

Amicus *Curiae*

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EDITOR'S INTRODUCTION

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Welcome to the third issue of the third volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for supporting the progress that the relaunched journal is making.

This issue begins with contributions on issues of legal aid. These form a Special Section on 'Declining Legal Aid and the Implications for Access to Justice'. In their essay 'The Demise of Legal Aid? Access to Justice and Social Welfare Law after Austerity', Daniel Newman and Jon Robins argue that access to justice is a cause

that needs to be championed for the good of all in society. Their important paper examines the troubled and diminishing role of legal aid in the legal system of England and Wales. Many of the difficulties faced today are the result of the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Reductions to legal aid were a result of the then government's austerity programme and a manifestation of the continuing and intensifying aversion towards state funding of legal services. Using a socio-legal

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Article or short Note to a future
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[webpages](#) to view the Style Guide
and submission information.

perspective, with insights drawn from Robert Merton's idea of middle-range theory and from vulnerability theory, the paper is grounded in empirical analysis of four richly textured illustrative case studies based mainly on semi-structured interviews. The essay also argues for the value of bringing together more closely journalism and social science research. The study examines the consequences for the frontline of the legal aid sector of the LASPO cuts, and governmental aversion to legal aid, and other aspects of social welfare law, such as welfare benefits, debt and housing. This is part of a broader drive to weaken social citizenship and has created a crisis of lack of access to justice, undermining our collective provision against risk and vulnerability. The paper argues that the state needs to consider re-embracing the principles and values of the post-war social welfare state and, more specifically introduce a new Right to Justice Act in England and Wales and alongside it a new Justice Commission. Mauro Cappelletti's emphasis more than 50 years ago, in the early days of the access to justice movement, on the important role that legal aid should play in expanding access and thereby fostering legal equality and more, has been lost from view and needs to be recovered in such legal and institutional reform.

The article contributed by Jessica Mant entitled 'The Family Court in England and Wales: An

Effective Safety Net?' looks at how the decline of legal aid has impaired the extent to which the family court can effectively operate as a safety net for families in crisis. It considers the manner in which the impact of declining support from legal aid in family law has significantly altered the role of the family court in England and Wales. This changed nature of the family court negatively impacts on the sustainability of the family justice system as a whole. The essay shows us how family law advice and representation has been shaped—largely by political pressures—so as to limit parties' access to family justice, especially to lawyers and the family court, when their relationships are in dispute, with negative consequences for the family court, especially its capacity and its working practices. In reflecting on what the future may hold for family justice, the author argues that there is a real need for reform in order to revive and strengthen the place of legal aid in the family justice system, thereby giving parties earlier intervention and more informed choice of process. But even while such reforms are contemplated, a danger to be borne in mind is that for family justice, legal aid provision may be in due course withdrawn entirely.

The co-authored essay contributed by Lucy Welsh and Amy Clarke entitled 'United by Cuts: Exploring the Symmetry between How Lawyers and Expert

Witnesses Experience Funding Cuts' concludes that both defence lawyers and expert witnesses have experienced quite negatively the impact of criminal legal aid funding cuts. The main impact of such cuts has been to undermine the sustainability and quality of service of their work in the criminal process. In particular, defence lawyers have found it difficult to find and to instruct expert witnesses, fundamentally limiting access to justice for clients. Rates of payment have not only failed to increase, but also in some areas even been subject to cuts, and interaction with the Legal Aid Agency has often been a dispiriting experience. It was also clear that both the experts and lawyers were concerned that low payment rates and demoralizing interactions with the Agency have had a negative impact on both the quality of work done and on the long-term sustainability of legally aided services. As a result, the lawyers involved anticipate increased risk of miscarriages of justice and, where they do occur, limited possibilities of rectification. There is an urgent need to reverse policies in legal aid funding in order to prevent further deterioration in the situation.

The essay by Dr Jo Wilding entitled 'Beyond Advice Deserts: Strategic Ignorance and the Lack of Access to Asylum Legal Advice' introduces us to 'reading' the legal aid market in order to understand better the demand and provision

situation, drawing effectively on the work of sociologist Linsey McGoey and others which analyses the concept and issues of 'strategic ignorance'. Her contribution provides several succinct examples of what she characterizes as the 'dark corners' of the immigration legal aid market, and then examines the role of strategic ignorance in restricting and denying access to advice. Pathways of ignorance include, first, belief that the market is able to meet demand; secondly, the avoidance of evidence about the actual malfunctioning of the market; thirdly, fragmentation of control of both policy and operations, leaving wide spaces for ignorance to fester; and, finally, credibility deficits applied to the people caught up in the system, namely those seeking asylum. It concludes by arguing for focused efforts to overcome ignorance with evidence, particularly by the Lord Chancellor, who is effectively ignoring a statutory duty by not so doing.

In his thoughtful article 'Reflections on the Judicial Case Management Experiments of Sir Francis Newbolt' Michael Reynolds follows up on two earlier articles published in *Amicus Curiae*, examining an early, innovative, form of judicial case management. These studies revealed that Sir Francis Newbolt, an Official Referee, in his work between 1920 and 1936, was the pioneer in this processual innovation, laying the foundation for

Official Referees Court procedures which for the most part survive to this day in the Technology and Construction Court. In this article a comparison is drawn between Newbolt's 'Scheme' and the subsequent Access to Justice reforms in England and Wales. This shows in many respects significant equivalence in the objectives of Lord Woolf and Sir Francis—for example, in directing the parties to identify and dispose of the key issues, by dealing directly with an early summonses on directions as a forerunner to case management hearings; by summarily disposing of issues before trial; by pioneering settlement through 'discussions in chambers' and by a quasi-judicial form of informal discussions in chambers resembling mediation but not the actuality. Today's Technology and Construction Court in inheriting processes derived from Newbolt's experiments, practices an efficient form of case management, broadly conforming to the objectives of Access to Justice.

Dr Abdulkadir Yilmazcan's contribution entitled 'The Slow Train to Reforming Anti-Dumping Measures: Concrete Solutions for the Future' follows on from his essay on international trade problems published in the last issue of the journal (*Amicus Curiae*, Vol 2, No 2: 'The Slow Train to Reforming Anti-Dumping Measures'). He argues that while reform of the Anti-Dumping Agreement (ADA) should include a comprehensive

normative amendment of the rules, time limitations, conflicting opinions on issues such as zeroing or public interest, and other issues mean that priority should be given to procedural issues rather than substantive matters. The study proposes changes in anti-dumping processes that would enhance procedural justice. These include, first, publishing best practice guidelines; secondly, creating a standard questionnaire to be used by all World Trade Organization (WTO) members; thirdly, reforming and fixing the Dispute Settlement Mechanism; fourthly, raising awareness among exporters that cooperation with investigating authorities may have a significant effect on the anti-dumping measures imposed; fifthly, improving the accounting systems (especially for Chinese exporters); sixth, a support tool for exporters or exporting countries, such as the Advisory Center on WTO Law in Geneva; and, finally, software to assist exporters to fill in questionnaires.

In the Notes Section, Professor Patrick Birkinshaw, in an extended and reflective examination, considers the new study published by Professor Susan Rose-Ackerman entitled *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany and France* (2021). The book asks how administrative law might best enhance democratic accountability in the exercise of executive power.

It gives particular but not exclusive attention to the United States (US), the United Kingdom, Germany and France. The power of government rests heavily on bureaucracy, but how to make bureaucratic institutions and process more accountable and democratic? The importance of this issue is especially pertinent today, as Professor Birkinshaw emphasizes, when the disadvantages of bureaucracy are demonized by deep-space state conspiracy theorists. These ideologues, in some respects at least, are a latter-day manifestation of Weber's critique of the 'iron cage of bureaucracy', but base their appeal on irrationality and the limits of expertise and evidence rather than the creation of an oppressive bureaucracy by the ineluctable progress of rationality and technology. They are all too prepared to ignore the need for efficient and effective administration in the public interest on weighty matters such as social justice, the environment and public health. Representative democracies and their bureaucratic support have at least the potential to reconcile divergent views, sensibly inform decision-making and produce rational outcomes. The task of effective public law is to render accountable and transparent the consultative processes involved in democratisation so that there is adequate control of interest groups and others inclined towards partisanship and secretiveness,

thereby securing acceptable degrees of representativeness, transparency and accountability

Professor Deborah Hensler contributes an analysis of issues involved in legal responses to mass disasters. This includes a review of the recent Netflix film, *Worth*, which has perhaps raised public consciousness of some of the difficult issues involved in such responses. *Worth* is a cinematic drama, portraying the establishment and administration of the 9/11 Victims' Compensation Fund (VCF) in the US. The fund was created by Congress in response to the 9/11 tragedy, in order to deal with the complex and challenging problems involved—so the response was legislative and bureaucratic rather than judicial in nature. It was in part intended to limit the liability of the airlines involved in the tragedy. At the centre of the film is Professor Kenneth Feinberg's role as the fund administrator. A lawyer and mediator well versed in mass tort litigation and settlement, Professor Feinberg was asked to serve as Special Master of the VCF—largely due to his extensive experience and skills in devising solutions to the problems of determining eligibility and compensation amounts in such situations. Professor Hensler's insightful analysis also draws on the writings of Feinberg as well as her own important work and experience in this area of law and legal process. Also central, as the

film's title suggests, is the dilemma of how best to translate the value of a life into a monetary amount, while also giving the chance for claimants to tell their story—of the grief, anguish and loss that they had had to endure as a result of the disasters of September 11. Professor Hensler offers a sensitive and illuminating examination of the work of Professor Feinberg in administering the VCF, contextualizing her analysis in the literature on substantive and distributive justice issues, including the value of taking into account claimants' perceptions of the processes involved in resolving problems, in mass tort compensation.

Also in the Notes section, several other examinations of recent law publications are offered. Dr Ling Zhou considers the impressive collection of essays in honour of Professor Derek Roebuck entitled *Lawyer, Scholar, Teacher and Activist: A Liber Amicorum in Honour of Derek Roebuck* (2020) and Michael Palmer assesses the in-depth study of the decline in legal aid provision associated with the uses of a more market-orientated approach by Dr Jo Wilding under the title *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation* (2021).

Professor Yvonne Daly kindly reports ('Remembering Dr Aonghus Cheevers') on a memorial gathering held at Dublin City University on 6 April 2022 to commemorate the

work and life of a colleague and scholar, Dr Aonghus Cheevers, who had passed away two years earlier. Covid restrictions were in place at the time of his passing and delayed the commemorative event until the second anniversary of his death. The service was attended by Aonghus' family, close relatives and friends, as well as many academic colleagues. He was remembered, among his other strengths, as an emerging scholar of great intellect who had made a significant contribution to the development and understanding of mediation in Ireland.

Dr Max W L Wong offers a Note on a recent (late 2019) Hong Kong case in which it seems that complications in the transplantation of the marriage provisions in Republic of China civil law from mainland China to Hong Kong (Marriage Reform Ordinance [MRO] 1971) has been imperfect inasmuch as it allows for judicial recognition of bigamy. In *Ma Siu Siu, Vivian v Tam Wai Mun, Alice & Another*, the court determined that a marriage celebrated in the early 1960s could not be nullified by a subsequent registered marriage contracted after the Ordinance came into force, with the effect that the man concerned had entered into a marriage whilst still married. Dr Wong points to the fact that, in the drafting process of the MRO, the provisions on marriage had been drawn from the Chinese Civil Code of 1931, and the potential

problem of bigamy was known. However, this potential was realized when, in applying the law in *Ma v Tam*, the court failed to consider adequately contextualizing factors relevant in both mainland China in the 1920s and 1930s, and in Hong Kong when the MRO was being drafted. As a result, the court applied an interpretation of the rules too literally, so that it in effect recognized a bigamous union.

Members of 'CeLIA' (the Centre for Law in Asia) SOAS University of London contribute an introduction to the development and work of the Centre, which is an important part of the law school at SOAS. The Centre is not only a facilitator of research in the region, and of teaching about law and legal development in Asia, but also has a long history in playing a major role in professional legal education programmes for legal professionals in several parts of the continent, designed to promote understanding of differing approaches to legal practice and the rule of law.

Dr Max Wong also contributes this issue's Visual Law piece, entitled 'Abolition of Concubinage in Internet Games in the People's Republic of China'. This examines briefly the problem of internet gaming by young people, and its control, in the mainland People's Republic of China today. Although an issue in many parts of the world, in China the felt need to restrict the conduct of children and juveniles on

the internet is considered especially important as young people are seen as successors to the worthy cause of socialism. Games relating to historical events and stories included in the system of control on the mainland and Dr Wong produces examples which have been subject to a ban on depiction of the traditional practice of taking concubines, especially by members of the elite (including the emperor) in old China. Although games based on this aspect of family life are now censored in the People's Republic, outside the mainland such games have continued to flourish.

