.[175] By deciding what constitutes a relevant political issue, decision-makers can decide what the State is responsible for and what it is not. This helps insulate them from criticism. After all, people cannot criticise decision-makers for failing to do that which they were not responsible for. Through refining the scope of responsibility, decision-makers can place the responsibility elsewhere. Nondecisions can therefore change not just the State's responsibilities but also the responsibilities of others.

In practice, the State, or rather the government in control of the State, exercises nondecisions by employing specific 'strategies, techniques, and procedures' known as the 'technologies of government'.[176] Through this, governments can implement their neoliberal ideology and exclude particular issues from the political sphere. Thaler and Sunstein highlight that neoliberal policymakers prefer to 'nudge' people into making decisions rather than mandating specific behaviour.[177] Nudging others to take up functions and processes of dispute resolution subtly limits the State's role in society.

[175] ibid 39.

[176] Peter Miller and Nikolas Rose, 'Political Rationalities and Technologies of Government', in Sakari Hanninen and Kari Palonen (eds), *Texts, Contexts, Concepts: Studies on Politics and Power in Language* (Finish Political Science Association 1990).

[177] Richard Thaler and Cass Sunstein, *Nudge: Improving decisions about health, wealth and happiness* (Penguin Publishers 2009).

Neoliberalism seeks to transfer responsibility from the political sphere onto 'various arm's-length agencies, private interests, and voluntary bodies'.[178] This shift occurs through the technique known as 'responsibilisation', which reconfigures roles within society by instilling a sense of moral agency on private interest groups or individuals.[179] Through this technique, individuals 'assume responsibility for states of affairs for which they are not responsible'.[180]

To achieve this shift in responsibility, the State reduces its role in performing a duty, allowing others to take up the mantle. McNay highlights that the removal of the State often presents an 'apparent increase in individual autonomy' and allows for greater private entrepreneurship which 'instil[s] in the individual a seemingly paradoxical "compulsion to responsibility"'.[181] By assuming responsibility for a particular state of affairs, individuals alleviate the State from performing its duties. In doing so, the performance of the responsibility shifts from the political sphere to the social domain. This form of governance creates the appearance that the responsibility has been depoliticised, disarming any potential critique that people could level at the State.

Peters highlights that the State has managed to 'begin the process of writing itself out of its traditional responsibilities... through twin strategies of a greater

[178] Danny MacKinnon, 'Reinventing the State: Neoliberalism, State Transformation, and Economic Governance', in Trevor J. Barnes, Jamie Peck, Eric Sheppard (eds) *The Wiley-Blackwell Companion to Economic Geography* (Wiley-Blackwell 2012) 346.

[179] Ronen Shamir, 'The Age of Responsibilization: On Market-Embedded Morality' (2008) 37(1) Economy and Society 1.

[180] McNay (n 17) 65.

[181] ibid.

individualisation of society and the responsibilisation of individuals and families'. This has been achieved 'by contracting-out state services',[182] which reduces the individual's dependence on the State.

The next three chapters explore three ways in which the State has started to shift its responsibility for facilitating dispute resolution onto others. Firstly, the neoliberal State has reduced its involvement in the legal system by decreasing the availability of legal aid through the justification of austerity. Because this factor has significantly impacted society, this thesis will focus mainly on this method. Secondly, in conjunction with the removal of legal aid, the State has favoured an increase in voluntary work within the public legal system. Thirdly, the State has implemented policies and measures which emphasise private dispute resolution over the public legal system. By devolving certain processes of dispute resolution, the State is undermining one of its fundamental duties and reducing the ability of citizens to resolve their disputes justly.

[182] Peters (n 17) 59.

5. The First Method – Reducing Legal Aid

5(a). The Legal Aid, Sentencing and Punishment of Offenders Act 2012

The first way the State has sought to reduce its costs and redefine its responsibilities has been by reducing the scope and eligibility of legal aid. Many within the State's apparatus have long-since argued that the legal aid system requires reform. Sir Sedley writes that the Treasury disliked the Legal Aid and Advice Act 1949 from the start. 'All it could ever see', he states, was 'an annual haemorrhage of public money; the return on it – public justice – didn't show up in the state's accounts'.[183] In 2005 the legal aid budget had a reported overspend of £190 million.[184] Over the past few decades, considerable reform has taken place over concerns about its sustainability in light of rising demand for legal aid and increasing litigation costs. The Access to Justice Act 1999 removed legal aid for most personal injury cases in favour of conditional fee agreements.[185] Despite this, the legal aid budget increased from approximately £1.5 billion each year during the 1990s to around £2 billion by 2013.[186]

The financial crisis provided further drive for reform and allowed the coalition government to curb spending. In 2010, the Ministry of Justice declared that 'Legal aid must also play its part in fulfilling the Government's commitment to reducing the fiscal

[183] Sir Stephen Sedley, 'Foreword', in Ellie Palmer and others (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016) vii.

[184] Steve Hynes, *Austerity Justice* (Legal Action Group 2012) 60.

[185] Richard Lewis, 'Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?' (2011) 74(2) Modern Law Review 272, 274.

[186] Chris Grayling, *Transforming Legal Aid: Next Steps* (Ministry of Justice Consultation Paper September-November 2013) 5.

deficit and returning this country's economy to stability and growth'.[187] The government sought to rectify the problem that the legal system was too 'expensive, slow and [one] which can tend to worsen disagreements'.[188] Kenneth Clarke, the then Lord Chancellor, and other ministers held to the narrative that 'fat-cat lawyers' had demanded extortionate payments and inflated the legal aid budget. This idea was enforced by the media's stereotypes around legal aid lawyers, even though Hynes points out that legal aid pay had been either static or already falling.[189]

Plans to reduce public spending on legal aid culminated in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. LASPO repealed the Access to Justice Act 1999 and replaced the Legal Services Commission with the Legal Aid Agency as the new legal aid regulator.

Part 1 of LASPO governs civil legal aid. Under section 8, the parameters of legal aid include providing advice as to how the law applies in various circumstances, and providing advice and assistance concerning legal proceedings, the prevention or resolution of disputes, and the enforcement of resolved decisions.[190] Advice and assistance involve both legal representation in a court or other dispute resolution fora.

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[187] Kenneth Clarke, *Proposals for the Reform of Legal Aid in England and Wales* (Ministry of Justice Cm 7967 November 2010) 15.

[188] Kenneth Clarke, *Ministry of Justice Annual Report and Accounts 2010–11* (HC 986 15th September 2011) 3 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217243/moj-annual-report-accounts-2010-11.pdf.

[189] Hynes (n 184) 84.

[190] LASPO 2012 s. 8(1)(b).

Section 9 states that civil legal aid is only available for areas of law within the scope of Schedule 1. Schedule 1 has significantly restricted the scope for civil legal aid. Employment law has been removed from the ambit of legal aid. Except for instances where an individual is at risk of losing their home, LASPO has removed debt from the reach of legal aid. Legal aid has been significantly removed for non-asylum immigration cases and is now limited to issues regarding detention, applications for indefinite leave to enter or remain, human trafficking, and judicial review in only certain circumstances.[191] Within family law, LASPO has restricted legal aid to instances of forced marriage and domestic violence, or where child representation is required.[192]

Qualifying for civil legal aid requires litigants to satisfy the merits and financial criteria under section 11 and 21.[193] Section 21 assesses financial eligibility based on three criteria – the individual must be below the threshold for capital, gross income, and disposable income.[194] The merits test differs depending on the nature of the legal case, and the type of service and funding sought. Regarding the criteria for deciding the merits of a claim, the Lord Chancellor must consider both the circumstances where it is appropriate to make civil legal services available and the extent to which the criteria should reflect the factors in subsection 3.[195] These factors include a cost-

[191] The Modern Slavery Act 2015 extended legal aid for slavery and human trafficking.

[192] Lucy Green and James Sandbach, *Justice in Freefall: A report on the decline of civil legal aid in England and Wales* (Legal Action Group Special Report January 2017) 2.

[193] LASPO 2012 s. 11(1).

[194] Regulations cover these in greater detail, see Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013; Civil Legal Aid (Merits Criteria) Regulations 2013.

[195] LASPO 2012 s. 11(2).

benefit analysis of providing the services, the availability of State resources to provide the services, the opportunity cost of applying these resources given present and future demands on the civil legal system, the individual's prospect of success, the individual's conduct, and any relevant public interest.[196]

LASPO also regulates criminal legal aid. Under section 13, an individual in custody can obtain legal aid. Per section 17, the individual must also satisfy the financial means test under section 21. The individual's case must also accord with the interests of justice described under section 17(2). Interests of justice include whether the individual may lose their liberty, livelihood, or suffer serious damage to their reputation. Other factors include whether the criminal issue involves a substantial question of law, or whether the individual may be unable to understand the proceedings or to state his or her case. Questions of whether proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual are also considered. Lastly, interests of justice may include whether it is in the interests of another person that the individual has representation.

5(b). The Effect of LASPO

The effect of legal aid reform has been to reduce its availability drastically. The financial and merit test thresholds have restricted the eligibility criteria significantly. While reforms in the 1990s reduced the number of people eligible for legal aid, LASPO has furthered this trend. In 2014, a year after LASPOs implementation, the National

[196] LASPO s. 11(3).

Audit Office found that the number of individuals receiving legal aid fell by just under half due to LASPO.[197] Particularly striking is the 80% drop in the number of social welfare cases by 2014.[198] By 2016 only 25% of people were eligible for legal aid,[199] significantly fewer than under the Legal Aid and Advice Act. Within the magistrate's court, legal aid grants decreased by 45% from 431,000 to 236,000 between 2010-11 and 2017-18.[200] Non-asylum immigration cases fell by 85% between 2013 and 2018,[201] forcing many immigration and asylum legal aid providers out of the market. The result of LASPO has been to cut legal aid to such an extent that significant sections of the public lack access to legal services and representation.

Litigation costs have become so high that very few people in society can afford to litigate without legal aid.[202] The tighter restrictions for eligibility have reduced the number of people who qualify for legal aid. Many people are not rich enough to afford to litigate but are not poor enough to qualify for the State's strict financial test for legal aid. This demographic is known as the 'missing middle', people who fund the legal system through taxation but cannot afford to use it themselves.[203] This is the

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[197] Sir Amyas Morse, *Implementing Reforms to Civil Legal Aid* (National Audit Office HC 784, Session 2014-15, 20 November 2014) 4.

[198] Ling (n 145) 26.

[199] Chris Smith, *Legal Aid and Advice Act 1949: 70th Anniversary* (House of Lords Briefing Report, 23 July 2019) 4 Available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2019-0099#fullreport.

[200] David Gauke, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (Ministry of Justice, CP 37 February 2019) [55].

[201] ibid 31.

[202] Zuckerman, 'The Law's Disgrace' (n 85).

[203] Robin Knowles and others, *Access to Justice for Litigants in Person* (Civil Justice Council November 2011) [14] Available at https://www.judiciary.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf.

majority of people, and these people are largely unable to resolve their disputes justly before a court due to lack of affordable access to lawyers. Legal aid cuts are only widening the scope of people residing in the missing middle.