The Editor also thanks contributing authors, and Eliza Boudier, Lindsey Caffin, Sandy Dutczak, Narayana Harave, Amy Kellam, Maria Federica Moscati, Simon Palmer, Patricia Ng, and Marie Selwood, for their kind efforts in making this Issue possible.

‘THE DEMISE OF LEGAL AID’? ACCESS TO JUSTICE AND SOCIAL WELFARE LAW AFTER AUSTERITY

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Abstract

Access to justice in England and Wales has been undermined by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These cuts to legal aid came as part of the Conservative–Liberal Democrat Coalition government’s austerity programme and they represent part of a deeper legacy of antipathy towards state funding of legal services over recent decades. This socio-legal paper draws on interviews across four case studies with those on the frontline of the legal aid sector to draw out the implications of the LASPO cuts, and the wider disdain of successive governments for legal aid, for social welfare law. Vulnerability theory is used to highlight the importance of the legal aid scheme and the threat posed by the cuts. The paper makes an argument that access to justice is a cause that needs to be championed for the good of all in society.

Keywords: access to justice; legal aid; social welfare law; austerity; vulnerability.

[A] INTRODUCTION

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced the deepest set of cuts to legal aid (the LASPO cuts) since the legal scheme was introduced under the Legal Aid and Advice Act 1949. The Coalition Government’s flagship justice legislation was predicated on one idea: to cut £350 million a year from a total £2.1 billion budget. The cuts were partly achieved by removing public funding for large parts of social welfare law such as welfare benefits, debt and housing. The legal aid scheme in these areas has been cut to the bone. All that remains is what could not be removed because of the residual protections afforded by the European Convention on Human Rights. The

proportion of the population eligible for legal aid has collapsed from 80 per cent in 1980 to 29 per cent in 2007, and could possibly be as low as 20 per cent (Fabian Society 2017).

In one example of the decline, the number of people granted legal aid in welfare cases fell from 29,801 in 2011-2012—before the cuts—to 308 in 2016-2017—post-LASPO—99 per cent less (Helm 2018). Legal help (advice and assistance under the legal aid scheme other than representation in a court or tribunal) had collapsed with debt, for example, now standing at half of pre-LASPO levels partly due to the relegation to telephone advice only for several years (Brendon 2018). There were more than 1000 fewer civil legal aid firms operating in 2017/2018 compared to 2011/2012 (Gilbert 2018). More than half of legal aid practitioners consider their remuneration under the scheme to now be unfairly low (Denvir & Ors 2022). Advice deserts are now common as, to take one example, around a third of regions in England and Wales have one or no housing provider (Law Society 2019).

There is growing evidence of a crisis for access to justice caused by these legal aid cuts (Amnesty International 2016; Mind 2018; Law Centres Network 2020). For Sigafos and Organ (2021), what we are seeing is the dismantling of social citizenship. Welsh (2022) has shown the impact on criminal justice, Wilding (2021) the effect on immigration. This article reports on a project that considers access to justice after the legal aid cuts, focusing on social welfare law (Robins & Newman 2021). The overall project comprised over 200 interviews, with those in and around the social welfare system. Interviews typically lasted between one and two hours. These interviews were spread across 12 regions of England and Wales to offer insights into the local advice sector and its ability to meet demand for legal advice, with a broad geographical, cultural and demographic spread. They were conducted across 12 months during 2018-2019, focusing on one location each month. This paper concentrates on a sub-sample of interviews with those working in the advice sector providing social welfare advice. It offers four case studies from the larger project to draw out the reality of access to justice after austerity. The accounts were captured through semi-structured interviews, which were analysed using thematic analysis (Braun & Clarke 2006). The stories are contextualized through a lens of vulnerability to draw out the importance of access to justice and the consequence of its dismantling through legal aid cuts. These case studies give voice to experts on the frontline to highlight the challenges being faced in social welfare law today and help make an argument for the importance of access to justice.

The article begins by outlining the theoretical approach of the paper, including the provision of background on the socio-political context of the research. Thereafter the four case studies are presented. The first case study looks at the roll-out of Universal Credit in England and Wales. An example of north Wales is drawn out, wherein advisers from two Citizens Advice Bureaux present the difficulties for benefits claimants. Next, the importance of legal advice for those facing poverty is discussed. Drawing on a law centre in the northwest of England, the value of advice for deprived communities is highlighted. Thereafter, the impact of a law centre closing is outlined. Figures working in and around a law centre in south Wales explain the problems for individuals and communities that can result from closure. In the following case study, the limitations of *pro bono* as an alternative to legal aid are considered. A *pro bono* advice clinic in the English Midlands offers a backdrop against which the contribution of *pro bono* (unpaid legal work) is shown to not be a substitute for funded legal advice. Finally, the paper moves on to consider conclusions. These engage with the theoretical basis of the paper and suggest ideas to move forward for access to justice.

[B] THE RESEARCH

This project draws together investigative journalism and academic critique. Gans (2018) identifies a mutual distrust between the two disciplines. Journalists are dismissed as being descriptive, anecdotal and oversimplifying issues, while the academic is criticized for opaque writing with an over-reliance on jargon and a lack of focus on current events. While such analyses are stereotypes and equally problematic in their analysis, by bringing socio-legal scholarship and investigative journalism together, our project looks to overcome any such problems and attempt a study that could combine strong, deep critique with clear storytelling that gives voice to those with experiences to share on social welfare. This follows Gans' (2018) call for social scientists to help journalists see patterns in their stories, and use social science research methods, including around sampling procedures, to ensure there is no over-reliance on anecdotes.

Gans (2018) highlights the benefits of bringing these two worlds together on a topic such as that considered in this study; the impact of neoliberal austerity on access to justice, and the specific exploration of problems around social welfare. For Gans (2018: 10):

A closer working relationship with journalists might even help sociology draw even with the other social sciences that already study current events and other topics that journalists cover regularly, notably, economics, political science, and psychology. Journalists

would benefit as well, since their coverage would be enhanced if they knew more about the work of economic and political sociologists. If the country's current economic, political, and social problems—for example, those wrought by its many inequalities, globalization, and climate change—continue, the two disciplines may discover that mutual understanding and cooperative relationships might help them to better understand the society they both study.

While the above was written about the United States, it would be equally applicable to the United Kingdom (UK) wherein austerity could be linked into the kind of economic, social and political problems that are alluded to in the exert. This work thereafter takes on the ideas of Burd (1983), who brings together links between the social scientific and journalistic approaches, voicing the notion of the sociologist as a 'super-reporter'. This research here thus drills down into a pressing contemporary issue in the hope of taking further both the practical and theoretical understanding of access to justice in England and Wales.

A key feature in producing this research was to be accessible; underpinning this project has been the desire to make sure that these stories about the impact of austerity on access to justice can reach as many people as possible. The case studies are illustrative; they are offered in a manner that gives voices to those on the frontline of legal aid to give readers a feel for their experiences. Their deployment as a means of organizing the data here is intended to make the paper readable, to make concrete some of the issues in an emotive, tangible manner. While the analysis of the case studies provided is grounded by theory, this theory has been selected to carry the maximum explanatory power with the minimal technical baggage to help ensure work that is decipherable to non-specialists, with as wide a reach as possible.

To these ends, this paper is influenced by the work Fineman (2013) has conducted on vulnerability theory. The value of vulnerability theory here is as a theory of the middle range. Middle range theory is what Merton (2017 [1968]) advocated; theories of limited numbers of variables and scope. They are of most use for helping to describe, explain and make recommendations on specific situations and areas of society. Essentially, the middle range theory is one that involves a restricted amount of conceptual matter and is, rather, grounded in empirical data. These are the perfect theories for helping to draw out what is going on in front of us, without getting lost in sometimes burdensome—perhaps to some, abstract or specialist—debates about social structures and trends.

The middle range theory exists in contrast to grand theories, which seek to explain all of society—perhaps across time. The most widely

known grand theory may be historical materialism (Engels, 2012 [1892]), which sets out a theory of the laws of motion of history through economic development. By this line, history is the result of material conditions and social institutions are determined by a society's economic organization. The case studies could be read through the lens of such Marxist approaches to show how such a grand theory helps shed further light on the role of austerity by unpicking its structural function and the organizational role it plays in society.

Indeed, along these lines Newman (2016) looked at legal aid cuts in the lens of the notion of Marx and Engels' 'alienation'. A 'dog-eat-dog' class system based on financial worth means we lose touch with our sense of solidarity and community, which leads to changes that devalue the justice system being nodded through. This key common protection, which underpins much of the welfare state and our rights as citizens, has been debased and undermined through marketization. By pitting people and classes against one another, and discouraging us from seeing our collective humanity, we will accept cuts to services that we view to impact others more than ourselves.

Valuable as a grand theory approach such as Marxism might be in providing powerful accounts of austerity on people's relationships with the state and state services, a grand narrative is not applied here. Rather, focus is on the narratives recounted by participants in the research. The voices of those experts from the frontline of the justice system are privileged in this paper. It is the job of the authors to bring their stories to as wide an audience as possible and present the experiences of those in the justice system to help inform broader debates, rather than risk losing their lived reality in theoretical discussions that make take us down different paths. Such reasoning is behind the paper using vulnerability theory because it allows us as scholars to loosely organize and contain what we have uncovered in a way that helps us ensure that the people we have been with are at the forefront of our analysis.

For Fineman (2008: 9), vulnerability is 'a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility'. From this we can understand the welfare state and the legal aid system as part of our collective provision against risk. These are institutions through which the state ensures that it recognizes and tends to our vulnerability, guaranteeing us shared protection and support whatever our individual resources. The state should provide us resilience when we need it as part of the deal that binds citizen to state, and ensures our acquiescence to its dominion over us.

Vulnerability theory is a reaction against an antagonistic and suspicious approach towards the state that dominates contemporary policymaking. It can be used to challenge the individualistic approach of neoliberalism, which seeks to roll back the state and promote a ‘sink or swim’ approach among citizens (Newman & Ors 2021). Neoliberalism is a word that some people find challenging as it disrupts their sense of who they are and what they represent so you will see a hackneyed performative ignorance that tries to deny its long-standing operation as an analytical term. It is true that the label has recently been misused as a catch-all for everything that the left dislikes but, as Metcalf (2017) has noted, neoliberalism has a value as a lens to understand how society has been reshaped as one big market. People, relationships and communities are less about rights and duties than they are about profit and loss calculations.

Neoliberalism has changed the way we see ourselves and each other as we have been encouraged to take on this economic outlook. We are increasingly economic rather than social beings. As such, we are using the term here to represent that shift away from social welfare provision towards free markets, privatization and deregulation that has dominated UK politics since the late 1970s. The value of using vulnerability theory in this book is to shine a light on and bring into focus this ideological context to the austerity politics whose consequences we explore. Hall (2011) explains that neoliberalism came to the UK under Margaret Thatcher’s Conservative Governments from 1979 to 1990 and was continued by John Major’s successor Conservative administration. For Hall (2011), perhaps more controversially, the New Labour Governments that followed from 1997 are also implicated in this shift, governments that he viewed as having transformed social democracy into a variety of free-market neoliberalism.

Despite progressive achievements such as introducing the Human Rights Act 1998 and the minimum wage, the New Labour era also invited the market into key public services such as the National Health Service in England through private finance initiative contracts and promoted the well-being of individuals over the collective improvements through their approach to the matter of work. What we saw under New Labour was an emphasis on social mobility rather than social justice. Social mobility promotes the notion that we live in a meritocracy, that anything can be achieved with hard work and that lack of success is down to personal failings. This is the core neoliberal notion of personal responsibility as the organizing principle of society, that moving barriers to achievement is enough to achieve equality. It is in this context that we saw the demonization of welfare recipients and, crucially for this paper,

the beginning of the attack on the welfare state and legal aid system that would escalate in subsequent years.

Indeed, one of the most visible forms of this neoliberalism in the UK has been the austerity programme under the Conservative–Liberal Democrat Coalition Government from 2010 and, thereafter, by the Conservative majority Government. By this line, the austerity that has been implemented following the post-2008 financial crisis has allowed for a punitive attitude towards the poor alongside the redistribution of income and wealth away from the poor and towards the rich, the deterioration of public services, and the sale—from the public to the private sector—of assets. Austerity and neoliberalism take a particularly dismal view of the poor—and especially, the non-working poor—who rely upon and use public services, seeing them as a burden on the state.

Harvey (2006) has talked about how neoliberalism provides a form of wealth redistribution that can be labelled capital ‘accumulation by dispossession’. This concept involves removing economic rights, power and resources, and forms the foundation of the neoliberal process of reducing and/or removing key state services, as is being witnessed with elements of the welfare state and civil legal aid. By this line, wealth and power is funnelled upward, away from those who rely on the public sector. The more vulnerable who rely on public services, such as the welfare state, are not considered to be of value so as little resource as is required to ensure compliance with the existing order is expended on them.

In her work on access to justice, Mant (2017) has shown how the very concept of access to justice has been transformed by neoliberalism. What she picks out is that the ‘economization’ of social policy such as welfare and legal aid has led to an ‘economic re-making of the ideas of justice, fairness and equality, which have traditionally underpinned these policies’ (Mant 2017: 246). There has been a paradigm shift away from what we used to know as access to justice, and the phrase has increasingly less substantive value in changed circumstances in which individual autonomy is privileged to such a great degree over state intervention. Newman and Welsh (2019) have shown neoliberalism has undermined legal practice through the marketization and degradation of state-funded legal aid. Practitioners are unable to provide the service they want or their clients need; access to justice is undermined by a political ideology that sees legal aid support as a drain on the state.

Vulnerability theory argues that discourse moves away from the notions of ‘the liberal legal subject’, that idea that anyone can achieve anything if they are given the freedom to do so, and, instead, encourages

us to replace it with 'the vulnerable subject', recognizing that we all need help sometimes. This paper uses vulnerability theory because this substitution offers a powerful counter to the economization of neoliberal ideology. So doing offers the foundation for an argument that pushes back against the supposed abandonment of the poor by the state under austerity programmes.

State institutions should be built on the idea of human vulnerability because, as Fineman (2008: 9) notes, we are all embodied beings, prone to 'the ever-present possibility of harm and injury from mildly unfortunate to catastrophically devastating events'. Gordon-Bouvier (2021: 228) has provided one of the most informative treatments of Fineman's body of work. She helps us to understand how the individual that we saw in neoliberal visions of the state is 'a mere snapshot of a human, taken at the height of physical strength'. That a person should need help is implicitly assumed as something that people grow out of once they leave infancy. This approach allows us to understand how the neoliberal subject is, in effect, disembodied. The chance of injury, illness, decline and, as a result, dependency do not feature within the neoliberal narrative. In contrast, vulnerability theory acknowledges the way that anybody can go through stages where they are more or less able, and will resultantly require varying levels of care. Following vulnerability theory is to agitate for a state that will provide resilience to the vulnerable subject and has great value in access to justice studies that attempt to understand the impact of austerity as Newman and Dehaghani (2022) have shown in relation to criminal legal aid wherein both the individuals and the institutions that serve them are vulnerable.

This paper involves a light-touch approach to theory with the aim simply to ground the research in an understanding that visions of individualism and economic self-sufficiency are destroying our collective support mechanisms and damaging people's lives. Vulnerability theory works well in this regard, as a middle-range theory that allows us to ground our examination in this philosophy without needing to necessarily engage in further theoretical debates at this juncture. Crucially, as Gordon-Bouvier (2021) shows, the theory is able to be deployed with broad brushstrokes. With that in mind, the paper can focus on what has been seen in the research and, thereafter, what could happen next. The case studies are given space to operate as snapshots in the reality of the situation rather than simply data to be corralled by the authors. Framing the protections that once were and, to our minds, again should be, offered by the civil justice system in the language of vulnerability underlines that we are looking at the dismantling of a public service, which has the effect of

putting the well-being of citizens across England and Wales in jeopardy. Vulnerability is thus a theme that will be returned to in the conclusion but, between now and then, the paper will focus on the case studies in and of themselves to help communicate the stories of those encountered in the research as clearly as possible.

[C] THE UNIVERSAL CREDIT ROLL-OUT

The first case study looks at problems with welfare benefits in the northeast of Wales to highlight the importance of access to legal advice. Citizens Advice offers free advice across a range of areas. At Flintshire Citizens Advice, Julie Griffiths told us about their experiences, while Winnie Lawson talked us through what was going on at Denbighshire Citizens Advice. Universal Credit is a benefit payment for people in or out of work that replaced previous benefits such as Housing Benefit, Child Tax Credit, Income Support, Working Tax Credit and Jobseeker's Allowance. It has a reputation as an especially punitive approach to welfare benefits, and is characterized by its five-week initial wait prior to payments as well as the need for online management of the claim.

Universal Credit was well established when we visited Flintshire, with the live service starting in 2014 for households who would normally have claimed Job Seekers Allowance. The full service Universal Credit started in early 2017, Flintshire being the first local authority in Wales to take part in the roll-out for new claimants or people with altered circumstances. Julie told us that it was largely working okay, and that 'the majority of people will manage it fine'. Not everyone would get on with it, though, and this is where the issues came. 'But where problems do occur they are really bad, and it's difficult to get them resolved, and get them resolved in a reasonable amount of time. It takes quite a long time to sort things out.'

The initial waiting period for the first payment does not work well for most people who claim. For Julie, 'people can't manage without their payment for five weeks.' While the principle might be that people should have had their last monthly wage so they could use that to get by, Julie said, 'it doesn't work like that' and the reality is that 'these people just tend to have no money whatsoever.' Winnie gave us an example of the impact this has, telling us about a young woman who had come in to see her that morning. She was separated from her partner and had to make a claim for Universal Credit, so Julie did her an application for discretionary assistance starting immediately because she was penniless.

The woman's last money went on a fine.

Because she dropped a cigarette—she put a cigarette in a box and it blew out and she got fined, and she tried to challenge the fine but ended up with a six-hundred-pound bill. That's gone, and now she's got no money 'til the next month's Universal Credit.

The consequences of this accident showed how tight things were for those claiming and how little give there was in the system. 'Those circumstances, now, because people are on so little benefit, and there's so little leeway, the least thing will spark off a crisis in their circumstances.'

The woman initially came into Citizens Advice looking for the food bank.

People are living on, on foodbanks and fuel banks. Luckily, we have a fuel bank here now—so we'd applied for a fuel bank voucher for her, we've given her a food bank voucher, and we've tried for a discretionary assistance application because she's not going to get any money 'til the twenty-sixth of this month.

The woman 'wasn't dealing with it well, because most people aren't equipped to deal with it'. Winnie explained, 'she's so stressed, she's got a chest infection and this is all because of the stress that she's under. People are struggling really badly.'

Both Citizens Advice branches had concerns over the online demands required within the claiming process. Winnie thought that it was acceptable to conduct the process online, as long as there were people to help and, Denbighshire for example, has Citizens Advice volunteers based in Job Centres to help people claim. 'It's relatively easy for us to do a claim; it's not for most people,' she tells us. Julie's concern is that,

when the managed migration [of all benefits] takes place, which is where they'll move all the long-term sickness claimants over, that is going to be so difficult, because many of them will have never had to manage a benefits claim like this before, and they've got existing difficulties in terms of their health.

This is where the bigger problems will come. She told us, 'I'm just really worried about it, to be honest.'

Winnie had worries about people claiming with mental health problems. 'The North Wales mental hospital was in Denbigh, it closed down in about 1984. And lots of the people who were in the hospital settled within our community.' As a result, 'we have quite a high level of mental health issues here.' This was an important consideration for the new benefit because, for Winnie, 'those are people that need the most help and support with Universal Credit.' There were other groups Winnie was worried about also. 'We've got quite a lot of people with literacy and learning difficulties. They need help and they need support to do the applications.' The digital expectations were

simply not practical for many. 'I don't know how many drug addicts that I see that have mobile phones that are capable of email that they keep for longer than a couple of weeks,' Winnie told us. 'It just doesn't happen. So, how are they going to be able to sustain a claim? I just don't know.'

Claimants in Flintshire were relatively well-placed for Julie,

because we're quite fortunate that we've got this Flintshire Connect offices, council offices which are like a one-stop-shop, really. I think we've got five in the county, and they offer digital support to people. So, we're very lucky there, but there are areas—the benefit advice shop covers Gronant and Talacre—and places like that are very isolated. Their nearest library or connect centre is going to be Holywell. That's a bus journey away, and a bus that might only come once or twice a day.

The local authority made sure less people were cut off than in some areas. 'But I'm sure there's other counties within Wales that are going to find it much more difficult than we, than we have', Julie explained. Generally, though, and especially as more people moved onto Universal Credit, she feels, 'there's not enough support in place for people'.

[D] POVERTY AND LEGAL PROBLEMS

Access to justice is not simply about individuals, it also impacts on communities and the second case study investigates the experience of deprived communities in Liverpool. We talked to Alan Kelly at the Vauxhall Law Centre. Law centres had emerged in the 1970s to bring social welfare law to the poor as a public legal service that would complement the private profession by offering legal services to those who could not afford to pay for them in areas of law crucial to social justice. They are deeply rooted in their communities, accountable to those who rely on them and often have an important campaigning element to seek progressive change for those who risk being left behind by the state in a neoliberal capitalist society. While Citizens Advice offer generalist advice, law centres offer specialist legal advice.

Vauxhall Law Centre was established in the 1970s and, Alan tells us, 'the Vauxhall area has always been a disadvantaged community in Liverpool'. It's in an area adjacent to Liverpool Docks, which 'was never a particularly buzzing place' and 'when the law centre was set up in the 1970s, the big issue in them days was the housing'. The housing was of poor quality. The law centre took legal action on behalf of the longer-standing residents who had experienced several generations of this inadequate housing. Alan explains,

we took everyone to court in them days. Because the council was the biggest landlord, and it was a bit of a bizarre situation, actually because they used to fund us, and we used to take them to court.

He told us that the housing problem had dissipated.

So gradually over the years, most of the slum houses in this area have gone. There’s still one or two areas of it that’s not great housing, but by and large, that problem has gone away.

Another problem had emerged to take its place and, for Alan, ‘what’s been left behind now is poverty at a pretty dire level’. According to Office for National Statistics figures, Alan tells us,

it’s in the bottom one per cent in England and Wales so, so it’s a pretty poor area. And all the issues surrounding poverty are issues that we deal with.

For Alan,

in the recent past, the big issues have been people losing their benefits because the Department for Work and Pensions and their agents are saying that people who are obviously in dire straits are fit for work when obviously, most are not.

‘This is one of them areas,’ for Alan, ‘where anyone who can, gets out’. The result is that,

you’re left with a population that tends to be older than average and tends to consist of a lot of people who are vulnerable, for a large variety of different reasons. It might be evictions, but more often than not it’s sickness and disability and old age and infirmity. So that’s the sort of area that we’re based in and that’s the community that we serve.

Funding has been a constant problem in recent years and, where they used to get most of their funding from legal aid, they are largely reliant on grant capture from charitable organizations.

Now, the reason we don’t get legal aid is because almost all of the stuff that we do is, is welfare benefits. Sick and disabled people. And you just can’t get legal aid for that anymore.

Alan explained how representing people at tribunal was one of the big things they did at the law centre, with around 130 appeals a year. They had an impressive record. Alan recounted to us, ‘last year, for the first time in forty-five years, we won every tribunal we represented at.’ He did qualify this feat. ‘Now, that sounds good but, I used to be a welfare rights advisor myself, and I always used to think that if I was winning all my appeals then I wasn’t doing enough appeals.’ For Alan, ‘you’ve got to challenge what they’re doing all the time’.

If they have a 100 per cent success rate then, for Alan, that shows how flawed the welfare system is and how they need to keep pushing. ‘And I’m saying here, well if we’re winning them all, then we should be appealing some that we’re not going to win, because they’ve got to be challenged.’ They need to be able to do enough appeals that they start losing some because only then will they be sure that the huge mass of people wrongly turned down for benefit are being helped. It was important to use all the capacity they had to appeal. Alan explains, ‘you’ve probably heard people saying about—everyone’s getting refused, and those that appeal might win, but those don’t appeal who have lost, haven’t they?’

The changes to the welfare system have ‘had a brutal impact on people, particularly those who are disadvantaged’. Alan suggested,

if you’re someone who is unable to work because you’ve got a disability and you’ve been getting benefits and all of a sudden most of them benefits stop or if there’s a big reduction in them, then what do you do to get your income back up?

He saw this problem around Liverpool, and told us how it was now obvious around the city the struggles people were having:

you can’t walk a hundred yards without bumping into people sleeping in doorways. You know? That’s visible signs, and you’ve got less visible signs whereby people are in houses without any gas or any electricity. And water and things like that. So, that’s the situation that people find themselves in.

These people relied on the support of organizations such as Vauxhall Law Centre,

because of the nature of the people who are sick and disabled, they’re a lot less able to challenge things themselves. They tend to be older, and don’t have the same level of education as the average person has.

Without help, ‘they’re being ground into the ground’ and that is why he pushes so hard on the need to challenge a welfare system he sees as having such a ‘brutal’ effect on people in his community.