The Justice Committee has found that, despite the budget cuts, there is an 'underspend in the civil legal aid budget because the Ministry has not ensured that many people who are eligible for legal aid [can] access it'.[204] Immediately after the Act came into effect in 2013, spending on civil legal aid was 17% less than expected.[205]

The underspend has partly resulted from the fact that there is a dearth of legal aid providers. This means that those who qualify for legal aid cannot find anyone to take up their case. The Law Society's research found that 184 out of the 348 local authorities in England and Wales have no housing legal aid providers.[206] Their research revealed that there was only one housing legal aid provider for the whole of Cornwall. While many may qualify for legal aid, they may not be able to afford to travel to the closest legal aid provider, rendering their eligibility redundant.

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[204] House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Eighth Report of Session 2014–15)* (HC 311, 4th March 2015) 3 Available at https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf.

[205] Morse (n 197) 4.

[206] Mondipa Fouzder, 'Society exposes 'catastrophic' housing advice deserts' (Law Gazette, 5th April 2019) Available at https://www.lawgazette.co.uk/practice/society-exposes-catastrophic-housing-advice-deserts/5070051.article.

5(c). The Consequences to Litigants

The first and most obvious consequence of being without legal aid is that the litigant must bear the full burden of their legal costs. Since many cannot afford these costs, they will not pursue their claims or defences at all.[207] Litigants who do decide to pay for legal services despite lacking support from the government face significant financial deprivation. The Equality and Human Rights Commission reports that some litigants surveyed 'were unable to afford food, adequate housing or other essentials' because they had to spend their income on litigation.[208] Unless the party obtains third-party litigation funding, a process whereby a third party foots the bill in return for a proportionate share if the party wins, the litigant may struggle to pay the costs of litigation.

Litigants without legal aid also risk falling victim to the costs war surrounding recoverable costs and the cost-shifting rule. Section 26 LASPO provides that litigants supported by legal aid are not required to pay costs to the winning party beyond what is proportionate and reasonable for them to pay, having regard to the financial resources of all involved and their conduct during the dispute. Part 3 of the Civil Legal Aid (Costs) Regulations 2013 details the procedure for determining these costs. While this does not absolve publicly funded litigants of the cost-shifting principle completely, it does mitigate their risk. Zuckerman asserts that, in practice, because 'funded litigants are poor, it would be rare for the court to order the funded client to

[207] Higgins (n 89) 693.

[208] Organ and Sigafoos (n 77).

pay even a small proportion of the successful party's costs'.[209] Reducing the eligibility of legal aid removes many from this vital protection.

In 1994, Lord Woolf described the existing barriers to courtrooms as 'deplorable'.[210] In light of the restrictions introduced by LASPO, this 'deplorable' situation has only grown worse. In *Coventry v Lawrence (No. 3),* Lord Dyson and Lord Neuberger declared that 'in the absence of a widely accessible civil legal aid system (which had ceased to exist by 1999), it is impossible… [to promote] access to justice for all litigants'.[211] The fact that many do not have this access demonstrates how the State is struggling to fulfil its duty to facilitate dispute resolution.

The lack of legal aid funding has also increased the number of litigants in person.[212] As mentioned in chapter 2(c), a litigant in person is an individual in court who lacks legal representation.[213] CPR 2.3(1) defines a legal representative to include, *inter alia*, a barrister, solicitor, or person who is authorised to an activity within the conduct of litigation per the Legal Services Act 2007.

Chapter 2(c) discussed how self-representation was often detrimental to the individual's case. However, it did not discuss how marginalised individuals are more likely to become litigants in person. Support Through Court's study reveals that 24%

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[209] Zuckerman, *Zuckerman on Civil Procedure* (n 5) 1444.

[210] Lord Woolf, 'Bentham Club Presidential Address' (n 101) 345.

[211] *Coventry v Lawrence (No 3)* [2015] UKSC 50 [72].

[212] Gabrielle Grimwood, *Litigants in Person: The Rise of the Self-Represented Litigant in Civil and Family Cases* (HC Briefing Papers 07113, House of Commons Library 2016) available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113#fullreport.

[213] CPR 1998 r. 46.3.

of the litigants in person surveyed did not speak English as their first language.[214] The 2019 LASPO Post-Implementation report submitted that 73% of the Support Through Court's clients at the Royal Court of Justice were from an ethnic minority background.[215] The Low Commission stated that they 'repeatedly heard concerns' of the 'particular impacts on black and minority ethnic communities as a result of the loss of immigration advice from legal aid'.[216]

Not only do legal aid cuts disproportionately impact ethnic minorities, but it also disproportionately impacts women. Women are statistically less likely to be as financially secure as men,[217] and are therefore more likely to require legal aid than men. The Low Commission states that changes introduced around family law mean that women suffering from relationship breakdown may 'find that all their needs for legal advice are outside the scope of legal aid because of the reduction in the scope of housing cases'.[218] It seems that both women and ethnic minority members face greater risks of being unable to resolve disputes than other demographics.

[214] Charlotte Rooke, *Legal language and its impact on Litigants in Person* (Personal Support Unit March 2018).

[215] Gauke, *Post-Implementation Review of Part 1* (n 200) 38.

[216] Low Commission, *Tackling the Advice Deficit: A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales* (Low Commission, LAG 2014) 15 Available at https://www.lag.org.uk/article/202491/low-commission-reports-on-the-future-of-advice-and-legal-support.

[217] Diana Pearce, 'The Feminization of Poverty: Women, Work, and Welfare' (1978) 11 Urban and Social Change Review 28-36; Kimberly Richman, 'Women, Poverty, and Domestic Violence: Perceptions of Court and Legal Aid Effectiveness' (2002) 72(2) Sociological Enquiry 318, 322.

[218] Low Commission, *Tackling the Advice Deficit* (n 216) 15.

The increasing number of litigants in person also has negative consequences to the opposing party. *Re K and H,*[219] a family law case, raised concerns over whether the alleged perpetrator should be allowed to cross-examine his victim given that he did not qualify for legal aid and was a litigant in person, and whether he should be provided legal aid to prevent him from conducting the cross-examination. Forcing victims to be cross-examined by their alleged perpetrator can cause severe distress for the victim. In *Re A*, Mr Justice Hayden criticised allowing alleged perpetrators to cross-examine their victims, stating that it is 'a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross-examined by an alleged perpetrator'.[220] The Domestic Abuse Bill 2020, however, seeks to address this issue by prohibiting alleged perpetrators from cross-examining their victims in person.[221] Nonetheless, the cuts to legal aid currently have graver consequences on civil procedure beyond merely gaining access to the courts; it can be detrimental not just for the party seeking the legal aid but also for the other side.

The increasing number of litigants in person is also changing the way courts operate. Returning to *Re K and H*, the Court of Appeal recognised that the first instance judge could have cross-examined the witness instead of the perpetrator. Judicial cross-examination is, however, problematic. Ryder LJ states that when a court is 'faced with litigants in person the judge has to [guide the individual] while

[219] *Re K and H (Children)* [2015] EWCA Civ 543.

[220] *Re A (a minor) (fact-finding; unrepresented party)* [2017] EWHC 1195 [60].

[221] Domestic Abuse Bill 2020, see https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet.

maintaining both the reality and perception of fairness and due process'.[222] This can be a difficult task for judges. Tugendhat J in *Mole v Hunter* explained that in the absence of legal representatives, judges have to adopt an essentially investigative approach.[223] To decide *Mole v Hunter*, Tugendhat J not only devoted 'a disproportionate amount of the resources of the court' but also 'had to deploy experience gained from practice at the Bar in this field of the law'.[224] Zuckerman highlights that 'A judge who becomes actively involved in the process of presenting and testing evidence and argument is bound to be seen as favouring one party over the other'.[225] This potential for bias undermines the legitimacy of the legal system, as judicial impartiality is needed for people to trust the courts and the law.

Moreover, an investigative approach without lawyers takes an increasing amount of time. This is because judges must explain to the parties how to comply with the legal procedure.[226] The issue of prolonging the resolution of a dispute may mean that parties may not have access to timely remedies. In these instances, 'justice delayed is justice denied'.[227] The issue of time and potential bias supports Assy's claim

[222] *C (a child)* [2013] EWCA Civ 1412 [40].

[223] *Mole v Hunter* [2014] EWHC 658 [107]-[119].

[224] ibid [118].

[225] Adrian Zuckerman, 'No Justice Without Lawyers – The Myth of an Inquisitorial Solution' (2014) 33(4) Civil Justice Quarterly 355, 360.

[226] *C (a child)* [2013] EWCA Civ 1412 [40].

[227] Adrian Zuckerman, 'Quality and Economy in Civil Procedure' (n 9).

that the 'high numbers of [litigants in person] and their lack of legal knowledge pose a serious challenge to the effective and efficient administration of justice'.[228]

5(d). Litigants Challenging Austerity Measures through Human Rights Law

Some litigants have argued that the State's restrictions on legal aid infringe on their right to a fair trial under article 6 of the European Convention of Human Rights, brought into domestic law through the Human Rights Act 1998.[229]

Airey v Ireland provides that the right to a fair trial under article 6 requires a right to access a court, which may require legal aid.[230] Legal aid is an implicit right under article 6 but it is not absolute.[231] Since *Airey,* courts have kept a 'tight rein on the right to legal aid'.[232] *Steel and Morris v United Kingdom*[233] provides that the right to a fair trial under article 6 does not generally require the provision of public funding for legal representation in civil proceedings unless it is necessary. The court in *Steel and Morris* held that Article 6(1) leaves the State free to choose the means used to guarantee the litigant's right to a fair trial. Implementing legal aid schemes

[228] Assy (n 69) 1.

[229] Legal aid is also expressly granted as a qualified right under article 47(3) of the European Union Charter of Fundamental Rights 2000. Article 47(3) provides that legal aid shall be available to those lacking resources only in so far as it is necessary to ensure effective access to justice.

[230] *Airey v Ireland* [1979] ECHR 3.

[231] *Ashingdane v The United Kingdom* [1985] 7 EHRR 528.

[232] Simon Rice, 'Reasoning a Human Right to Legal Aid' in Asher Flynn and Jacqueline Hodgson (eds) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing 2017) 204.

[233] *Steel and Morris v United Kingdom* [2005] 41 EHRR 22.

'constitutes one of those means but there are others, such as simplifying the applicable procedure'.[234]

The European Court of Human Rights held in *Steel and Morris* that 'it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party'. Instead, it is enough that 'each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary'.[235]

Some have raised concerns about how fair the 'reasonable opportunity' approach is. Equal resources and the equality of arms should be of paramount importance if society is to provide a fair legal system.[236] Because an individual with fewer resources than their opponent is likely to be disadvantaged, Scanlon asserts that the State should be 'obligated to provide the representation for poor litigants that is as good as whatever the rich can provide for themselves'.[237] Without it, the legal system may not be able to achieve equal justice.

Nevertheless, courts often hold that the restrictions on legal aid comply with human rights law. The means test set out by section 21 LASPO is compatible with Convention rights provided its restrictions 'pursue a legitimate aim and are

[234] ibid [60].

[235] ibid [62].

[236] Wilmot-Smith (n 9).