[E] THE LOSS OF A LAW CENTRE

In the next case study, a south Wales example is used to show what happens to access to justice when the legal advice is not there due to services closing. We spent time with the Speakeasy in Cardiff, which had been providing advice in the centre for 25 years. Since 2010, the legal not-for-profit sector has been dealt a double body blow. Before LASPO, legal aid would typically account for 40 per cent of a law centre’s income and 40 per cent from local authorities. Because of the 2013 cuts, the income

of law centres halved and 11 were forced to close, leaving Wales without a single law centre and only 43 in England offering specialist advice for those who cannot afford to pay a lawyer. More law centres have opened since our fieldwork, but the new additions to the network are largely volunteer organizations supported by little funding. Over the course of this research, the Speakeasy became the newest member of the Law Centre Network. This made it the sole Welsh law centre. Five years before the Speakeasy, Wales and, indeed Cardiff, did have a previous law centre. Cardiff Law Centre was established in 1978, the first and—for the entirety of its existence—the only law centre in Wales. But it closed in 2013.

For Alison Jones, now of Shelter Cymru but previously of Cardiff Law Centre, ‘LASPO was the final nail in the coffin.’ Warren Palmer, now of Speakeasy Law Centre, saw the demise of Cardiff Law Centre as part of a wider trend following LASPO.

The law centre didn’t manage to pull through, and that’s been the pattern around lots in Wales and, dare I say, England as well, where places have closed because legal aid is gone and actually there is nothing else.

For Barbara Kerridge of Riverside Advice, ‘the demise of legal aid’ was important in the loss of the old law centre ‘because they had held quite a large legal aid contract’. She also emphasized that, as well as decisions from the UK Government, there was a Welsh and Cardiff angle to the end of the original law centre. She explained how LASPO was compounded by ‘Welsh government money going somewhere else’ and, then, on top of that ‘the loss of the council money was the end of them’.

The Welsh Government criteria to only fund, what it termed, national advice organizations contributed to loss of local, independent advice organizations. Generalist advice was favoured over specialist advice. One organization that has especially benefitted from this has been Citizens Advice. There have been a number of funds—including initiatives such as Better Advice: Better Lives and Communities First—which went directly to Citizens Advice. Citizens Advice has an important role in access to justice, but there needs to also be specialist advice to complement the generalist support largely provided by volunteers. This is why law centres are crucial to an advice ecosystem.

Before social welfare was taken out of scope by LASPO, Cardiff had a quarter of the legal aid budget for Wales, at £1 million. At the same time as the Welsh Government’s advice funding decision, Cardiff Council decided to make all its advice grants into a single entity tender. They had previously been granted to several independent advice providers. Citizens

Advice was the main bidder and rejected requests to make a collaborative bid from all but one local organization. So legal aid cuts added insult to injury for such a specialist independent provider.

For Mike Norman, of Bristol and Avon Law Centre who was working in Cardiff at that time, this was largely about volume and numbers.

And when the, when the law centre in Cardiff went, I just think that what happened was that a long-standing specialist organization with significant community links and a huge amount of local respect to a certain area just got sacrificed on an altar, really, to be able to say, 'We're able to provide this new service that's going to help this number of people.'

It was a perfect storm of funding decisions at UK, national and local level that mitigated against this local, independent advice organization, despite it being well established and, from several accounts of those who worked in and around the local advice sector, efficient and well-run—it had even owned its own building bought with Big Lottery moneys.

It is in this context that the law centre closed. As Barbara explained, 'They survived a year after the loss of all that, but they actually weren't doing anything much in that year. They were just winding down.' When Alison left, it was still open 'but the funding had gone and there was very little casework going on there. In fact, there was hardly any casework there, if any.' The welfare benefits work had gone,

so the welfare benefit department was just slowly wound up then. But you still had the people coming in who traditionally had come in for the advice, and they were coming to see the generalist advisor at that stage.

And there was still big demand—too much demand.

And of course, he could see, I don't know, ten, twelve people in the morning? Ten, twelve, people in the afternoon? And he couldn't physically deal with the advice that people needed.

A bigger problem was that 'there was no-one to refer them to', Citizens Advice 'would help with form-filling' but 'you couldn't get appointments'.

The death of the old law centre had 'a huge impact'. It left people without support, 'people who traditionally came to have the help kept their benefits and payment, didn't have any problems, suddenly, they weren't able to access that sort of advice.' Katie White, from Shelter Cymru, told us the effect that the closure had on the city. 'I think law centres as well, they're part of the community in a way that things like Shelter Cymru aren't and private firms aren't.' Being part of the community was an important

accessibility issue, it played a major role in wider perceptions of whom the advice was for.

You get a really diverse collection of people visit. It’s very much in the community and people come to it for all different kinds of reasons. And it’s more than just legal advice that you get there. So, I think it’s just generally such a huge thing to lose.

A particular problem was that the law centre had served parts of the community that would now be left without local help and might be reluctant to travel further to seek advice from organizations and individuals they do not know. Alison talked about their ‘very strong relationship with the Somali population and everything in Butetown who ‘often used the law centre’. She explained that the Sudanese also used the law centre in large numbers. ‘They were, because they’ve got used to using it over the years. So, they suddenly had no access for advice.’ It was not just advice, it could be as simple yet vital a service as reading English for those who struggled with the language. Alison explains, ‘they couldn’t physically read the letter’. Law centre staff ‘would happily read the letter for him, and they would go’. The law centre had left a big loss for many vulnerable people when they needed help.

[F] THE LIMITATIONS OF *PRO BONO*

Finally, this case study focuses on the English Midlands to highlight that *pro bono*—volunteer legal support—cannot ‘fill the justice gap’ in the absence of legal services as is sometimes suggested by commentators and the occasional government minister. Linden Thomas, co-ordinator of Birmingham Law School’s *pro bono* programme and formerly chair of the local Law Society’s *pro bono* committee, told us more about the problems the advice sector was facing in the city. Her experience of *pro bono* provision—offering free support for legal issues to those who did not qualify for legal aid and could not afford to pay their own lawyer—offered a great insight into local legal need. For Linden, ‘the services provided by *pro bono* clinics—whether that’s involving universities, or law firms, or anyone else—cannot fill the gap.’ She explained, ‘There’s such legal need out there that we are overwhelmed with queries.’

Linden also sat on the board of trustees for the local Citizens Advice so ‘I’ve got an idea from that about what the state of advice is around the city.’ And what she knew about the advice sector was that it was struggling. ‘It’s a massive problem that we’re the second city and there’s nowhere to refer people to or signpost people to.’ She spoke specifically of the situation Citizens Advice may face. ‘Take the Citizens Advice, for example,

you can get funding for some first tier, initial advice signposting, telling people where they need to go to get more help for their problems. There's no extra level, now, of support' except for 'the odd *pro bono* clinic and services'. There are obvious limitations here due to stretched resources 'because it's volunteering and good will'.

At the time we were speaking with people in the city, there were looming problems. 'In Birmingham, the council at the moment is proposing to cut all funding for any kind of first-port-of-call advice service, just like a generalist turn up service because you've got a problem.' Such provision is funded by the city council, it is not a statutory service. The financial difficulties being faced by the council mean that it is looking to cut budgets. As Linden explains,

if they cut that then there's pretty much nowhere for people in the city to go. It's already all by telephone, not open door, from the Citizens Advice in Birmingham because of cuts. So, it's increasingly desperate.

This is not a circumstance where *pro bono* could or should take up the slack. '*Pro bono* can't begin to do that, and the lawyers that want to, and the universities that have the good will and want to do *pro bono*, don't necessarily have the expertise in all of the areas.'

Across the austerity period, the advice sector had been facing similar situations since the first threat of funding cuts in 2011 that risked closing all of the Citizen Advice provision in the city. Linden picks up on how this feels for those providing advice, 'Yeah, we had to battle every few years.' She looks back on the previous attempt to cut funding.

They did it about three years ago. They said, 'We will be withdrawing all funding,' and then the advice agencies that were then in the city, of which Citizens Advice was probably the biggest, did a really good job of saying, 'Look, this is the impact if you do this.' And so they then provided another three years' worth of funding at a very reduced rate.

And that funding is about to expire as we visit the city.

'And once again it's, the latest strategy is that it's off the table, because they just don't have the money.' The council will prioritize its statutory services. What is left for Citizens Advice is that they may struggle to continue to offer the kind of generalist advice that they are probably best known for, and well placed to deliver. For Linden,

Citizens Advice still provides an awful lot of advice, but it's funded for specific things like funding on debt advice from central government funding, or very specific Universal Credit support. It's not that kind of general, 'I've got a query. I can just go to my Citizens Advice and get some help or pointed in the right direction.' That's just gone or going.

[G] CONCLUSIONS

The introduction explained how this paper would be loosely framed within Fineman’s (2013) theory of vulnerability. The four case studies subsequently offered have drawn together instances of how access to justice is unravelling across England and Wales, which has the effect of undermining our collective provision against risk. A major benefit of applying vulnerability theory is for the way it encourages us to recognize and accept the universality of vulnerability; vulnerability is not a matter of personal failure, an inability to attain autonomy, it is an entirely ordinary, and much to be expected, part of the life course. Illness can mean one person falls behind with the bills, disability results in another person being unable to work. Such reflects the essential ordinariness of vulnerability—it is something we all experience and every reader should be able to relate to. And it is just such vulnerability that can lead to people needing help with social welfare issues.

The neoliberal state that has brought about austerity is rooted in the idea that personhood is innately autonomous; freedom to do things is key. As such, the state can be stripped back, protections watered down, to the level that they ensure there are supposedly no barriers holding us back from working hard, knuckling down, developing our skills, building on our natural ability and going out to achieve great things in the world. This is apparently a meritocracy that rewards those who try. Vulnerability has been stigmatized; those people that are visibly depending on state support have been ‘othered’. Thus we can see the way that people who receive welfare benefits have been reduced to an underclass. The norm is to be independent, with a sad few ‘genuinely’ vulnerable people accepted as some sort of unfortunate deviation to be patronized with pity, and a majority of others ‘undeservingly’ exploiting the system by supposedly passing off their laziness as an ailment. Such appears an all too common bigoted view of the welfare system to judge from media reporting.

Considering the degradation of the welfare state and legal aid for social welfare law in the context of vulnerability theory would encourage us to reject the individualistic account provided in the previous paragraph—a worldview that looks for the worst in every personal story of struggle and links them together into a bigger picture. Such moves represent a shift away from focus on individuals towards a wider, structural account of how the state can act to cause and worsen inequality. What vulnerability theory calls for is a holistic approach to understanding the way that the state has withdrawn to provide a bare minimum service. The current expectation is that all individuals have responsibility for resolving their

own problems but instead, if we were looking through a vulnerability lens, we are reminded that many of the problematic situations we find ourselves in are simply out of our personal control. It is in these circumstances that we would look for the state to step in and bolster us.

Following Fineman's (2013) analysis, societal institutions have developed around vulnerability: they interlock and overlap, creating possibilities of opportunities—as well as gaps. A key concept that needs be considered here is the idea of resilience. For Fineman (2010: 269), 'the counterpoint to vulnerability is not invulnerability, for that is impossible to achieve, but rather the resilience that comes from having some means with which to address and confront misfortune'. Crucial in working with vulnerability theory, then, is giving attention to the role that institutions can play in providing us with resilience in relation to our human vulnerability. Resilience may be a problematic term as its lay usage seems to place responsibility again onto the individual—the antithesis of vulnerability theory—but the conceptual usage here is rather intended to highlight the value of that support which should be expected from the state.

The state should grow to recognize our universal vulnerability and the need to provide the scaffolding that can hold us up, and such was a principle of the post-war welfare state that developed in the UK. The 1942 Beveridge Report on which it was based offered a system of social insurance, covering every citizen. This system that supposed to offer a state that would be there for citizens with its services provided from the cradle to the grave (with the legal aid that later emerged under the Legal Aid and Advice Act 1949 supposed to ensure citizens' access to such services). The offer is most obvious in terms of the National Health Service, with universal coverage that meant anyone who fell ill had the help when they needed it, without judgment or stigma. Vulnerability is not something to be embarrassed about, a sign of weakness or lack of moral fortitude; it is a reality that we must be prepared to confront.

The rise of neoliberalism has undermined this principle, as accelerated under austerity politics, which has led to growing inequality and flagging levels of resilience among many. Cuts to legal aid mean that vital resources, which would once have been offered by the state to allow us to uphold our rights as citizens, have been withdrawn, diminished or restricted. This handicaps the resilience of many. Neoliberal ideology contains within it a particular notion of resilience, some manner of inner fortitude—a natural toughness to overcome adversity. Tending to our shared vulnerability shows how inane and damaging such a reading of resilience is. Resilience is more effectively understood as a series of advantages that we all possess

in various measures; the rich tend to have more of this, economic capital begets all other manners of social and cultural capital, and gives people many more resources to fall back on. The less money someone has, the less they have to fall back on when they need it.

Having explored a little of the way that cuts can hinder people achieving access to justice, the manner in which the sheer luck of finding the good will of charity can be all that stands between hope and despair, it seems imperative that we need to bolster the institutions of the state to promote the resilience of all. The welfare state is supposed to protect us when we need it, but what value is a safety net with such big holes in it that many just fall through? Legal aid should operate to enable us to push for what we are entitled to, but when there is so little advice that people are left to face the might of the state on their own, the principle of justice becomes a cruel joke and the scales are decisively weighted against most.

Following the vulnerability theory approach here means an insistence that institutions have a responsibility to be attuned to our vulnerability as human beings. It is the state that needs to underwrite our resilience. In a capitalist system, we cannot expect that all have the same resources and, if the state is to be worth anything, it should be premised on reflecting that we have different levels of resilience and will all need to be supported at some time. There should be no shame in dependency on the state; society should be based on solidarity and helping one another when we need it. Because we all need help at some point. One way the justice system could be reformed to help maximize our resilience is through enshrining access to justice within the law.

This paper—and the larger project it forms part of—suggests a society in which the state largely is increasingly abandoning its commitment to ensuing proper access to justice. While access to justice might be a fine concept and make for aspirational sound bites, the reality of access to justice is that it has been debased to such a level that it has little everyday value. To counter this requires a wholesale reappraisal of how the state deals with access to justice, such as can be found in the headline recommendation of the 2017 Bach Commission into access to justice after the legal aid cuts, namely the need to establish a new Right to Justice Act for England and Wales (Fabian Society 2017). This Act would set in place a new right for people to get legal assistance without accruing costs that they cannot afford. The new right would be underpinned by a set of guiding principles that recognized the importance of early legal help and the valuable role played by public legal education.

The operation of the right would be monitored by a new Justice Commission. The Justice Commission would take a proactive role

in enforcing and defining the right to justice in practice. The Justice Commission would be an independent body operating at arm's length from the UK Government and thus overcoming many of the problems with the existing Legal Aid Agency, which sits within the Ministry of Justice and can be subject to party political pressures. The new right would be enforced in the courts, with the Justice Commission challenging perceived infringements of the right through the courts. The independent body would act as a check on whether and to what extent the state was upholding this new right.

The right to justice would promote a new way of looking at access to justice, tying it into our basic rights as citizens and locating legal aid where we think it should be; as part of the welfare state. It offers the potential to realize the idea of access to justice that we have found to be so routinely denied to people across England and Wales. The absence of access to justice here discussed could begin to be righted by firmly setting out what it means in principle and practice, and placing this at the heart of the relationship between citizen and state. Crucially, from our perspective, it needs to explicitly recognize the vulnerability of all. Social welfare law—and other areas beyond—could benefit from establishing such a right in order to rejuvenate access to justice.

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Legislation

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Legal Aid and Advice Act 1949

Human Rights Act 1998

THE FAMILY COURT IN ENGLAND AND WALES: AN EFFECTIVE SAFETY NET?

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Abstract

This article contributes an insight into how the decline of legal aid in family law has transformed the role of the family court in England and Wales, and how this is, in turn, is affecting the sustainability of the family justice system as a whole. It will begin by setting out some of the pressures that have historically characterized the legal aid system in England and Wales, focusing specifically on how family law advice and representation has been uniquely and particularly targeted by a host of intersecting political efforts to minimize people's use of family lawyers and the family court when their relationships break down. The article will then turn to consider the consequences of this for the family court. Here, the article will reflect upon how these pressures have constrained capacity and altered working practices within the family court. In sum, it will examine how the decline of legal aid has impaired the extent to which the family court can effectively operate as a safety net for families in crisis, and what the future may hold for family justice.

Keywords: legal aid; access to justice; family law; litigants in person.

[A] INTRODUCTION

When families break down, people often find themselves at a point of crisis. This is because the end of a relationship triggers a whole range of changes in a person's circumstances. Amidst this crisis, people need to navigate important decisions about things like where any children should live, how often they spend time with each parent, and how any property or assets should be divided. Although these decisions are often extremely difficult and come with tenuous emotional baggage, most parents work these issues out by themselves and do not need to rely on the legal system. Some families will use mediation, where a mediator will

help them to work through the issues and come to agreements. Others might instruct solicitors to negotiate arrangements on their behalf. However, this is not possible for all families, especially in situations where former partners are struggling to communicate effectively, contending with complex circumstances, high levels of conflict, power imbalances, or even safety concerns and allegations of domestic abuse. Traditionally, these would be the families most likely to find themselves in the family court. Although used by only a small proportion of families in England and Wales, the family court has always operated as a safety net for these kinds of scenarios. It does this by providing a formal environment where court orders can secure safe and appropriate arrangements in otherwise chaotic and difficult family circumstances. However, this safety net has been placed under significant strain by swathes of legal aid reforms, including the almost complete removal of eligibility for funded advice and representation for private family law problems under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) 2012. Now, approximately 80% of cases that reach the family court involve people who are representing themselves as 'litigants in person' (LIPs), and many of those arrive for their hearings without prior legal advice or an advocate to help them navigate the legal, procedural and cultural norms of the family court process.

This article will contribute an insight into how the decline of legal aid in family law has transformed the role of the family court, and how this is, in turn, affecting the sustainability of the family justice system as a whole. It will begin by setting out some of the pressures that have historically characterized the legal aid system in England and Wales, focusing specifically on how family law advice and representation has been uniquely and particularly targeted by a host of intersecting political efforts to minimize people's use of family lawyers and the family court when their relationships break down. The article will then turn to consider the consequences of this for the family court. Here, the article will reflect upon how these pressures have constrained capacity and altered working practices within the family court. In sum, it will examine how the decline of legal aid has impaired the extent to which the family court can effectively operate as a safety net for families in crisis, and what the future may hold for family justice.

[B] DECLINING LEGAL AID AND FAMILY LAW

For most separating couples, the main objective on both sides is usually to maintain a reasonable relationship with their ex-partner, especially if there are children involved. As such, without legal advice, there is an

inevitable risk that couples allow feelings of guilt or vindication to govern the decisions they make relating to their relationship breakdown. Rather than inflaming conflict between parties, family solicitors have traditionally assisted their clients in navigating private negotiations and ensuring that any agreements reached incorporate a practical understanding of their future needs and the future needs of their children, rather than the immediate trauma of the relationship breakdown (Wright 2007). As Ingleby (1992: 2) explains, family lawyers do not simply pick up the pieces by meeting the day-to-day needs of their clients, but they also put the pieces back together again by helping them to negotiate a final resolution which is forward-looking.

The accessibility of legal advice, however, has historically hinged on the availability of legal aid. Introduced under the Legal Aid and Advice Act 1949, legal aid is available through a *judicare* model, which involves providing state funding to private law firms for the purposes of supplying legal services to those who could not otherwise afford to instruct lawyers. Although the legal aid scheme was characterized by ambitious post-war aspirations of equitable access to law, it has never quite achieved these objectives. Rather, the expense of the *judicare* model has meant that the legal aid scheme was a common target for cost-saving measures, particularly as neoliberal ideas about the appropriateness and affordability of state-funded welfare provision began to take hold within public policy. Several successive government administrations introduced reforms to limit eligibility for the scheme through increasingly strict means testing.¹ This meant that even those eligible for legal aid have often been excluded from its benefits because they were expected to pay expensive and sometimes unaffordable contributions towards the cost of legal services (Hynes 2012; Hirsch 2018).

Beyond limiting eligibility of individuals, however, these cost-saving initiatives were also targeted at the providers of legal services themselves. This was because the cost of the scheme was inextricably linked with the growing demand for legal advice and representation. This is especially true in family law, where the law has necessarily become more complicated to keep up with the reality of modern family life. Greater acceptability of different family forms and relationships, as well as increasing numbers of families co-parenting across different households, all came with a greater demand for family dispute resolution and orders under the Children Act 1989. The corresponding increase in demand for legal aid raised government concerns about ‘supplier-induced inflation’ and a suspicion

¹ See eg Legal Aid Act 1988 and Access to Justice Act 1999.

that firms reliant on income from legal aid were not incentivized to provide services efficiently, especially compared to those motivated by private profits (Moorhead 2004). These concerns indicated a shift in the relationship between lawyers and the state, in which government policy became geared towards promoting efficiency, greater scrutinization of firms offering legal aid-funded services, and limiting remuneration for lawyers undertaking legal aid work. In short, the insufficient support for the legal aid sector meant that this work quickly became unprofitable and arduous. While some firms were able to offset the impact of this by taking on private clients alongside their legal aid clients, many organizations began to move away from legal aid work entirely.

In family law, concerns about expenditure were only one half of the story. In reality, the decline of legal aid in this area was also underpinned by another debate, where questions have been raised about whether the involvement of lawyers and the court in family disputes is in fact an appropriate way to reach resolutions at all. Under this logic, lawyers are not conceptualized as a means of understanding one's rights and entitlements, nor as facilitators of agreements. Rather, the involvement of lawyers is instead something that exacerbates and entrenches conflict, increasing the chances that families will end up in the family court, which should be avoided at all costs (House of Commons Public Accounts Committee 2007; Legal Services Commission 2007). This narrative aligns neatly with concerns about the spiralling costs of lawyers who provide publicly funded legal services through legal aid. Therefore, although other forms of dispute resolution exist, mediation has consistently been promoted as a one-size-fits-all, cheaper, quicker alternative to going to court which minimizes conflict between parents (Barlow & Ors 2017: 10-14).

However, the appropriateness and efficacy of mediation varies, and it has never been able to offer a universal remedy for all disputes. Moreover, the success of out-of-court resolution options like mediation can often depend on whether people are able to access legal advice in the first place. This is because many families who seek advice about their disputes have often not considered the potential benefits of mediation until a lawyer is able to offer them a bespoke understanding of their options, as well as the benefits and disadvantages of each of these choices (Ingleby 1992; Eekelaar & Ors 2000). Without this early intervention, many may pursue their cases to court unnecessarily without recognizing the potential value of alternative routes. As a result, despite the intentions of policy-makers, self-representation in the family court has always been a common phenomenon. Although there are, of course, some LIPs who pursue court proceedings because they are determined to have their day in court, LIPs

are not typically a population of litigious troublemakers. Rather, they are most often families caught in the gaps formed by the way these policies have disrupted the delicate ecosystem of family law.

In 2010, this became even more amplified. In that year, a fresh set of reforms to the legal aid scheme were proposed under a new statute now known as LASPO. Coming into force in April 2013, LASPO introduced sweeping cuts to several areas of law, the extent of which was incomparable to the incremental restrictions and constraints of previous policies. The four aims of LASPO, stipulated in the initial policy consultation, were to discourage unnecessary litigation, target legal aid at those who need it most, make significant savings to the cost of the legal aid scheme, and deliver better overall value for money for the taxpayer (Ministry of Justice 2010). These were to be achieved by withdrawing legal aid eligibility for several legal problems including social welfare law, employment law, and several issues relating to immigration, clinical negligence, debt, and housing law. Although public family law was to remain within scope, private family law disputes were to be entirely removed, with a narrow exception for those who can corroborate that they have experienced domestic abuse through prescribed forms of evidence. This meant that, in practice, disputing families on very low incomes would only be able to access public funding to support their participation in mediation, and, if they wanted to consult a solicitor or use the family court, they would need to do this at their own expense.

Almost all responses to the public consultation on LASPO argued that these reforms were unnecessary and would impede access to justice for the most vulnerable in society. Nevertheless, the then-government proceeded on the basis that large-scale withdrawal of legal aid was not only necessary from a financial perspective, but would be beneficial for the justice system and those who rely upon it:

Legal aid has expanded far beyond its original intentions, available for a wide range of issues, many of which need not be resolved through the courts. This has encouraged people to bring their problems to court when the courts are not well placed to provide the best solutions ... (Ministry of Justice 2011: 8).

In many ways, the further removal of funding for private family law under LASPO was merely an extension of previous reforms. After all, prior limitations on eligibility, remuneration for providers, and encouragements to try mediation and avoid court were all inherently linked to making savings and delivering value for money. However, the vast scale of the LASPO reforms distinguishes them from earlier policy initiatives. The default position is now one of non-eligibility, where individuals may not

expect state-funded legal support in relation to their family disputes, and use of the family court is generally stigmatized.

Predictably, given the trajectory of earlier reforms, this did not play out in the manner that the then-government had hoped. Although mediation is the only route for which public funding remains available for most families, rates of attendance at mediation fell significantly after LASPO. At the same time, rates of self-representation in the family court have increased exponentially (Ministry of Justice 2021a; 2021b).