[237] Thomas M. Scanlon, 'Equality of opportunity: A Normative Anatomy' Third Uehiro Lecture (University of Oxford 2013) 23.

proportionate'.[238] Since State resources are scarce, courts have deemed it legitimate for States to restrict civil legal aid, provided that the limitations are not arbitrary.[239]

To prevent legal aid restrictions from breaching human rights law, LASPO provides legal aid funding for 'exceptional cases' under section 10(3). The criteria for an 'exceptional case' will be satisfied if failure to provide legal aid breaches the Convention or the individual's European Union rights.[240] The provision of legal aid, however, must only be given if it is 'appropriate… in the particular circumstances of the case'.[241]

Although 'the Government consider[s] that the exceptional funding scheme is working effectively',[242] individuals have successfully challenged the scheme's restrictive approach. In *Gudanaviciene*,[243] litigants argued that the guidance issued over section 10(3) LASPO by the Lord Chancellor, which had denied them legal aid in immigration law, was too restrictive. The guidance stated that section 10(3)(b) does not 'provide a general power to fund cases which fall outside the scope of legal aid'. Instead, exceptional funding is only 'to be used for rare cases' where the risk of breaching human rights 'is such that it is appropriate to fund' the case. With regards to article 6 ECHR, the guidance stated that the test is whether withholding legal aid

[238] *Steel and Morris v United Kingdom* [2005] 41 EHRR 22, 62.

[239] Winer v United Kingdom, App no. 10871/84 (ECtHR, 10 July 1986).

[240] LASPO 2012 s. 10(3).

[241] ibid s. 10(3)(b).

[242] HC Deb, *11th February 2014* Vol 752, col 529.

[243] *R (Gudanaviciene) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622.

will make bringing the claim 'practically impossible or lead to an obvious unfairness in the proceedings'. Collins J held that this guidance test was defective since it sets the threshold too high for legal aid applications.[244] The court held that the idea that exceptional funding is permittable only in rare cases did not follow ECHR jurisprudence, declaring that the Lord Chancellor's guidance prevented adequate access to resolving disputes.

Since *Gudanaviciene,* the number of successful applications for exceptional funding has grown exponentially. Between April 2013 and March 2014, the court only granted legal aid to nine exceptional cases.[245] Between January 2018 and March 2018 there were 746 applications alone, of which 59% of claims were successful.[246] This increase reveals how restrictive the scope around exceptional cases originally was in 2013 and how tight the law surrounding legal aid would have remained had there not been a legal challenge. *Gudanaviciene* serves to demonstrate how the State has perhaps overlooked human rights in its pursuit of cutting its costs.

Considering all this, human rights challenges to the State's cuts to legal aid have had mixed results. The right to legal aid is implicit under article 6 ECHR and is expressly stated under article 47(3) EUFCR. Case law has demonstrated, however, that

[244] ibid [51].

[245] Ministry of Justice, *Legal Aid Statistics in England and Wales, Legal Aid Agency, 2013-2014*, (24th June 2014) 27 Fig. 22 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf.

[246] Ministry of Justice, *Legal Aid Statistics Quarterly, England and Wales, January to March 2018* (ONS 28th June 2018) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720647/legal-aid-statistics-bulletin-jan-mar-2018.pdf.

these rights are limited in their application. Courts have tightly controlled the implicit right to legal aid since *Airey* to give effect to the proportionate and legitimate aims of the State's need for fiscal responsibility. Significant progress is needed to establish an effective 'human right to legal aid'.[247]

5(e). The Consequences to Legal Aid Lawyers

LASPO has also caused problems for lawyers who work within legal aid. As there are fewer people who qualify for legal aid there is less work available for legal aid lawyers. This is problematic for upcoming barristers who may be too inexperienced to be given anything other than legal aid cases by their firms.

Not only is there less work available, but fees have also been cut. Before the introduction of LASPO, the hourly rates and standard fees were regulated by the Community Legal Service (Funding) Order 2007. Now, lawyer fees are controlled and set by the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013. The new regulations have reduced civil legal aid fees in all areas except family mediation by 10%.[248] While this intended to cut the State's costs, it also had the goal of motivating lawyers to be more efficient and innovative. It would seem, however, that this goal has not materialised. Pay rates in some areas of law, such as education, have become so low that unless a third party such as a charity provides financial backing or the lawyer supplements their work with private practice, the work will be financially

[247] Rice (n 232) 195.

[248] Gauke, *Post-Implementation Review of Part 1* (n 200) 174.

impossible for the lawyers to take up. The number of civil legal aid providers has diminished by 32% overall.[249] Instead of innovating, people have sought work elsewhere instead.

The Post-Implementation review highlights that reductions in lawyer fees for legal aid mean that the 'legal profession is no longer attracting the next generation of legal aid lawyers'.[250] Low remuneration coupled with high levels of student debt establish barriers to entry for the next generation.[251] In a 2013 survey, Young Legal Aid Lawyers found that 50% of junior legal aid lawyers earned under £20,000 per annum, despite 67% of them incurring a debt of over £15,000.[252]

Within criminal law, lawyers preparing the defence of those prosecuted by the State are paid under the Litigators' Graduated Fees Scheme. The Litigators' Graduated Fees Scheme operates a fixed fee regardless of the number of hours spent on a case. Since the introduction of LASPO, there has been an 8.75% reduction in fees for legal aid cases under this scheme. The reduced fees significantly increase the probability of suffering stress and anxiety for lawyers.[253] The Post-LASPO review asserts that providers are now turning to other careers or employers.[254]

[249] ibid 11.

[250] Gauke, *Post-Implementation Review of Part 1* (n 200) 11.

[251] Young Legal Aid Lawyers, *Social Mobility & Diversity in the Legal Aid Sector: One Step Forward, Two Steps Back* (October 2013).

[252] ibid 34.

[253] ibid 12.

[254] ibid.

The reduction in financial rewards for legal aid lawyers potentially impacts their quality of service to their client. Reducing pay diminishes the incentives to work as hard, which likely negatively affects the quality of service that lawyers provide their clients. The reduction in quality means that individuals are more likely to receive an unjust result. Newman's study into criminal legal aid lawyers,[255] one of the most extensive pieces of ethnographic research in this area since McConville's in 1994[256] and Travers' in 1997,[257] demonstrates this reduction in quality.

Newman interviewed legal aid lawyers and studied their relationship with their clients. He found that legal aid lawyers were often more likely to encourage their clients to plead guilty rather than spend more time striving for a better outcome. Lawyers did so because establishing a better outcome involves more work for the lawyer, work which would not be financially viable for them. This occurred so strongly in some instances that one lawyer declared that he wished he 'didn't have to take [his client] to trial tomorrow. Maybe I'll get him to crack in the morning'.[258] The disincentives that austerity cuts have for lawyers mean that the quality of service they provide their clients is likely to be substandard, despite the individual's need for a lawyer to help justly resolve their disputes.

[255] Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013).

[256] Mike McConville and others, *Standing Accused* (OUP 1994).

[257] Max Travers, *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* (Ashgate 1997).

[258] Newman (n 255) 48.

5(f). Legal Aid Lawyers Challenging Austerity Measures

Due to the problems that legal aid lawyers face, legal aid lawyers have brought challenges against the reduction in legal aid payments. In 2014, legal aid lawyers protested the government's austerity policies by going on strike.[259] In 2018, 100 barrister chambers in England and Wales refused to take on any more criminal legal aid cases.[260]

Criminal legal aid lawyers have also challenged the State's cuts to their paid fees under the Litigators' Graduated Fee Scheme. One factor that determines the fixed fees under this scheme is the number of pages submitted as prosecuted evidence, known as 'PPE'. In *R v Napper,*[261] the court lifted restrictions on what constituted PPE and allowed lawyers to submit electronic documents as PPE. Due to the ease in which electronic documents can be submitted compared to paper copies, the Ministry of Justice believed that lawyers would begin submitting significantly more documents than previously. Given that the more documents submitted by lawyers meant that they were paid more under the scheme, the Ministry of Justice calculated that paying lawyers for the extra pages would lead to an annual increase of £33 million by the State. In believing that this was unjustifiable, the Lord Chancellor reduced the limit on PPE that contributed to the fixed fee. The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2017 reduced the number of pages that

[259] Owen Bowcott, 'Barristers and solicitors walk out over cuts to legal aid fees' (The Guardian, 5th January 2014) Available at https://www.theguardian.com/law/2014/jan/05/barristers-solicitors-walkout-legal-aid-cuts.

[260] ibid.

[261] *R v Napper* [2014] 5 Costs LR 947.

counted under the fixed fee from 10,000 to 6,000, where cases with more than 6,000 pages paid no more than those at the 6,000 page threshold regardless of the case's complexity. Consequently, lawyers faced a 37% maximum reduction in their final fee.[262] In *R (Law Society) v The Lord Chancellor,*[263] the Law Society sought to overturn this.

The court accepted the Law Society's judicial review challenge on two grounds. Firstly, the steps taken to implement the regulations did not follow the principles of procedural fairness laid out in *Coughlan*.[264] Neither the £33 million figure nor the analysis conducted to produce this estimate were disclosed during the consultation process. The non-disclosure deprived the opportunity of interest groups to respond appropriately to the consultation.

Secondly, the court held that the Lord Chancellor's decision was irrational. As Professor Adams revealed, the method used to justify reducing the number of documents that counted under the fixed fee was flawed because the reduction did not consider either the length of the trial or the number of defendants. The High Court subsequently accepted that the decision to reduce the number of PPE that counted towards lawyers' pay was unlawful.

R (Law Society) represents an important attempt by criminal legal aid lawyers to challenge the cuts to their pay. However, considering the 'legal aid deserts' that exist across both criminal and civil legal aid, there are fewer lawyers available to take

[262] ibid [75].

[263] *R (Law Society) v The Lord Chancellor* [2018] EWHC 2094.

[264] *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213.

up the cases of individuals who do qualify for legal aid. Whilst *R (Law Society)* helped prevent further cuts to legal aid pay, the 8.75% fee cuts to the Litigators' Graduated Fee Scheme introduced in 2014 for criminal legal aid lawyers remain.[265]

Moreover, the broader reductions to civil legal aid fees remain. The case of *R (Law Society)* represents a small victory within criminal law, compared to the large-scale reductions across the system. The effects of austerity on legal aid lawyers pose significant problems for individuals who need to resolve their disputes justly, and the additional stress on the available lawyers due to pay cuts have reduced the quality of service they provide their clients. In reducing its role in facilitating dispute resolution, the State is hindering people from resolving their disputes justly.

[265] Gauke, *Post-Implementation Review of Part 1* (n 200) 210.

6. The Second Method - Favouring the Voluntary Section

So, the first way in which the State has reduced its role in facilitating dispute resolution has been by removing legal aid. Restricting the eligibility requirements for legal aid may have reduced the State's expenditure, but it has created problems within civil procedure.

To compensate for the problems caused, the State has placed greater responsibility on charitable and voluntary bodies, by changing the discourse from 'Big Government' to 'Big Society'.[266] The 'Big Society' puts forward the idea that welfare should be provided by an 'organic civil society rather than the state'.[267] The State's policy of promoting the 'Big Society' rests on a dichotomy between government and society. It suggests that 'Big Government' has broken society by assuming the role that communities once played. The 'Big Society' seeks to reverse this by emphasising greater social responsibility.

Under the Woolf Reforms, the Labour government sought to shift the responsibility for access to justice onto the legal profession and insurers through the conditional fee agreement system. After the large-scale removal of recoverable after-the-event schemes and success fees, this shift has been harder to achieve as there are less incentives for lawyers and insurers to support individuals who could not initially afford to litigate.

[266] Dan Bulley and Bal Sokhi-Bulley, 'Big Society as Big Government: Cameron's Governmentality Agenda' (2014) 16(3) The British Journal of Politics and International Relations 452.

[267] Martin Smith, 'From Big Government to Big Society: Changing the State-Society Balance' (2010) 63(4) Parliamentary Affairs 818, 830.

Since Lord Justice Jackson's reforms, the State has emphasised how voluntary bodies can help provide legal advice for litigants in person who are at a disadvantage during legal proceedings.[268] The demand for the charitable advice sector has increased as a result of the lack of available lawyers,[269] leading to the rise of McKenzie friends.[270] These are laypersons who provide unqualified legal advice for litigants and are not afforded the right to legal representation under the Legal Services Act 2007. Although this Act allows courts to provide them with the rights to conduct litigation, they do so only in exceptional circumstances.[271]

McKenzie friends are mainly family members or friends, but they can often be volunteers at charities or law students participating in their university's pro bono society.[272] Because they are not lawyers, many are less experienced and less capable than qualified lawyers. Having a McKenzie friend instead of a lawyer may, therefore, reduce the quality of advice that individuals receive. Due to their inexperience, McKenzie friends and other charities are often unable to fill the gaps that lawyers can provide. Judges, however, are increasingly being encouraged to include McKenzie friends within civil proceedings.[273] The Judicial College guide suggests that, in 'a

[268] Judicial College, *Equal Treatment Bench Book* (Judicial College, February 2018) 1-6 Available at https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf.

[269] Gary Hickinbottom, *Report of the Judicial Working Group on Litigants in Person* (Judiciary of England and Wales Report, July 2013) 26.

[270] *McKenzie v McKenzie* [1970] 3 W.L.R. 472.

[271] *Re N (Child) (McKenzie Friends: Rights of Audience)* [2008] EWHC 2042.

[272] Assy (n 69) 128.

[273] ibid.

climate where legal aid is virtually unobtainable and lawyers disproportionately expensive, the McKenzie friend and lay representatives make a significant contribution to access to justice'.[274]

Charitable organisations such as Citizens Advice have become the first port of call for many people seeking to resolve their disputes. Volunteers at Citizens Advice undergo training to help advise individuals on their legal issues. Part of their value is their ability to build relationships with their clients, allowing them to not only translate legal issues into ordinary language but engage with clients on an emotional level. Anger, frustration, fear, anxiety, distrust, and shame are all emotions which may negatively impact or prevent a client from pursuing their claim. Given the distress and confusion that most clients face, the emotional relationship needed for 'both advice-giving and advice-receiving is critical to [the service's] effectiveness'.[275]

Due to legal aid cuts, however, there has been a significant influx of people using Citizens Advice. Volunteers are taking up more and more of the responsibility for facilitating dispute resolution while the State's role diminishes. 'As legal aid and direct social provision are cut', McDermont highlights, the 'increasing use of voluntary sector advice organizations to fill gaps in provision leaves them open to simply becoming a "new institutional fix"'.[276]

[274] Judicial College (n 268) 1.20 [87].

[275] Samuel Kirwan, Morag McDermont, and Sue Evans, 'Triaging overflow: A case study of the 'Gateway Assessment' in the UK Citizens Advice Service' (2017) 35 European Management Journal 745, 746.

[276] Morag McDermont, 'Acts of Translation: UK Advice Agencies and the Creation of Matters-of-Public-Concern' (2013) 33(2) Critical Social Policy 218, 235.

Citizens Advice centres now face an overflow of clients who no longer qualify for legal aid. To deal with the lack of available capacity, they have implemented triage systems to channel clients into different types of claims. This triage system disrupts their ability to form relationships as clients are passed between assessors. To handle the increased overflow in 'a climate of ever-decreasing funding', alternative approaches such as telephone or email conversations are being used.[277] These alternate forms of communication socially distance the adviser from their client, making it harder to support their clients both legally and emotionally, and in turn, making it harder to help them bring their claims.

Embracing the concept of civic obligations and a sense of societal duty provides a cost-efficient alternative to the State's governance of social issues and policy.[278] David Cameron, when writing in a Conservative Party green paper, asserted that the 'time has come for us to think of the voluntary as the first sector', arguing that the voluntary sector offers 'answers that neither the state nor the market can provide'.[279] This emphasis on charity reflects an attempt to devolve State responsibilities and authority onto other sections of society; the focus on 'Big Society' allows for a 'Small Government'.[280]

[277] ibid, 753.

[278] Fred Powell, *The Politics of Civil Society: Big Society and Small Government* (2nd edn Bristol: Polity Press 2013) 11.

[279] David Cameron, *A Stronger Society: Voluntary Action in the 21st Century* (Conservatives Green Paper Responsibility Agenda Policy Green Paper No.5 2008) 4.

[280] Martin Smith and Rhonda Jones, 'From Big Society to Small State: Conservatism and the Privatisation of Government' (2015) 10(2) British Politics 226.

The State's reformulation of responsibility for helping litigants within court is problematic on two accounts. Firstly, Cameron's argument that society cannot look to the State to provide the means for civil dispute resolution is erroneous given that protecting its citizens from internal conflict is one of its primary functions.

Secondly, it is problematic for the State to place responsibility with the voluntary sector. The voluntary sector lacks the scope and ability to help resolve disputes in the same way that a State legal aid scheme can. While Cameron believes that volunteers help because of a moral obligation to society, some McKenzie friends charge for their services and have established a private market for unqualified legal advice.[281] This market reveals that 'the loss of public provision [is] being filled by a growing private sector',[282] and suggests that Cameron perhaps 'has contradictory understandings of the motivations for human behaviour'.[283] The State's devolution of its responsibility to facilitate dispute resolution onto charitable volunteers poses significant problems, especially considering that organisations such as Citizens Advice are struggling to cope with the high demand in the wake of legal aid restrictions.

[281] Leanne Smith, Emma Hitchings and Mark Sefton, *A study of fee-charging McKenzie Friends and their work in private Family law cases* (University of Bristol and Cardiff University, June 2017) Available at https://www.barcouncil.org.uk/media/573023/a_study_of_fee-charging_mckenzie_friends.pdf.

[282] Martin Smith and Rhonda Jones (n 280).

[283] Martin Smith (n 267) 830.

7. The Third Method - Favouring Private Forms of Dispute Resolution

The first two methods used by the State involve diminishing its role within the legal system. The third method expands upon this by emphasising alternatives to the courts. While it was the court who first accepted private dispute resolution long before the need for austerity, neoliberalism has nonetheless embraced it as a political policy. As Genn highlights, 'State responsibility for providing effective and peaceful forums for resolving civil disputes is being shrugged off through a discourse which locates civil justice as a private matter rather than a public and social important good'.[284] Seeing dispute resolution through the private lens is problematic for the reasons provided in chapter 2, namely the public nature of dispute resolution. However, in the wake of overcrowded court lists, expensive litigation costs, and pressures on the judiciary, private dispute resolution is increasingly seen as a viable alternative to the public legal system.

Private dispute resolution has been one of the most significant developments in civil procedure in recent decades. There are many forms of private dispute resolution. In arbitration, for example, an independent adjudicator hears the evidence and decides on the outcome, much like a court. Mediation, meanwhile, involves a greater emphasis on negotiation to arrive at a consensual agreement.[285]

[284] Genn, *Judging Civil Justice* (n 9) 26.

[285] Issacharoff (n 5) 195.

Private dispute resolution can be tailored to the needs of the parties, ranging from mediation to more formal arbitration. However, the decisions and outcomes made in private dispute resolution are kept strictly confidential, unlike the public legal system. Private dispute resolution, therefore, cannot create a system of precedent. Precedent is essential for ensuring procedural fairness because knowing what the law is in advance of a case helps people predict the outcome of the case, reinforcing the legitimacy of the process. The lack of precedent under private dispute resolution means that, on its own, it lacks the fairness of the legal system and must rely on legal precedent to reconcile this.

Offloading civil dispute resolution onto the private sector involves two things. The State has undermined and reduced the effectiveness and availability of the public legal system while simultaneously raising the importance of private dispute resolution.

One way the State has undermined the legal system has been by removing its physical structures. Many courts across the country have been closed in a bid to save money.[286] Closing courtrooms has significant implications on the principle that justice should be seen to be done.[287] Mulcahy asserts that citizens expect physical courtrooms because they indicate that 'society… has an active public sphere'.[288] The

[286] John Hyde, 'Court closures to continue as £1bn upgrade lags' (Law Gazette 13th September 2019) Available at https://www.lawgazette.co.uk/news/court-closures-to-continue-as-1bn-upgrade-lags/5101430.article.

[287] Linda Mulcahy, 'Architects of Justice: The Politics of Courtroom Design' (2007) 16(3) Social & Legal Studies 383.

[288] Linda Mulcahy, 'The Unbearable Lightness of Being? Shifts Towards the Virtual Trial' (2008) 35(4) Journal of Law and Society 464, 484.

courtroom's physical features, such as a coat of arms, represent the 'full authority of the state and [that] legitimate force is behind the judge'.[289] Closing court buildings diminishes the judiciary's presence amongst society, signifying that the State does not necessarily fully support the legal system.

Secondly, the State has promoted private dispute resolution. When the Lord Chancellor advocated for LASPO's implementation, he argued that reform must preclude 'unnecessary litigation [in] society by encouraging people to take greater personal responsibility for their problems, and to take advantage of alternative sources of help, advice or routes to resolution'.[290] Clarke asserted that the amount of legal resources that existed before LASPO 'has encouraged people to bring their problems before the courts too readily'.[291] In maintaining this belief, the current Lord Chancellor Buckland has accepted that the 'ability of individuals to resolve their legal issues is vital for a just society',[292] but that this may not necessarily need to take place in court. Emphasising alternative dispute resolution and mediation downplays the role of the public court system.

The State has reflected this policy within legislation. Statutory provisions for arbitration exist under the Arbitration Act 1996.[293] Rule 1.4(2)(f) of the Civil Procedure Rules emphasises 'encouraging the parties to use a non-court dispute resolution' if

[289] Mulcahy, 'Architects of Justice' (n 287) 385.

[290] Kenneth Clarke, *Proposals for the Reform of Legal Aid in England and Wales* (n 187) 16.

[291] ibid 3.

[292] Gauke, *Post-Implementation Review of Part 1* (n 200) 4.

[293] Although, the State has not established any principles to govern mediation.

the court deems it to be more appropriate. Section 11(5) LASPO states that the qualifying criteria for legal aid 'must reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings'.