Although LASPO contained nothing remarkably new in the way of policy rationale, it fundamentally altered the ways that people have traditionally engaged with family law. We are now living in a 'post-LASPO context', in which people are more frequently falling to the safety net of the family court not only as their last resort, but sometimes as their only option. Consequently, judges, legal professionals, and academics have accused the LASPO reforms of creating a false economy in which money saved from the legal aid budget has simply been displaced to the family court, which is now unsustainably strained under the additional costs and burdens that come with increased numbers of LIPs (Cookson 2013; National Audit Office 2014; Richardson & Speed 2019). In short, LASPO rapidly accelerated the decline of legal aid in family law, undermining the potential utility of out-of-court dispute resolution options, and channelling even greater proportions of families towards an overloaded family court process.

[C] LITIGANTS IN PERSON AND THE FAMILY COURT

As discussed so far, the family justice system has been significantly shaped by policies which have sought to not only reduce state expenditure on legal aid, but also reframe family disputes as personal affairs for which lawyers and the court system are not necessary. Underpinning these policies is an assumption that most individuals have the resources and capacity to manage these disputes by themselves, which has meant that certain population groups have disproportionately struggled to access legal services. For many, these fraught political efforts to limit reliance on lawyers have had the unintended consequence of forcing them into the family court process as LIPs.

Since the widespread withdrawal of state-funded legal representation that came with the implementation of LASPO, LIPs have been the rule rather than the exception. However, LASPO did not only result in more

LIPs. Rather, the blanket withdrawal of legal aid has added a whole new category of LIPs: those on the lowest incomes and with the fewest resources because their family disputes are now categorically excluded from scope.² In fact, emerging data suggests that, since LASPO, significant proportions of LIPs arriving at court include people who have accessed no prior advice, people with low levels of literacy, people without access to a phone or the internet, as well as many who do not speak English as a first language (House of Commons Justice Committee 2015; Lee & Tkakucova 2018). In the post-LASPO context, LIPs are now an even more diverse population of individuals who are potentially contending with an even more amplified range of marginalized circumstances, backgrounds and characteristics.

Yet, the family court process is not designed with LIPs in mind. Rather, it remains predicated on a ‘full-representation model’,³ which presumes that every party has a lawyer with legal and procedural knowledge, as well a general understanding of how hearings work and how different people within the family court are supposed to interact with each other. In reality, when a lay individual is expected to navigate an unfamiliar legal process, it is likely that they will make mistakes, and judges and other professionals involved will need to take time to assist them and to demystify the process. As a result, cases are frequently more difficult and sometimes take longer when they involve LIPs.

This reality is already clearly demonstrated by a wealth of research studies that evidence the challenges associated with increased numbers of LIPs in family court processes across England and Wales, as well as akin jurisdictions such as Northern Ireland, Canada, Australia and New Zealand. Firstly, these studies have consistently linked the presence of LIPs with increased work for others within the court process, due to the problems that LIPs have in completing and submitting paperwork, the additional time that is required to explain things to LIPs, and the frequency with which hearings had to be adjourned (Dewar & Ors 2000; Moorhead & Sefton 2005; Trinder & Ors 2014; McKeever & Ors 2018). Secondly, when facing a LIP, lawyers and judges encounter difficulties in performing their traditional roles within the court process. For example, lawyers are frequently required to take on the extra work of preparing trial bundles and extending help to LIPs whilst also maintaining their ethical obligations and confidence of their own clients (Williams 2011; Bevan

² See, especially, Cusworth & Ors (2021) where researchers classified just under a third of LIPs in England as living in the most deprived quintile of England.

³ This term is drawn from Trinder & Ors (2014: 53).

2013; Trinder & Ors 2014; McKeever & Ors 2018). Judges also sometimes need to change their approach, ranging from basic signposting, giving procedural leeway to LIPs, to acting on behalf of LIPs during key tasks like cross-examination, and even sometimes managing hearings in an entirely inquisitorial way (Dewar & Ors 2000; Moorhead & Sefton 2005; Trinder & Ors 2014; Corbett & Summerfield 2017). The inconsistency between these approaches stems from judicial anxiety about maintaining their traditional position of impartiality, as well as time and resource constraints (Moorhead & Sefton 2005; Moorhead 2007). Thirdly, there is evidence to suggest that many cases reaching the family court are, in fact, even more challenging and contentious than they were before LASPO, with more people needing to return to court to enforce contact arrangements which might otherwise have been addressed by solicitors (Cusworth & Ors 2021).

As such, people who end up as LIPs in the family court are now finding themselves within a context of diminished legal support, overwhelmed lawyers and advice services, and a strained court system attempting to maintain its important role as a safety net for those who rely upon it. In reality, there is deepening chasm between the experiences of those trying to find their way through the court process as LIPs, and those who can afford to instruct a legal representative to navigate this process on their behalf. For untrained and uninitiated LIPs, the procedural and legal rules that govern the court process are likely to pose a variety of barriers to meaningful participation. For instance, these rules and customs dictate when and how certain issues may be raised, what aspects of a family dispute are legally relevant, and who is permitted to discuss those issues within hearings. From completing court forms, to preparing paperwork, to participating in advocacy, LIPs are continually required to extract and translate specific aspects of their lives into stringently prescribed written and oral formats, without the assistance of a lawyer (Moorhead & Sefton 2005; Trinder & Ors 2014). The impact of this is likely to vary depending on the circumstances and characteristics of individual LIPs. Those who struggle with either written or oral forms of communication, for instance, are likely to face significant challenges when it comes to contributing to the discussions that will ultimately inform the decisions reached in their cases. The barriers that LIPs face within the post-LASPO family court process are also crucially likely to affect the experiences and perceptions that people have of the wider family justice system, and its ability to meet their needs in a time of crisis (Mant 2020). In other words, when LIPs have negative experiences of the family court, their attitudes and understandings may have wider implications for public perceptions of

the family justice system, and its efficacy for delivering justice to families in need of support.

The implementation of LASPO has therefore marked a significant turning point for this system. In many ways, it accelerated the decline of legal aid by delivering a final, definitive blow to many of the services that were already struggling to support families within a diminished advice sector. At the same time, it has fundamentally compromised the capacity of the family court, which is now struggling to support an increased number of LIPs who are arriving with an even more diverse range of needs and circumstances.

[D] WHAT NEXT FOR FAMILIES IN CRISIS?

The decline of legal aid, and subsequent displacement of people to the family court, is having ramifications not only for the families at the centre of those cases but also the resilience of the wider family justice system to cope with other cases. Of course, the majority of families do not need to employ the full panoply of law, nor endure a protracted court case in order to settle their arrangements after relationship breakdown. For many couples, out-of-court or alternative dispute resolution models such as mediation are an ideal method to negotiate and reach agreements in a neutral, supportive environment. However, without the early provision of legal advice, many separating couples may not be informed as to the potential benefits of these methods and may perceive court proceedings as their only option. For others, an absence of early intervention may mean that potentially resolvable disputes escalate into much more serious problems that necessitate reliance on the safety net of the family court. In turn, greater numbers of LIPs in the family justice system, as well as the increased complexity of their circumstances, are impacting the capacity of the court to provide this safety net.

Taking all of this together, this article has painted a rather dire view of the impact of LASPO on family justice. However, rather than conceptualizing LASPO as the end of the story of legal aid reform, I argue that LASPO may, in fact, mark a turning point at which people are finally asking questions about what might come next if legal aid is no longer available (Kaganas 2017: 181). Although it may be a controversial position to advocate, LASPO may in practice provide both the opportunity and the impetus to creatively respond to the tensions that have long characterized the relationship between family law, legal aid and the family court process. By exacerbating these problems to such a degree, LASPO has amplified the importance of finding solutions and instigating change, rather than

simply papering over the cracks of a family justice system that has always struggled to support its users.

Nevertheless, questions about what comes next and what might be done to support families facing the crisis point of family breakdown must be considered carefully. Care is needed because, firstly, the LASPO changes were not an isolated reform. Rather, they were implemented as part of an ever-delicate political context which is underpinned by specific ideas about whom family law is for, the appropriate role of the court process, as well as conflicting ideas about the extent to which government administrations are willing to extend state-funded support to its citizens. Any potential future for family justice that is geared towards supporting LIPs will need to be carefully negotiated so that it is capable of both addressing long-standing problems as well as garnering political support from policymakers.

Secondly, given this complexity, it is often difficult to disentangle the different voices that govern our understandings of these long-standing problems. For instance, while reinstating legal aid to pre-LASPO levels would do a great deal to improve the current situation, it would not necessarily provide a panacea which is fully capable of addressing the challenges and pressures that have historically characterized the legal aid scheme and framed differential experiences for those attempting to use family law. In reality, many people have always been practically excluded from the benefits of legal aid, and the different working conditions of publicly and privately funded lawyers meant that, even when eligibility was far broader, there was never quite equal access to quality legal help when comparing the experiences of those relying on legal aid and those who could afford to pay privately for legal services. To this end, it is important to remember that it is not only the absence of legal advice and representation which has created barriers for access to justice. Rather, it is also important to examine the system that exists without this support (McKeever & Ors 2018: 153-156). By cutting off access to advice and representation, LASPO has not only *created* barriers to the family justice system: it has additionally exposed the disadvantages that people experience within it due to the way that the system works.

In considering the question of what comes next, therefore, it is imperative for scholars, practitioners, and policymakers to take the devastation of LASPO carefully and consciously as a sobering opportunity to reflect upon the long-standing pressures that have characterized the relationship between family law, legal aid and the family court. After all, it is only from the ruins that it may be possible to ask questions about

what family law is for, why the processes of family justice should exist, and how it may be built anew to best serve those families at the crisis point of relationship breakdown.

About the Author

Jessica Mant is a Lecturer in Law at Monash University, Australia. Her research specialisms span access to justice, legal aid, technology, lay participation in court processes, family law, and socio-legal theory and empirical methods. Her forthcoming monograph Litigants in Person and the Family Justice System (Hart 2022) is the first book to explicitly examine the relationship that litigants in person have with the family justice system. Her research has also appeared in journals including the Child and Family Law Quarterly, Journal of Social Welfare and Family Law, and Social and Legal Studies. She currently sits on the editorial board of the Journal of Law and Society, and often collaborates on research projects with practitioner-led organizations and charities such as the Access to Justice Foundation and the Legal Aid Practitioners Group.

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Legislation

Access to Justice Act 1999

Children Act 1989

Legal Aid Act 1988

Legal Aid and Advice Act 1949

Legal Aid, Sentencing and Punishment of Offenders Act 2012

UNITED BY CUTS: EXPLORING THE SYMMETRY BETWEEN HOW LAWYERS AND EXPERT WITNESSES EXPERIENCE FUNDING CUTS

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Abstract

This article highlights that defence lawyers and expert witnesses appear to have experienced the impact of criminal legal aid funding cuts in similar ways. Despite the very different and specialized nature of their respective work, both sets of professional participants in the criminal process identify that funding cuts create problems around sustainability and quality of service.

While a growing body of literature has well documented, and continues to document, the perilous position that defence lawyers are in as a result of funding cuts, less is known about the effect of funding cuts on the work done by expert witnesses. To that end, we conducted two focus groups with expert witnesses during which we put to them some findings from our study of the impact of legal aid cuts on lawyers conducting appellate and Criminal Cases Review Commission (CCRC) case work. During interviews in the CCRC study, it became apparent that defence lawyers were struggling to instruct expert witnesses, so we wanted to explore that issue more with expert witnesses themselves. In doing so, we discovered a significant overlap in the concerns expressed by both defence lawyers and expert witnesses regarding the ways in which their work was affected by funding cuts.

Keywords: expert witnesses; legal aid; defence lawyers; sustainability; quality; morale.

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[A] INTRODUCTION

The key effects of legal aid cuts on the work of defence lawyers are now well known in practitioner, academic and policy circles. Research on the impact of legal aid cuts on the behaviour of publicly funded criminal defence lawyers has identified several common themes. These themes include reductions in the amount of work performed on individual cases in favour of volume processing, reductions in client care activities (including face-to-face time spent with clients), routinization of case procedures resulting in de-skilling, increased financial/business uncertainty, unsustainable working practices and decreased morale. Last year the Justice Committee concluded that there are very real and pressing concerns over the sustainability of criminal legal aid practice, and that unless ‘the system provides more of an incentive to work on complex cases at every stage of the process, it is likely that practitioners will have to focus on quantity over quality’ (2021: 33). Among other things, the Justice Committee (2021) advocated for a rise in fees and a mechanism for regular review of fees paid to defence lawyers. The Independent Criminal Legal Aid Review (ICLAR), published in late 2021, also advocated for an urgent increase in criminal legal aid funding to try and restore the health of the profession (Bellamy 2021).