The State has encouraged employment law tribunals to increasingly use alternative dispute resolution, especially in the wake of employment law's removal from the scope of legal aid. Schedule 1(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that Employment Tribunals must encourage private dispute resolution through the form of ACAS conciliation and mediation.

The push for private dispute resolution is seen extensively within family law. In 2011, the introduction of Pre-Application Protocols for Mediation Information and Assessment encouraged individuals within family law disputes to 'explore the scope for resolving their dispute through mediation before embarking on the court process'.[294] Except in certain circumstances, judges expect individuals in family courts to have attended a Mediation Information and Assessment Meeting, known as a 'MIAM'.

Hunter highlights that the State introduced MIAMs to nudge individuals away from public resources. However, it did not initially have the desired effect.[295] To rectify this, the government implemented the Families and Children Act 2014. Section 10

[294] CPR 1998 Practice Direction 3A [3.5].

[295] Rosemary Hunter, 'Inducing demand for family mediation – before and after LASPO' (2017) 40(2) Journal of Social Welfare and Family Law 181.

made it compulsory for anyone making a relevant family law application to attend a MIAM, aiming to make private mediation the norm for most family law cases. Blacklaws highlights that 'individuals who were previously eligible for legal aid were to be encouraged into mediation as the correct and more supportive process'.[296]

To incentivise mediation, LASPO ensures that publicly funded MIAMs are available for those who cannot afford private MIAMs. While this aims to enable dispute resolution, there has been a 'near-total collapse' in publicly funded mediation for family law.[297] This collapse is due to the large-scale removal of solicitors from family law legal aid. Hunter writes that the government has 'failed to see that solicitors were a crucial source of information about referrals to mediation'. Subsequently, 'Once solicitors were taken out of the picture for legally aided clients, those clients had no source of information about mediation'.[298] Individuals often no longer have solicitors channelling them into mediation. Consequently, many not-for-profit mediation services reliant on legal aid referrals have gone out of business.[299]

To stay in business, not-for-profit mediators have had to spend more time explaining mediation to individuals who are now less knowledgeable about their

[296] Christina Blacklaws, 'The Impact of the LASPO Changes to Date in Private Family Law and Mediation' (2014) Family Law 625, 627.

[297] Emma Hitchings and Joanna Miles, 'Mediation, Financial Remedies, Information Provision and Legal Advice: The Post-LASPO Conundrum' (2016) 38(2) Journal of Social Welfare and Family Law 175.

[298] Hunter (n 295) 193.

[299] Lisa Parkinson, 'Mediation and the Government's Response to LASPO' (2015) Family Law 45, 1131–1133.

situation because they lack a solicitor.[300] These delays have caused the publicly funded MIAM scheme to suffer.

Within family law, there has been a gulf in the projected number of mediations compared to the actual number of people using the system. Before LASPOs implementation, the Ministry of Justice predicted that mediation within private family law would increase by 74% after the legislation came into effect. By 2015, the numbers had instead dropped by 38%.[301] Despite the emphasis on private mediation, the number of publicly funded MIAMs have dropped to around half of their pre-LASPO numbers, and mediation has stabilised at around 60% of pre-LASPO figures.[302] It seems that, at least within family law, the State's push for mediation and private dispute resolution has instead left many unable to resolve their disputes.

Despite the apparent fall in publicly funded family law mediation, private dispute resolution has become 'part of the mainstream'.[303] In England, the courtroom trial is becoming an increasing rarity.[304] The focus of ascertaining facts through confrontation and argument is giving way to the forms of mediation found within private dispute resolution.

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[300] Anna Bloch, Rosie McLeod, and Ben Toombs, *Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice 2014) 26.

[301] Public Accounts Committee, *Implementing Reforms to Civil Legal Aid: Thirty-sixth Report of Session 2014–15* (HC 808, House of Commons Public Accounts Committee 2015) 4.

[302] Hunter (n 295) 197.

[303] Shipman (n 13) xi.

[304] Issacharoff (n 5) 64-65.

The use of private dispute resolution allows the State to spend less on the legal system, helping to further its neoliberal aims. Asserting that private dispute resolution is a more appropriate mechanism suggests that public courts are less suitable. Whilst the State provides legal aid for MIAMs, the fact that it has cut legal aid across most parts of family law demonstrates its aim to nudge people away from the public legal system and onto private fora. This shift seeks to suggest that facilitating conflict resolution is not necessarily the responsibility of the State.

While private dispute resolution has certain advantages, it can fail to provide just outcomes. Wilmot-Smith is critical of private dispute resolution because it is often quite inegalitarian as arbitrators trade their services on the open market. In the same way as lawyers, the better arbitrators charge more, meaning that obtaining justice can be determined by wealth.[305] Moreover, because outcomes are kept confidential, and precedent can never develop, the limitations upon procedural fairness mean that mediation is less concerned with enforcing one's rights and more about settling and compromising. As Genn highlights, 'mediation is not about just settlement, it is just about settlement'.[306]

Chapter 2 discussed how resolving disputes is more than merely reaching an outcome. It provides people with their due by enforcing their legal rights. Private dispute resolution may resolve disputes, but it cannot establish or create rights for the individual. As society progresses and changes, individuals may require the creation of new rights to achieve just outcomes, which only the State can provide.

[305] Wilmot-Smith (n 9) 93.

[306] Genn, 'What is Civil Justice For?' (n 57) 411.

Favouring private dispute resolution over the judiciary highlights how the State is willing to trade justice for savings. Due to the unavailability of the courts, many choose private dispute resolution and settle for outcomes which are not as just as ones which they could perhaps obtain in a court because it is still better than not having an outcome at all.

8. Towards Post-Democracy

At this point, it might be useful to recap the argument so far. An analysis of social contract theory has revealed the State's responsibility to facilitate dispute resolution. Individuals need lawyers to resolve their disputes justly. Because of the State's duty, it must ensure that people can afford lawyers. Due to the combination of the hourly fee system and the cost-shifting rule, however, litigation costs are prohibitively expensive. Attempts to decouple hourly fees from the cost-shifting rule have been opposed by many within the legal profession. Considering the failed attempts to reduce litigation costs, the State may need to provide legal aid to comply with its fundamental duty to facilitate dispute resolution.

Providing legal aid incurs costs for the State. The issue of cost forms a significant role in its neoliberal ideology. Neoliberalism is the governing political rationality of the State, or rather, the successive governments in control of the State. The financial crisis has also bolstered concerns towards reducing the State's costs. In an attempt to reduce costs, the State has sought to devolve its responsibility of facilitating dispute resolution by using nondecisions to redefine the scope of the political sphere. In practice, the technique of shifting responsibilities seeks to downplay the State's role in conflict resolution and favours private entities. This allows the State to offload its costs onto particular sections of society and helps to achieve its neoliberal aim of creating a smaller State.

The State has adopted various strategies and techniques to devolve its responsibility to facilitate conflict resolution. The State has cut public spending by reducing the eligibility and scope of legal aid. Doing so has, however, cast many out

from the protection of legal aid. To reconcile this, the State expects McKenzie friends and charitable services to fill the gap. The State has also implemented policies which favour private forms of dispute resolution. By emphasising the 'Big Society' and suggesting that individuals should resolve their disputes through means other than the courts, the State has sustained the idea that it is not the appropriate authority for facilitating conflict resolution. While facilitating conflict resolution is a public and political issue, it is increasingly being framed in a private light.

It would be a mistake to suggest that society should accept the State's transformation and ignore its fundamental obligations. Doing so would undermine the State's democratic functions and propel society towards post-democracy. To understand this, this next section explores the meaning of democracy and how litigation benefits democracy. The analysis then explores how the State's devolution of its responsibility to facilitate dispute resolution undermines these democratic benefits and moves society towards post-democracy.

8(a). Democracy

Democracy comes from the Ancient Greek term *Demokratia,* which means 'rule by the people'. This focus on self-rule is crucial because it defines the relationship between the individual and the State. If the people are to rule, they must have something to rule over. Harrison highlights that the 'only possible object of rule is the people who form the state or political system'.[307] The rulers in a democracy, those

[307] Ross Harrison, *Democracy* (Routledge 1993) 3.

who form the political State, are themselves ruled by the very people who reside under the State's authority.[308]

Governments must be chosen and accepted by the people. Locke highlights that the 'natural liberty of man is to be free from any superior power on Earth'.[309] Due to this inherent liberty, no one can be 'subjected to the political power of another, without his own consent'.[310] As Manegold of Lautenbach asserts, no one can 'create himself emperor or king, the people elevates a certain one person over itself'.[311] Without the people's consent, political control is tyrannical and politically illegitimate. Political authority is only justified if people choose to recognise the validity of those in power. The foundation of any legitimate sovereign, consequently, rests not within themselves but within the mandate of the people.

A democratic State must not only be ruled 'by the people', it must also be governed 'for the people'.[312] Collectively, these two elements form the democratic principle of 'self-determination'.[313] Scharpf describes rule *by* the people as an 'input-orientated authenticity', whereby political choices are only legitimate if they reflect the will of the people. Rule *for* the people, meanwhile, is an 'output-orientated effectiveness', where political choices are only legitimate if they 'promote the

[308] ibid.

[309] Locke (n 26) 283.

[310] ibid 330.

[311] Alexander Carlyle, *Mediaeval Political Theory in the West. Volume 3* (Blackwood 1915) 163-6.

[312] Fritz Wilhelm Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag Publishers 1970).

[313] Fritz Wilhelm Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 6.

common welfare' of those governed by the State.[314] In this way, individuals can collectively choose which freedoms, interests, and goods should be protected, and can shift their priorities to reflect changes in the moral landscape.[315] Both factors must be satisfied before a political system is truly democratic, regardless of the type of democracy the political system is.[316]

To maintain the principle of self-determination, there must be a strong sense of society. Democracy 'requires a robust cultivation of society as the place where we experience a linked fate across our differences and separateness'.[317] 'Situated conceptually and practically between state and personal life', Brown defines society as the place 'where citizens of vastly unequal backgrounds and resources are potentially brought together'.[318] Through society, individuals gain political enfranchisement, cooperate, and access public goods. Through political enfranchisement, people can voice and address social inequalities and issues. Since people gain political enfranchisement by existing in society, society is also where people gain political identity. Due to all of this, civil society becomes 'the sphere in which social movements are active, and where the popular challenges that sustain

[314] ibid.

[315] Robert Dahl, *Democracy and its Critics* (Yale University Press 1989).

[316] Kathleen Gallagher Cunningham, *Inside the Politics of Self-Determination* (OUP 2014); Fritz Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Max Planck Institute for the Study of Societies 2010) 17; David Miller, *Is Self-Determination a Dangerous Illusion?* (Polity Press 2020).

[317] Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (Columbia University Press 2019) 27.

[318] ibid.

democracy's vibrancy are located'.[319] Without an answer to the question of 'who am I, politically?', it is 'difficult for us to play an active part in democracy'.[320]

A strong presence of society is, therefore, crucial to engaging in democracy. Not only this, but everyone must have political equality in society. This is because political equality 'alone ensures that the composition and exercise of political power is authorized by the whole and accountable to the whole'.[321] Without the ability for all to equally interact with the democratic process, dominant minority groups can wield disproportionate political power and undermine the collective's rule.

To protect political equality and provide everyone with an equal footing in the political arena, Brown asserts that 'Affirmative state actions to guarantee adequate conditions of existence (income, housing, health care) are crucial to preventing disenfranchisement through desperation'.[322] Moreover, 'Vital [for democracy], is state support for access to quality civic education, to voting, and to officeholding for those otherwise effectively barred from sharing political power'.[323]

[319] Colin Crouch, *Post-Democracy: After the Crises* (Polity Press 2020) 21.

[320] ibid x.

[321] Brown, *In the Ruins of Neoliberalism* (n 317) 26.

[322] ibid.

[323] ibid.

8(b). Litigation as a Function of Democracy

Another factor which is vital for democracy, which Brown has missed, is the ability for individuals to litigate. Litigation is fundamental for a well-functioning democracy because it 'serves the democratic value of participation by enabling individuals to engage directly in the process of law-making and law enforcement'.[324]

Whilst the primary function of the courts is not to develop the law and is instead to enforce rights, the judiciary nonetheless possesses this capability. Courts exercise this ability through the development of legal precedent and the common law. In filing a claim, the individual brings their issue before a State officer - the judge. The judge then decides what the law says on the matter. In the common law, judges actively develop or create new laws by adjudicating hard cases.[325] Whilst Elegido highlights that for centuries judges have denied their role in making law,[326] Lord Reid put an end to this pretence, commenting that the belief that 'in some Aladdin's Cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge' is misguided.[327]

Through the adversarial process, individuals play an active role in shaping the law by influencing judges on what the law is or ought to be. In this way, litigation allows individuals to engage directly with the principle of self-determination and self-

[324] Alexandra Lahav, *In Praise of Litigation* (OUP 2017) 84.

[325] For theories of adjudication see Herbert Lionel Adolphus Hart, *The Concept of Law* (OUP 1961); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); *Law's Empire* (Harvard University Press 1986).

[326] Juan Elegido, *Jurisprudence* (Spectrum Law Publishing 1994) 303.

[327] Lord James Reid, 'The Judge as Lawmaker' (1972) The Journal of Public Teachers of Law 22.

rule by ensuring that the people play their part in defining the laws of the land. Litigation can also be a mechanism for changing laws to reflect broader developments in society.[328]

To ensure that this process remains democratic, the ability to litigate must be open to everyone. Otherwise, those using litigation to shape the law may only represent a powerful minority and not the collective. As a result, people must have equal access to the courts.

Not only can litigation be used for law-making purposes, but it is also vital for law-enforcement. Litigation provides a democratic function for participating in government by holding the State to account. Through judicial review, individuals or groups can bring claims against public bodies or officials. The process of bringing a lawsuit against either a public body or a State representative helps to ensure accountability to the people. Through both the ability to shape the law and to hold the public officials and institutions to account, individuals can play an active role in participating in democratic self-government.[329]

Dispute resolution is also important for ensuring democracy's central need for a robust society where everyone is politically equal. Since all are under the rule of law, the law helps establish the social unification necessary to unify disparate groups across society by governing the behaviour of everyone. The common law provides a way in which litigation can create new laws and rights. When a court establishes new

[328] Owen M. Fiss, 'Against Settlement' (1984) 93(6) Yale Law Journal 1073; Marc Galanter, 'The Radiating Effects of Courts' in Keith O. Boyum and Lynn Mather (eds) *Empirical Theories About Courts* (Longman 1983) 117.

[329] Lahav (n 324) 84.

rights and laws, everyone gains the benefits of having these new rights. By establishing new laws, vindicating rights, and reconciling injustice, litigation helps unify depoliticised stratifications of society by extending the presence of law in society. Therefore, dispute resolution helps to maintain a well-functioning democracy by maintaining a unified society. Since the creation of new laws and the establishment of rights can only occur through the public courts, only a public legal system can provide these democratic functions. Devolving dispute resolution to the private sector undermines this.

8(c). Post-Democracy

Public dispute resolution plays an important role in protecting democracy. The high costs of litigation and the State's devolution of its responsibility to facilitate dispute resolution onto private third parties restricts people's access to the courts, lawyers, and just outcomes. This undermines the efficacy of litigation as an instrument for democracy. Undermining democracy in this way is shifting society towards post-democracy.

Crouch uses the term 'post-democracy' to describe a society which 'continues to have and to use all the institutions of democracy, but... they increasingly become a formal shell'.[330] Post-democracy operates under the guise that democracy is still prevalent and foundational to society. In this way, society does 'not notice that

[330] Mark Carrigan, 'Five minutes with Colin Crouch: "A post-democratic society is one that continues to have and to use all the institutions of democracy, but in which they increasingly become a formal shell"' (London School of Economics British Politics and Policy Blog, 5th February 2013) Available at https://blogs.lse.ac.uk/politicsandpolicy/five-minutes-with-colin-crouch/.

democracy has weakened, because its institutions and habits remain'.[331] Post-democracy is therefore distinct from measures which undo democracy such as dictatorships, since dictators often outright ban democratic processes. Post-democracy is also distinct from any historical stage that existed before democracy, given its need to hide behind the premise of democracy.

Crouch explores how powerful minority groups acquire greater active power than the mass of ordinary people. Through this disproportionate power, they can manipulate the political system to work for them. The more this occurs, the closer society moves towards post-democracy.

Crouch argues that this situation has increased as neoliberalism has developed. Neoliberalism is not in itself anti-democratic, for it is a legitimate expression of political ideals. However, neoliberalism does prefer post-democracy as a governing regime, where 'all the forms of democracy continue, including importantly the rule of law, but where the electorate has become passive [and] not engaging in disturbing activism'. This is because post-democracy prevents the development of a 'civil society vibrant enough... to rival the quiet work of business interests in the corridors of government'.[332]

The characteristics of post-democracy include a greater entanglement between the public and private sector, increased privatisation, and increased globalisation. Economic globalisation, in particular, removes 'important issues of

[331] Crouch, *After the Crises* (n 319) 3.

[332] ibid 39.

economic regulation beyond the reach of national politics'.[333] Through this, the public affairs once conducted for the benefit of all within society become 'conducted by overlapping business and political elites, following rules that seem robust but which have in fact been hollowed out'.[334]

Crouch argues that the financial crisis is evidence of society's move towards post-democracy and economic globalisation. To prevent the Great Depression from reoccurring, measures including the 1944 Bretton Woods arrangement were put in place to establish a system of financial governance, where 'governments exercised control over movements of capital'.[335] Systematic deregulation in the name of globalisation and neoliberalism, however, gave private banks more control and allowed them to take more risks to accumulate greater wealth. These financial institutions outgrew 'the governance capacity of individual nation-states'.[336]

When the 2008 financial crisis occurred, because the banks were seen as 'too big to fail' they were afforded 'privileged treatment in setting the terms for rescue from the disaster to which their negligent behaviour had brought us all'.[337] Although economic recovery affected the whole population, affording the banking elite this preferential treatment demonstrated the 'growing tendency for politicians to reduce their links with their mass supporters and prefer the company of global business

[333] ibid 118.

[334] ibid 20.

[335] ibid 42.

[336] ibid 7.

[337] Colin Crouch, 'The March Towards Post-Democracy, Ten Years On' (2016) 87 The Political Quarterly 71, 72.

elites'.[338] The ability for a powerful private minority to dictate policy which affected everyone in society demonstrated a decline in democracy, as not all had an equal voice in the matter.

One could argue that giving preferential treatment to the banks was needed to save the economy and so was in the public's interest. However, it is the fact that the State had already given financial institutions preferential treatment before the crisis by allowing them to take greater risks despite the known possibility of triggering another Great Depression, which is problematic. By allowing the banks to influence how economic recovery would occur, this treatment encumbered large swathes of the population with the problems created by public spending cuts, especially those most dependent on State support. While the general argument that the State needed to cut public spending is valid to some degree, neoliberal governments have used the financial crisis to justify permanent reductions in the size, scope, and role of the State, to the detriment of many.

8(d). Undermining Dispute Resolution

While Crouch uses the term 'post-democracy' to examine how political instruments and tools are increasingly becoming a formal shell, namely elections, this thesis wishes to extend the term to explore how the same thing is happening to dispute resolution.

[338] Crouch, *After the Crises* (n 319) 6.

As chapter 8(c) elucidated, the financial crisis revealed that many States provide preferential treatment to private financial institutions. Chapter 4 demonstrated that, to help recover from the 2008 financial crisis, the British State implemented austerity measures. The legal system has suffered from this austerity, seen chiefly through the reduction in legal aid. While legal aid cuts started long before 2008, the financial crisis justified more significant reductions. The reductions in legal aid have made it more difficult to litigate and use the courts for its democratic functions. The financial crisis, and the State's eagerness to prioritise the financial institutions, has had a knock-on effect of undermining the ability for dispute resolution to uphold democracy.

Yet the analysis goes deeper than merely attributing the current problems for dispute resolution to the private banking elite. The monopoly of the legal profession on litigation is also a significant cause for the move towards post-democracy. Implementing fixed fees would significantly reduce the costs of litigation. This would decrease the need for legal aid as more people would be able to afford to litigate. Legal aid remains necessary for many, however, because the State has failed to implement fixed fees due to the opposition from lawyers. The austerity measures which have negatively impacted upon the availability of legal aid are not the primary cause of the move towards post-democracy within litigation, but it has laid bare the underlying cause – the legal profession's monopoly and the high costs of litigation.

When discussing financial institutions, Crouch writes that under post-democracy, 'where a public policy provides financial firms with assurances that help themselves, it is welcomed'. Conversely, 'where it seeks to restrain their risk-taking

that might damage the wider public, they oppose it, even though they might seem to have a long-term interest'.[339] One can make a similar comparison to the legal profession. Lawyers welcomed Lord Woolf's implementation of success fees under conditional fee agreements. This is because the success fees provided lawyers with the opportunity to generate greater profits through the risk of representing individuals who could not initially afford the legal fees, in the hope of obtaining large pay-outs if they won. The large-scale removal of these success fees, with the possibility of implementing fixed fees through further reforms by Lord Justice Jackson, threatened to reduce the ability for lawyers to make a profit. Subsequently, a significant proportion of the legal profession have obstructed these reforms from taking place.

Because democracy must maintain a free society, every section of society should be able to lobby. The legal profession therefore has every right to voice their concerns over fixed fees. Issues arise, however, when 'particular interests are so [powerful] that they can wield a degree of pressure that others cannot rival'.[340] The monopoly of legal services by lawyers has allowed many within the profession to prevent public officials, namely Lord Woolf and Lord Justice Jackson, from implementing fixed fees. This is in contrary to the broader interests of the public. If post-democracy is conceptualised in a broader way than Crouch has used, then this lobbying by members of the private legal profession on public policy signifies the trend towards post-democracy.

[339] Crouch, *After the Crises* (n 319) 56.

[340] ibid 65.