While the Justice Committee and ICLAR were gathering their evidence, we were participating in a large-scale research project which examined the impact of legal aid cuts on work done by defence lawyers dealing with appellate level criminal casework, and how that could impact the Criminal Cases Review Commission (CCRC). Defence lawyers can play a crucial role in the CCRC’s decision-making. Hodgson and Horne’s (2009) study found that a lawyer’s role was perceived as crucial in 49 per cent of cases where a decision to refer the case was made, and that applications involving lawyers had a significantly greater chance of referral than those which did not involve lawyers. As part of their recent research, Hoyle and Sato (2019) considered it unsurprising that legal representation has been shown to have an impact on outcomes. However, CCRC staff did express, to Hodgson and Horne (2009), some concern about lawyers providing poor quality advice, which was perceived to be the result of inadequate funding. Indeed, solicitors interviewed by Hodgson and Horne (2009) expressed the view that publicly funded remuneration rates were so low that CCRC work was not economical, and some firms were abandoning such work altogether.

During the course of our work, there was considerable evidence to suggest that both the legal aid payment rates and regime and the

administration of tests and audits by the Legal Aid Agency (LAA) were undermining lawyers' efforts to conduct CCRC casework efficiently and in a financially viable way (Vogler & Ors 2021). We also found that levels of representation among CCRC applicants had declined significantly, and that decline appeared to be associated with a reduction in legal aid fees that was implemented in 2014. Another significant finding was that reductions in legal aid funding appeared to have had an impact on the commissioning of expert evidence by legal practitioners, to some extent shifting this burden on to the CCRC itself.

In 2018, the House of Lords reported that the 'quality and delivery of forensic science in England and Wales is inadequate' as a result of 'simultaneous budget cuts and reorganisation, together with exponential growth in the need for new services such as digital evidence' (House of Lords 2018: 3). They also recognized market instability as a key threat to quality. The result is that expert witnesses work under extreme pressure, leaving their Lordships concerned about 'equal and fair access for defendants' (ibid). Roberts described the closure of the national Forensic Science Service in 2012 as 'a terrible blunder' that 'shows the irrationality of applying rigid market models and solutions to spheres of human activity that cannot be understood or appreciated in purely economic terms' (2018: 59). Persistent problems with low rates of legal aid funding and competition for work based largely on price (with little consideration of quality standards) have also been raised in the reports of the Forensic Science Regulator (see, for example, Tully 2021).

Against this background, the House of Lords expressed concern that crimes might go unsolved, and that miscarriages of justice could increase, while tightened 'funding constraints, the viability and resilience of free market competition in forensic science provision ... are identified as continuing areas of concern' (2018: 3) in relation to expert evidence. In December 2021, the ICLAR report recommended that fees paid to expert witnesses, and to defence lawyers, should both be increased substantially (Bellamy: 2021).

Thus, while defence lawyers are struggling to maintain a financially viable and quality service as a result of funding cuts, it seems clear that serious concerns also exist about the ways in which public funding affects the ability of expert witnesses to conduct their work. Yet, even though 'publicly funded defence forensics in English criminal proceedings have lately experienced the shock of austerity' (Roberts & Stockdale 2018: 40), there has hitherto been a dearth of research directly focused on the impacts of changes to public funding on how expert witnesses and defence

lawyers work with each other. Recognizing this gap, we conducted two small-scale focus groups to begin testing the impact of legal aid cuts on expert witness instructions and reports (Welsh & Clarke 2021). In this way, we sought to begin building a picture of the realities of practice for expert witnesses, as well as the realities of practice for defence lawyers.

Having analysed the data, there were striking similarities in the ways that defence lawyers and expert witnesses expressed how they had been affected by funding cuts. A set of overlapping experiences emerged that we have grouped into three categories of discussion during this article: that funding rates are too low and have not risen in line with inflation; there was constant quibbling with the LAA about the level and type of work being done; and concerns about sustainability, and about quality. Through these themes, we can see that lawyers and expert witnesses have been affected by legal aid cuts in similar ways and are left with comparable concerns about the extent of services that they are able to provide. These themes all have the worrying potential to increase the risk of a miscarriage of justice occurring, and then remaining unrectified. Before discussing those themes and their implications, we begin with an explanation of the methods used.

[B] METHOD

We framed our research on the impact of legal aid cuts on appellate casework around four temporal anchors:

- 1 the CCRC's introduction of an Easy Read application form in April 2012;
- 2 the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in April 2013, which created the LAA;
- 3 cuts to legally aided expert witness fees as a result of the Criminal Legal Aid (Remuneration) Regulations 2013;
- 4 an 8.75 per cent fee cut across the board of criminal legal aid fees that defence litigators could claim, introduced in March 2014.

Having identified the above four dates as being of potential significance, we designed the project to consist of five stages.

- 1 A quantitative analysis based on information contained in CCRC databases. We examined all data in the CCRC dataset from 1997-2017. Analysis consisted of both descriptive statistics and time series analysis results around the four temporal anchors described above.
- 2 A review of 280 CCRC casefiles using the CCRC's case record system. We systematically sampled 70 cases from the six months

either side of the four time periods. Analysis focused on counting the incidence rate of particular features around each time period in a form of quantitative content analysis. We also conducted a thematic qualitative analysis of the data in relation to narrative comments recorded on case files.

- 3** A survey of legal professionals. This stage involved using Qualtrics to construct an online survey of lawyers according to some key themes around funding, lawyer behaviour and lawyer opinions about the CCRC.
- 4** Semi-structured interviews with 45 legal professionals, conducted between November 2019 and June 2020. The key themes explored at stage four replicated the themes investigated at stage three. Agreed and anonymized transcripts that were produced from the interviews were coded using NVivo.
- 5** Focus groups with CCRC staff. As the final stage of the project, the focus groups were intended to draw developed themes together and to examine possibilities for change.

Of most significance to our follow-up work with expert witnesses were our findings at stages two to five of the project. Only 34 of the 280 cases that we reviewed at stage two raised issues about the use (or otherwise) of expert evidence. In 19 of those cases the issue was raised by the applicant's legal representative, but only six of those representatives actually conducted further investigations in the form of commissioning further expert reports, or at least pursuing conversations or other investigations with experts. It was not clear, at that stage, whether so few expert reports were commissioned as a result of difficulties locating a suitably qualified expert (especially since fees were cut in 2013), or because lawyers did not have the time or resources to instruct and liaise with expert witnesses in this context. Consequently, we followed up these issues with lawyers and CCRC staff at stages three to five. The nature of our findings at those stages—detailed below—led us to determine that it would be helpful to put our findings to expert witnesses themselves.

We, therefore, collected data via two online focus groups, conducted using Microsoft (MS) Teams software during a Covid-19 lockdown. Seven people participated, of whom three were psychologists and four were forensic scientists (including digital, biological and fire investigation). Five of the participants worked for organizations that employed or consulted with a variety of expert witnesses, providing knowledge of a broad range of experiences. The focus groups were designed around key themes including legal aid payment rates, the LAA's practices, and post-conviction appeal and CCRC/appeals work. While we structured the focus

groups around these central themes, we also left space for new ideas and issues to be raised and allowed time to assess the main issues and explore suggestions for change. In conducting the analysis of this data, we were influenced by Foley (2013), who argued that funding defence experts has positive implications beyond the immediate criminal defence community. Proper funding of defence experts would enable prosecution errors to be detected early, allow the resources of prosecuting authorities to be redirected where necessary, enable investigations to be reignited before cases turn cold, thus increasing public safety and the chances of catching the correct perpetrator. In these ways, Foley (2013) argues, adequate funding for experts to assist the defence contributes to overall procedural fairness in criminal cases.

[C] FUNDING RATES

Lawyers in our study universally believed that funding rates for CCRC casework were (are) prohibitively low, often making the work financially unviable. This finding is congruent with several other studies of the impact of funding cuts on defence lawyers (Newman & Welsh 2019; Thornton 2020; Dehaghani & Newman 2021) and with ICLAR's findings (Bellamy 2021). While, at the time of writing, the government was reviewing the findings of ICLAR and its recommendation to increase legal aid payment rates, there has been no increase in criminal litigators' legal aid payment rates for more than 20 years, representing a substantial real-term cut of between a third and half of fees since the 1990s (Bellamy 2021). Additionally, as fees were cut by 8.75 per cent in 2014, lawyers have experienced a reduction of payment rates in cash terms too.

During our survey and interviews, some lawyers reported that payment rates were so low that they felt unable to perform CCRC casework. Several others commented that providing advice in this area of law was loss-making for the firm, and that they had changed their approach to CCRC casework in light of the legal aid cuts. Lawyers told us that payment rates were 'ridiculous' (R7), and that:

You can't do this sort of work effectively on the rates of pay that you get for legal aid, which haven't increased for 20 years or so. In fact, they've declined. (R28)

Several lawyers told us that payment rates meant they could not afford to pay people with the appropriate skills and experience necessary to conduct CCRC casework. Even firms who used paralegals to conduct CCRC casework struggled to make the work financially viable.

According to our interview respondents, funding cuts were also implicated in changes leading to redundancies, working ‘harder for less money’ (R17), refusing to accept CCRC cases without initial private funding, moving to consultancy work as firms went out of business and—in the case of counsel—a drying-up of requests for advice as fewer and fewer solicitors were working in the area. While responses to the 2014 fee cut varied, participants described the 8.75 per cent fee cut as ‘another nail in the coffin’ (R29) or ‘just another hit’ (R40). Several lawyers told us that the real problem was the absence of any increase in payment rates for over 20 years. In this context, lawyers reported that, while firms might have been able to conduct CCRC casework as a loss leader when other areas of defence work were better remunerated, funding cuts across criminal defence casework made it increasingly difficult for such work to be cross-subsidized by other areas of practice.

In similar ways, expert witnesses who participated in our focus groups expressed universal concern about the rates at which fees for legally aided work are paid. Experts who spoke with us also reported that legal aid funding for expert witnesses is so low that some do shy away from doing legally aided work. This finding was supported by our interview data, in which lawyers reported that experts appeared to be less willing to prepare reports at legal aid rates in recent years, meaning that fewer experts were available to accept instructions.

Like lawyers, expert witnesses’ fees have not risen in line with inflation and were cut in 2013. Also like lawyers, their business costs have increased over time. One expert told us:

The £72 rate is less than what we could get in 1999 in terms of its value. So, actually, as every year goes by, the value of the legal aid rate goes down with inflation because it’s also not index linked. ... The meaning of that, well, we’re having to do work for less and less every year on a rate that’s already far below what it needs to be. (R4)

Expert witnesses felt that funding rates meant that conducting work at legal aid rates was sometimes unviable. For both lawyers and experts, these issues raised serious concerns about the quality and sustainability of work that could be conducted (below). When we asked experts what they felt was the most important thing to change in relation to legally aided work, they told us:

we really need the £90 rate in order to continue to provide the service with all the quality standards in place. That would be our biggest thing. (R1)

It’s the rates and the discrepancies between the rates ... It doesn’t make any sense. And when things like that don’t make any sense,

it's really difficult to see how they've arrived at those rates and why on earth we end up getting offered £52 an hour, or whatever it is, for work that is clearly worth a lot more. (R5)

Both lawyers and expert witnesses felt that legal aid payment rates were especially low in the context of the complexity of work that they are required to conduct. Lawyers felt that CCRC casework was an especially specialized area of criminal defence practice. Experts also pointed to the specialized skills necessary to be an expert witness. Participants in both studies felt that such complexity should be recognized not only by requirements to demonstrate competence and accreditation—which represents additional business costs—but also by being paid at rates that reflected the training and expertise that participants had undergone and developed, and by rates that were not stagnant.

[D] RELATIONSHIPS WITH THE LEGAL AID AGENCY

Lawyers who spoke with us generally felt that decision-making practices at the LAA were not consistent, and that the LAA could be obstructive when making casework funding decisions. Expert witnesses similarly described dealing with the LAA as 'constantly battling' (R2) and 'lots of quibbling about fees' (R7). In addition to concerns about funding cuts, both lawyers and expert witnesses were concerned that the way funding casework applications were assessed by the LAA was contributing to the unsustainability of the work.