The availability of legal aid once masked the problems of the combination of hourly fees and the cost-shifting rule. Now that legal aid has mostly been removed, the march towards post-democracy has been exposed. If people cannot afford to litigate, then a pathway for engaging and holding the State accountable through judicial review is blocked off from them. The courts provide a fundamental function of ensuring that democratic institutions stay democratic. *Miller II,*[341] in which the Supreme Court unanimously declared that the 2019 prorogation of Parliament was unlawful and therefore void, demonstrates the court's ability to overturn measures which have an 'extreme effect upon the fundamentals of our democracy'.[342] Whilst Gina Miller is a successful businesswoman with the financial capabilities to launch two major legal proceedings and protect democracy, most are not in the same position.

The fact that only the wealthy can afford to litigate means that only the wealthy can use the adversarial process to shape the law. 'Legal aid', writes Smith, 'is an essential part of the administration of justice in a democracy' because it allows for the poorest to engage in the democratic process.[343] For the missing middle who are without legal aid but cannot afford to litigate themselves, their ability to engage in the democratic process is rendered void. While the legal system still exists, the fact that many cannot effectively access it and instead have to use alternative mechanisms demonstrates how the legal system is increasingly becoming a formal shell. In

[341] *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.

[342] ibid [57].

[343] Reginald Heber Smith, 'Introduction' in Emery Brownell (ed) *Legal Aid in the United States: A Study of the Availability of Lawyers' Services for Persons Unable to Pay Fees* (Lawyers Cooperative 1951) xiii.

practice, there is no political equality within the democratic process of litigation, and as Brown notes, when 'political equality is absent... the demos ceases to rule'.[344]

Brown highlights that an 'orientation toward democracy in the context of nation-states and capitalism requires state support for public goods'.[345] Given that litigation is a public good, its devolution onto charities and private entities involves 'turning away from politics [and] cannot be cited as [an indicator] of the health of democracy, which by definition is political'.[346]

The State has a responsibility to facilitate dispute resolution. Accordingly, it is duty-bound not to let private interest groups interfere with this responsibility. This includes those among the legal profession who have suppressed the implementation of fixed fees. Failing to do so is symptomatic of post-democracy.

Could an argument be made that those lawyers who have resisted these reforms are to blame and not the State? Ultimately, no. Those who have resisted are only behaving rationally by using the system in a way that protects their interests. As identified in chapter 2 through an exploration of Hobbesian social contract theory, everyone has a primary interest of self-preservation. This is human nature. Those who have sought to resist the implementation of fixed fees are only expressing this primary interest. By bowing to the resistance against the implementation of fixed fees, the State is ultimately to blame for the situation that civil procedure is in. If the State is to

[344] Brown, *In the ruins of neoliberalism* (n 317) 23.

[345] ibid 26.

[346] Crouch, *Post-Democracy* (n 19) 16.

be serious about protecting democracy it must begin to take its responsibilities, and all that comes with it, seriously.

9. Resisting the Move Towards Post-Democracy

To help reverse the trend towards post-democracy, Crouch argues that society must depend on non-democratic institutions which independently uphold democracy.[347] The courts in Britain are one of these institutions because judges are not democratically elected, but their decisions in certain cases can protect democracy. However, if people cannot access the courts, then the courts are drained of their democratic vigour and its ability to protect democracy. Litigation needs to become more accessible. Doing so would allow the benefits it provides towards democracy to flourish. To assess how this is can be achieved, this next section examines various possible avenues of reform.

A way to improve access could be achieved by reintroducing greater legal aid and repealing LASPO. This would allow more people to access lawyers and resolve their disputes justly. The Post-Implementation command paper review proposes to take a fresh look at LASPO detailed in the 'Legal Action Plan'.[348] One of the proposals is to have comprehensively reviewed the eligibility of legal aid by the summer of 2020.[349]

Whilst reforming legal aid may help mitigate the problem, it would not solve the situation completely. The 'legal aid desert' created by the cuts will be hard to fix

[347] Crouch, *After the Crises* (n 319) 146-7.

[348] David Gauke, Lord Chancellor, *Legal Support: The Way Ahead* (Ministry of Justice CP 40 February 2019) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf.

[349] ibid 11.

and will not be reversed quickly. Moreover, unless legal aid is reformed to such an extent that it eradicates the problem of the missing middle, it would not provide a complete solution. Given that most people exist within the missing middle, reforms to legal aid are unlikely to gain support from most people unless it solves their problem, which is unlikely to occur. Zuckerman highlights that it 'is only when access to justice is available to most that a convincing case can be made for a safety net to cater for those who are too poor to pay for legal representation'.[350]

Accessibility may only be improved through dealing with the costs of litigation. As Higgins highlights, the 'lack of accessibility of the English justice system is not simply a function of reduced state funding, but also the very high costs of litigation with private lawyers'.[351] As mentioned in chapter 3, decoupling the issue of recoverable costs from hourly fees would drastically reduce litigation costs. Doing so requires the State to overcome the legal profession's opposition towards this.

9(a). Wilmot-Smith's Proposals for Distributive Justice

Wilmot-Smith's proposals may allow everyone to resolve their disputes through the public legal system. His theory focuses on providing equal justice, ensuring that everyone can resolve their disputes in court. Wilmot-Smith criticises how lawyers sell their services on the private market, which causes inequality and high legal costs. He analyses how those who can afford to pay more to reduce the

[350] Zuckerman, 'The Law's Disgrace' (n 85).

[351] Higgins (n 89) 706.

risks of losing a case, which he terms 'the burdens of legality', do so. Richer litigants can pay for comparably higher quality lawyers than their opponents, which, although does not guarantee victory, certainly increases their probability of winning. In doing so, the burdens of legality become unevenly distributed amongst all, which in Wilmot-Smith's view is objectionable.

To achieve distributive justice, Wilmot-Smith suggests building a legal system around a fairness floor and providing equality of legal resources. Legal systems should 'not permit the contracting out of the public option of legal services'[352] because the ability to pay for legal resources, or 'contract out', disrupts the equal distribution of resources.

Wilmot-Smith puts forward two proposals for how this could work in practice. The first involves preventing people from contracting out *within* State institutions. The second involves preventing people from contracting out *of* State institutions into private dispute fora.

The first proposal aims to ensure that parties cannot pay for better judges or lawyers. Wilmot-Smith argues this on the basis that 'legal resources are a State-created resource'.[353] Because judges are of equal benefit to everyone in society, they are not traded on the open market - people cannot buy their judge in court. The prevailing idea for lawyers, though, is that they can trade their services on the open

[352] Wilmot-Smith (n 9) 106.

[353] ibid 94.

market. Many people believe that lawyers can sell their labour as they wish. They therefore regard them as private entities.

Wilmot-Smith, however, argues that lawyers should be considered State resources. He argues this by comparing lawyers to doctors working for the NHS. In the same way that 'doctors are thought to have special responsibilities to the public at large, so perhaps, do lawyers'.[354] Since litigants require lawyers to represent themselves effectively and achieve just outcomes, as discussed in chapter 2(c), this appears to be a defensible argument. In the same vein as judges, lawyers could be regarded as shared resources since they are primarily needed because many individuals cannot navigate the legal system themselves. If lawyers are perceived as State resources because of the equal benefits they provide to everyone in society, then the argument can be made that a lawyer's services should not be traded on the open market.

Instead of distributing lawyers based on who can afford the best, Wilmot-Smith argues that lawyers could be distributed depending on the complexity and importance of the case – with the best lawyers distributed for the hardest cases. In a centralised scheme, lawyers could still specialise into their chosen areas of law. What lawyers would lose is the ability to set legal fees. Instead, a government pay structure might dictate fees based on complexity, time, importance, and other factors. Alternatively, the State could invalidate contracts where an open market sets the fees

[354] ibid 98.

for legal services, and while not prevent lawyers from selling their services on this market, could 'refuse to provide its enforcement mechanisms' to support it.[355]

There are some objections to this model. Lawyers may feel that determining wages by some manner other than the free market deprives them of earnings that they deserve. Wilmot-Smith argues that a 'lawyer's complaint that they will be worse off than under a market system… is justified only if they are entitled to the institution of a market in legal professionals'.[356] For Wilmot-Smith, this is 'not a justifiable position as a matter of distributive justice', which should take priority considering the public nature of the legal system.[357]

There is also the problem that these proposals might disincentivise some lawyers from working as hard. Setting price bands is likely to reduce the earnings of some lawyers who would be able to charge more on the open market. The State would need to offset this by implementing policies to promote attractive and flexible careers which are capable of handling heavy workloads and stress. Financial incentives would need to be used to ensure that lawyers are paid adequately for their services. Beyond providing rewarding salaries, bonus fees for winning cases could help incentivise hard work and innovation. Although, under a State-regulated system, these financial incentives may not be able to match the earnings that some could make privately.

The proscription of private contracting may cause a brain drain, where some of the best lawyers may leave the legal system. Wilmot-Smith argues, however, that

[355] ibid 112.

[356] ibid 114.

[357] ibid.

this may not lower the quality of legal resources available to litigants. This is because the lawyer's value to their litigant is partly dependent upon the ability of the opposition's lawyer. An individual's lawyer does not have to be the best in the world, but their value increases if they are better than their opponent's. In this way, the 'quality of an individual lawyer to an individual litigant may not be reduced by an excellent lawyer quitting the legal industry'.[358]

For those who cannot afford the more expensive lawyers, this brain drain may provide them with greater equality of arms against their wealthier opponents. However, those individuals who could afford their services would be negatively affected as their access to quality counsel may reduce. This is a problem. Wilmot-Smith's answer to this is that no institutional arrangement can eradicate every individual instance of injustice. If no 'arrangement will work best for everyone, the mere fact that someone will be made worse off by an institutional change cannot mean that that change is ruled out'.[359] Injustices will always occur at an individual level, but injustice is only acceptable if it arises within a just system. Individuals cannot complain of the result of their case if the system distributes the risk of losing equally.[360] While capping fees may negatively impact those who can afford the best, it would enable greater equality of arms if both parties had lawyers of comparable expertise. This would make the system, overall, more just. For those who lose out,

[358] ibid 193.

[359] ibid 117.

[360] ibid.

Wilmot-Smith argues that they would have to convincingly argue that distributing legal resources based on the open market is a fairer model.

One issue with this analysis is that it assumes that only the top lawyers will be negatively affected by a centralisation pay scheme. If any proposed scheme lowers the pay of many lawyers, then a significant number may leave the legal system. As Wilmot-Smith accepts, lawyers are already a scarce resource.[361] Since there are already too few lawyers, pushing more outside the legal system may hinder the litigant's ability to obtain a lawyer and negatively affect their ability to resolve their dispute justly.

Wilmot-Smith's second proposal, however, may solve concerns over a potential brain drain. This proposal aims to stop the legal system from endorsing private dispute resolution, although he does briefly consider banning private arbitration altogether.

Currently, public courts can uphold private arbitration agreements. For Wilmot-Smith, the State 'should refuse to lend its hand to the enforcement of private dispute resolution mechanisms'.[362] This would not ban private dispute resolution. Instead, parties would purely uphold any private resolution out of choice. Because the law would no longer enforce any outcomes reached by private dispute resolution, the law would not stop people from disregarding any decisions made. By 'ensuring that anyone who did not want to comply with an arbitral decision could refuse to do so',[363]

[361] ibid 114.

[362] ibid 94.

[363] ibid.

private dispute resolution would cease to be regarded as a legitimate authority for settling conflicts. If individuals wanted to ensure that any agreement or ruling would be upheld, they would need to go through the public court system. This would likely incentivise greater use of the public courts and prevent the brain drain of legal resources out of the public sector, ensuring a higher quality of service within the legal system.

Ceasing State support for private dispute resolution, however, may not prevent the brain drain. Whilst it may be hard for a lawyer to relocate and train in a new jurisdiction, the skills of a lawyer involve analysing and evaluating arguments. These skills are highly transferable and may allow lawyers to switch to other profitable careers. Another problem to consider is that even if lawyers do not leave the legal system, they may still not fulfil their potential to provide quality services. If incentives for lawyers under a centralised system are ineffective, then their quality of service towards their client may deteriorate, leading to a decline in the overall quality of the legal system. Wilmot-Smith counters this claim by stating that more litigants will have an incentive to voice complaints about diminishing legal quality and find ways of ensuring that the quality of legal resources is improved. Whether this would occur in practice can only be answered by further empirical study.

Through these proposals, Wilmot-Smith explores how everyone may have access to legal representation within a public legal system. Centralising legal resources and bringing lawyers under greater State control might mean that legal fees would no longer be determined by market principles. The State could then reduce the cost of legal fees.

Moreover, he argues that the legal system should be paid wholly through taxation and dismisses the 'user pays' approach. However, to prevent vexatious litigation and correctly ration the scarce resources within the legal system, he suggests implementing fees. These fees would not be set relative to the cost of legal resources but would be used to ensure that the State distributes legal resources evenly. This would mean replacing fixed fees with a sliding scale, where richer litigants may perhaps pay more than the costs of the legal resources. By focusing on providing equal justice, Wilmot-Smith theorises ways in which the State can facilitate dispute resolution effectively.

Wilmot-Smith's model would provide greater access to dispute resolution. More people would be able to litigate and thereby use litigation's functions as a democratic process. This might help reverse the move towards post-democracy. By bringing civil justice within the public realm of the democratic process, his theory works well with the notion that the State is responsible for facilitating dispute resolution. Under Wilmot-Smith's model, the State would be upholding this duty. For that reason, this thesis commends his theory and supports its ideas. His proposals would, however, require a complete overhaul of the legal system and a more extensive theory of justice in taxation than has previously been considered. This may mean that 'reforms will be hard won, if they come at all'.[364] Nevertheless, if litigation is to be available for all in a way which allows litigation to support democracy, this is undoubtedly an effective way of doing so. Just because reforms may be hard won

[364] Wilmot-Smith (n 9) 202.

does not mean they are not worth pursuing. If reforms are won, then the benefits would be significant.

9(b). The Online Court

Another possible reform proposal is the use of an online court within the legal system.[365] Lord Justice Brigg's 2016 report proposes an online court designed around a three-stage process. The first stage is an automated triage system, the second is a conciliation stage, and the third stage involves judicial resolution, occurring either face-to-face, over the telephone, or through a video link.[366]

The initial triage stage aims to 'enable the court to probe the claimant's case by automatically presenting successive questions which are determined by the claimant's answers, so as to convert a convoluted grievance into a legal claim'.[367] This aims to reduce the lengthy processes of filling out forms and reduce administration costs.

The triage system is intended to streamline and simplify civil procedure by making it easier for individuals to bring their claims themselves. Simplification might reduce the need for legal representation, meaning that the State will spend less on

[365] Richard Susskind, *Online Courts and the Future of Justice* (OUP 2019); Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1(1) International Comparative Jurisprudence 76.

[366] Lord Justice Briggs (n 14).

[367] Lord Hodge, 'Technology and the Law' (The Dover House Lecture, 10th March 2020) 15, available at https://www.supremecourt.uk/docs/speech-200310.pdf

legal aid and reduce its costs. One of the reasons why the neoliberal State has devolved the duty to facilitate conflict resolution is because it is expensive. The online court may reconcile this tension by enabling the State to resolve conflicts while keeping its costs low. Doing so might avoid the need to outsource its fundamental responsibilities.

The online court, however, may change the relationship between the public and private forms of dispute resolution in two different ways. The first possible outcome is that the online court promotes the public legal system over private dispute resolution. There is often a trade-off between private and public dispute resolution: private dispute resolution can provide greater cost-efficiency, while the public legal system delivers fairness by consistently relying on pre-established laws.[368] Introducing a public online court promises to remove this trade-off by maintaining a fair legal system whilst increasing efficiency. The public online court would become a more attractive option than private dispute resolution because it can match the private sphere's benefits while providing greater fairness. If the public online court becomes more attractive and is used more widely, then public dispute resolution would be bolstered as a mechanism for protecting democracy.

The second potential outcome is that private and public forms of dispute resolution blend together, where private dispute resolution takes priority. Stage 2 of the online court aims to normalise mediation within the legal system. This conciliation stage is managed by a Case Officer. Lord Justice Briggs suggests that Case Officers may

[368] Orna Rabinovich-Einy and Ethan Katsh, 'A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution' (2017) 32(4) Ohio State Journal on Dispute Resolution 695, 722.

provide ‘their own provision of simple telephone mediation’. However, cases ‘which require a face to face traditional mediation are likely to be best served by full-time or at least specialist private mediators’.[369] If private mediation becomes the primary tool for resolving disputes in stage 2, then the private sector may dominate the public legal system. Online courts may then further propel society into a post-democratic age. This is because private mediators have no responsibility to society, unlike the State, and are therefore difficult to control by democratic means. Digitisation could change 'some of the most basic characteristics of both public and private dispute resolution processes, thereby drawing them closer together and altering the relationship between them'.[370]

The State's increasing emphasis on reducing its costs through the technological transformation of the justice system also faces other significant issues that require addressing.

Firstly, many individuals do not know how to use technology or lack access to the internet. In 2018, there were 5.3 million 'internet non-users'; people who had either never accessed the internet or had not used it in a significant period.[371] Although, whilst this is a problem, it should be noted that the number of 'internet

[369] Lord Justice Briggs (n 14) 69.

[370] Rabinovich-Einy and Ethan Katsh (n 368) 716.

[371] Office for National Statistics, ‘Exploring the UK’s Digital Divide’ (4th March 2019) Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04

non-users' has halved between 2011 and 2018, signifying significant progress in overcoming this issue.[372]

Secondly, the online court aims to be accessible to litigants in person, but a potential consequence of this is that it might undermine the role of lawyers. Increasing the accessibility for laypeople might lead individuals to believe that engaging the services of lawyers and obtaining their advice is no longer necessary. Lord Justice Briggs highlights that designing an online court which increases accessibility for litigants in person but 'does not stimulate the provision of early bespoke advice... from a qualified lawyer would I think risk giving rise to a number of unattractive features'.[373] Without a lawyer, individuals may settle too quickly when opposed to skilled, experienced and powerful opponents such as large insurance companies during the conciliation stage. This may mean that many individuals might fail to obtain just outcomes. Furthermore, Lord Justice Briggs is concerned that people who have weak cases will not be deterred from using the system, which may lead to vexatious litigation.

To circumvent these problems, the State must, therefore, design the online court to encourage individuals to seek early legal advice. Some believe that this advice could be carried out online. Lord Justice Briggs highlights, however, that whilst 'very simple, standardised guidance can be provided online', this 'will not (at least at the current stage of IT development) be a substitute for bespoke advice'.[374] The intricacies

[372] ibid.

[373] Lord Justice Briggs (n 14) 43.

[374] ibid.

of individual cases and their sensitive nature often cannot be solved by online standardised guidance. The online court may force solicitors and barristers to change their business models, as individuals are likely to carry out more of the bulk work during the triage stage while lawyers may focus more on providing early bespoke advice. This may cause difficulties for lawyers as they seek to find ways to make the 'provision of such early advice, uncoupled (or unbundled) from a full, expensive retainer, a practical possibility'.[375]

Despite these concerns, the online court may mark a positive step towards protecting democracy. 'If the triage at the first stage is good enough', writes Lord Hodge, 'it will certainly save parties much of the cost of litigation as they, rather than the lawyers, will do the donkey work of building up their case with the help of the court's software'.[376] Reducing costs would make litigation more accessible and allow more people to bring their cases before a court. Doing so would enhance the ability to hold the State to account and participate directly in the law-making process, helping litigation to play a greater role in protecting democracy. This is, however, conditional on how successful the triage system is at allowing individuals to bring claims and undertake parts of the litigation process themselves. How the triage system and the other elements of the online court will work in practice remains to be seen.

[375] ibid.

[376] Lord Hodge (n 367) 15.

10. Conclusion

To function free from the state of nature, societies must have legitimate institutions and procedures to adjudicate conflicting claims.[377] The State must provide effective ways for people to bring these disputes.

This thesis has argued that the State has intentionally distanced itself from its responsibility to facilitate dispute resolution and has instead focussed on its neoliberal objective of cost-efficiency. To reduce its costs, the neoliberal State has significantly reduced the eligibility and available for legal aid. However, considering the costs of litigation and the difficulties that litigants in person face, the State may have to provide legal aid to uphold its fundamental responsibilities.

The State has, instead, sought to reduce its costs by devolving its responsibilities. This has occurred by promoting private dispute resolution and placing a greater emphasis on volunteers within the public legal system. Doing so moves society towards post-democracy by 'converting the distinctly political character, meaning, and operation of democracy's constituent elements into economic ones'.[378] Brown is concerned that society's 'democratic institutions, practices, and habits, may not survive this conversion'.[379]

Citizens must be aware of how the institutions which protect democracy are being drained of their democratic worth. Moreover, these institutions themselves

[377] Hampshire (n 9) 7.

[378] Brown, *Undoing the Demos* (n 11) 17.

[379] ibid.

must be vigilant. In seeking to analyse and expand upon Crouch's idea of post-democracy, this thesis has sought to raise awareness of these problems. This thesis hopes that by elucidating the problems created by the State's decision to shift its responsibilities, calls for reform from the general public may help bring about change. After all, the 'health of democracy depends on active citizens'.[380]

This thesis has examined some proposals which might make dispute resolution more accessible. These include Zuckerman's desire to decouple hourly legal fees from the cost-shifting rule and Wilmot-Smith's model for distributive justice. These reforms, however, require the British State to go against its neoliberal policies. This will, undoubtedly, make it hard for change to occur.

One of the most significant opportunities to resolve the problems within the legal system is through technology. On the surface, the online court indicates greater State involvement in facilitating dispute resolution. However, this depends upon the extent to which the online court utilises private dispute resolution during the conciliation stage. One possibility is that private dispute resolution becomes the default method for conciliation. If this were to happen, then, given that many cases may be resolved through conciliation and never reach the final stage where parties come before a judge, many individuals might never have a public official to resolve their disputes while using the online court. Technology may simply become another way for the neoliberal State to solve existing problems within the legal system through means which may only further remove itself from active involvement. British society

[380] Crouch, *After the Crises* (n 318) 150.

must, therefore, be wary of how the online court will be shaped and implemented as a new form of dispute resolution.

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