Lawyers felt that the LAA did not trust their decisions and found this frustrating and insulting. For lawyers, this made the work burdensome and had a negative impact on morale, as illustrated by the following quote:

Let's say, for example, that a particular witness needs to be spoken to The Legal Aid Agency want to know why that witness needs to be spoken to, but also will cut down the number of hours as much as it can ... what they will do is they will make it so, so difficult to do that those avenues won't be explored on appeal. (R31)

Several lawyers explained that the LAA simply did not grant the hours required to do the work, leading diligent lawyers to work for free. This position is illustrated by the following quote from one of our interviews:

If you put a request into the Legal Aid Agency, you know you're not going to get the level of funding you require to do the piece of work. They may grant you two hours, but you know it's going to take you five. So, you find the time to do it, whether that's weekends, evenings. (R17)

Furthermore, the work involved in making applications for funding was often time-consuming yet was also unfunded. This unpaid administrative work ate into already low (or non-existent) profit margins, thereby increasing the financial strain on firms. One solicitor described the challenges as follows:

The difficulty is that the process of extending [funding] ... it's time consuming. And my view is that the amount of time it takes just to do the extensions is probably ... I mean, once you get the money through, it probably pays for the time that you spent getting the extension itself, not doing the actual work that you've got the extension to do. (R45)

Legal professionals were also concerned about the LAA's unwillingness to fund investigation work. Ultimately, this meant that investigative work to discover whether or not there had been a potential miscarriage of justice might not be conducted. Specifically in relation to expert witnesses, interviews with lawyers revealed that sometimes the LAA had refused to grant funding to obtain expert witness reports at all. While this prompted some lawyers to submit an application to the CCRC in the hope that it would commission the expert, for others LAA refusal meant the case had to end since further work could not be justified under lawyers' delegated powers to claim public funding.

Some lawyers believed that the LAA was reluctant to fund experts because of perceptions about high costs (even at legal aid rates). Expert witnesses were similarly concerned about LAA perceptions about how long it takes to prepare an expert report, as well as the LAA's reluctance to fund the time required to conduct their work. One expert explained:

the hours that they've set for some of the work are just not realistic. And I'm sure my colleagues here will actually, you know, probably feel the same way. I hear my colleagues say all the time, 'We work for less than the minimum wage, really, when you consider the hours that we do to do a proper job.' It's not something you can turn around in a day. It's a long piece of work. You're looking at, you know, probably four or five, maybe even eight or nine days to do a decent report, and you're being squeezed into these 20 hours. (R3)

In a couple of cases, experts also implied that the LAA's desire to reduce hours could, in some cases, affect an expert's strategy, or whether an expert was used at all. This had potential implications for quality and justice:

we would quote a for a job ... and quite often, the legal aid will come back and say, 'No, can you not take a different approach?' Now, the bit that makes me slightly uncomfortable with that is that, I can't say for certain, but I'm pretty confident the person at the legal aid making

that decision is not a forensic specialist who can formulate a forensic strategy. It concerns me that that's then shaping our forensic strategy we're deploying on cases. (R2)

Participants were very concerned that forensic strategy might be shaped by LAA decision-making processes regarding funding. This not only constrained experts' professional autonomy, but also had the potential to significantly shape the way cases were prepared and later presented in court.

Where lawyers had managed to persuade the LAA to pay for an expert or to pay above the standard rate, they often noted the complexity, time and bureaucracy involved in doing so. One participant explained that, in order to persuade the LAA to grant funding, they had sometimes asked experts to write initial statements *pro bono*. In fact, both experts and lawyers reported having to conduct significant amounts of unpaid work because of difficulties obtaining LAA agreement.

Interviewed legal professionals were also concerned—particularly given cashflow issues related to an inability to claim disbursements from the LAA in CCRC cases—about the pressure on firms to pay expert witnesses in a timely manner, as the quote below indicates:

Everybody's quite willing to help and everybody will say, 'Yeah, yeah, don't worry about the invoice, that's fine.' And when you say, 'No, really, this could be years.' They go, 'Yes, that's fine, that's fine.' And then five, literally five years later and he rings and he's fuming, and he says, 'I've never been paid on this, what's going on?' And you say, 'It's still going on.' And he says, 'Right pay me, I don't care, ...' That was nearly four grand we had to pay out. (R19)

This issue was also highlighted by the experts we spoke with. Expert witnesses described frequent difficulties receiving payments via solicitors:

It's difficult to get the money out of some solicitors, some are easy. That's where we sit. And whether or not that blockage is at the solicitor or at the Legal Aid Agency, we have no way of knowing that and no way of dealing with it wherever it is anyway. (R5)

In such cases, experts explained that they were often left without payment and had to absorb those costs internally. This could put considerable financial pressure on companies and increased the risk profile of legally aided work, which was not well-paid enough to make such risks worthwhile.

As can be seen from the above, experts and lawyers both reported that decision-making practices at the LAA were a hindrance to their work, making it more financially unstable and demoralizing. Lawyers

sometimes felt that the LAA did not trust them, while a perceived lack of understanding about expert casework at the LAA had left experts feeling ‘demeaned’ (R3) and undervalued. These issues fed into concerns about the sustainability and quality of work conducted.

[E] QUALITY AND SUSTAINABILITY

Lawyers and experts each raised concerns about both the sustainability and quality of work that they were able to perform under legal aid payment rates. Lawyers also raised concerns about the quality and sustainability of work being conducted by expert witnesses.

During focus groups with expert witnesses, we sought to clarify lawyers’ suggestions that a lot of expert witnesses were no longer accepting instructions for legally aided work. While all of the participants in our focus groups were actively engaged in conducting legally aided work, they were aware of experts in their respective fields who no longer accepted work funded by legal aid. Experts told us:

I’m aware of a number of colleagues who have said, ‘This is just not in my interests anymore. It’s too much work for too little pay.’ (R3)

I know people who refuse to do legal aid work because it’s just not worth asking their people to do it. Financially speaking, you could work on a case for 12 hours for legal aid and make as much as you might make in a couple of hours for a civil case. It’s just not worth their time, so they just won’t do it. (R5)

Experts were concerned that these patterns could result in skills shortages. Given the low fees on offer for expert witness work, some participants explained that this led to problems with both sustainability and quality:

The prosecution can buy experts at a high rate, which means the experts are unwilling to do defence work and tend to go off and do prosecution work instead, so we start to run short of defence experts. (R4)

We won’t have long-serving digital forensic scientists because there are these other opportunities open to them, and we can’t be competitive because we’re limited by a rate. (R2)

As these quotes allude to, not only do low rates of remuneration for legal aid work threaten the sustainability of defence experts in the long term, but they were also understood to risk quality and standards because individuals who build up particular expertise and experience are not retained.

Similar patterns emerged among the defence lawyers that we spoke with. Legal practitioners explained to us that they have been increasingly driven to undertake unremunerated work or to abandon practice in this area altogether. One solicitor decided to withdraw from publicly funded CCRC work because it became ‘uneconomic’ to do it to the necessary quality. They described how ‘laughable’ legal aid rates meant that it was impossible to perform casework with ‘any semblance of quality’ (R16). In fact, almost half (42 per cent) of the lawyers we spoke with were no longer willing to accept potential CCRC cases on legal aid. More experienced practitioners were retiring, while three of the seven trainees, and several other paralegals/caseworkers, we spoke to had either already moved, or had plans to move, into another area of practice. Similar problems were also reported in the junior Bar, where again the rates were not sufficient to attract or to keep good junior lawyers. Some lawyers were concerned that low payment rates meant that junior barristers would not build specialism in the area, and that this would cause long-term sustainability problems. Some lawyers who were still providing a legal aid service also suggested that, if things did not improve, they too would have to stop.

Although we did not find that the quality of lawyer-led applications to the CCRC had decreased when we conducted file reviews, the majority—though not universal—view among CCRC staff who spoke with us during stage-five focus groups was that overall the quality of lawyer-led applications had deteriorated. One member of CCRC staff explained:

When I first started there was quite a comprehensive response with the solicitors, they would go into detail, they’d obviously done their homework, as it were ... If I get any legal reps at all now it tends to be nothing more than a covering letter saying, you know, ‘Here you go.’ (CR5)

The variable quality of applications had implications for CCRC case review manager and administrator workloads, with extra time and effort required to organize materials and locate key information. One CCRC focus group participant attributed changes in the quality of representations received to de-skilling within firms.

Additionally, there were indications during our CCRC file reviews, surveys and interviews with lawyers that legal professionals felt funding cuts to their work, and the work of expert witnesses, created a barrier to investigating concerns about expert evidence. Most surveyed lawyers indicated that they would commission an expert report if they were assisting an applicant who raised concerns about expert evidence. However, as noted above, when we looked at CCRC case files, we found that only six (of 19) lawyer-led applications raising issues with expert

evidence actually conducted further investigations into potential issues with expert witnesses (or lack thereof). It was not clear from the case file reviews whether the lawyers who raised issues about the use of expert evidence hoped that the CCRC would conduct further investigations into these issues. We therefore explored this issue further when interviewing lawyers and found that, despite recognizing the importance of expert evidence, lawyers were generally less likely to commission experts in CCRC cases than in other cases precisely *because* of the CCRC's existence (particularly given resource pressures in firms). However, this was not always the case, and several lawyers said that they always tried to instruct experts themselves because they were unconvinced about the CCRC's willingness to do so. As indicated above, some lawyers also suggested that they might try to persuade an expert witness to prepare a report *pro bono*.

When we spoke with CCRC staff, there was a sense that lawyers were not instructing expert witnesses in the hope that the CCRC might do so instead, and CCRC staff were divided on whether this was appropriate or not. Some felt it was understandable to rely on the CCRC's extensive powers of investigation (granted under Part II Criminal Appeal Act 1995), especially in light of funding cuts, while others thought that obtaining expert evidence was part of the lawyer's role. One CCRC focus group participant described it as 'perfectly fair' (CR11) for lawyers to suggest that the CCRC obtain expert evidence. However, another suggested that legal professionals should be instructing expert witnesses on behalf of their clients and expressed suspicion that—perhaps because of funding issues—some lawyers attempted to pass responsibility on to the CCRC.

CCRC staff recognized/acknowledged that lawyers faced difficulties locating suitably qualified experts since fees were cut in 2013 and, in this context, expressed understanding that lawyers did not necessarily have the time or resources to instruct and liaise with expert witnesses. This issue was exemplified by one record of a conversation—noted during case file review—between a solicitor and CCRC case reviewer in 2014:

Unfortunately funding is an issue ... we are concerned that in the current climate funding may not be extended ... [the solicitor] wanted to explain that he has no funding to do further work ... he has not really done anything more than briefly read [the expert reports] and is not in a position to perform any kind of analysis.

[F] CONCLUSION

Lawyers and expert witnesses clearly felt that their ability to conduct high-quality legally aided casework has been diminished by the funding difficulties they have faced since the 1990s, and which have worsened during the twenty-first century. While there is a significant, and growing, body of evidence that supports the findings in relation to the lawyers that we spoke to (for example, Welsh 2017; Newman & Welsh 2019; Thornton 2019; Thornton 2020; Bellamy 2021; Justice Committee 2021; Dehaghani & Newman 2021), less is known about the impact of funding cuts on the ability of expert witnesses to conduct their work.

Having gathered data which specifically examined how lawyers perceived the role and work of expert witnesses in criminal appeal casework, we felt that it was important to take those findings to the experts themselves. In doing so, we have been able to highlight significant overlaps in the ways that both professional workgroups have experienced conducting legally aided work.

The lawyers and experts who spoke with us expressed overlapping concerns about the levels of payment rate which have not increased for decades and have been subject to cuts, and about the way in which experts and lawyers deal with the demands of the LAA. It was also clear that both the experts and lawyers were concerned that low payment rates and demoralizing interactions with the LAA were having a negative impact on both the quality of work done and on the long-term sustainability of legally aided services.

Expert participants echoed the House of Lord's (2018) concerns that all of these issues could increase the risk of a miscarriage of justice occurring. The lawyers we spoke with, who were already working on potential miscarriages of justice, were also concerned that potential issues indicative of a wrongful conviction would not and could not be examined as fully as they would wish because of the funding. This leads us to conclude that inadequate funding might both increase the risk of a miscarriage of justice occurring and decrease the likelihood of it being rectified.

That experts and lawyers share similar concerns is, clearly, worrying. However, it does tell us that patterns emerge about the impact of funding cuts across a diverse range of professionals. This highlights the potential for each group to find support for their own concerns, which is potentially empowering and may bolster demands for change. It is less easy to brand

a group as overly pessimistic or self-serving when another group who has faced similar funding issues independently reports the same concerns.

The ICLAR suggested that both expert witnesses and defence lawyers need to be paid more to make service sustainable in the long term (Bellamy 2021). It also recognized that the LAA should take a more generous approach to claims and suggested that an Advisory Board be established to keep the topic of legal aid in criminal cases under regular review. At the time of writing, the government has indicated its intention to increase fees for lawyers and experts but has also launched a further consultation to review Sir Christopher Bellamy QC's recommendations (Ministry of Justice 2022). The government intends to publish a full response later in 2022. In light of our findings, the ICLAR's proposals seem eminently sensible—and indeed necessary—to at least diminish, if not reverse, some of the negative effects of changes to legal aid funding and reduce the risks of miscarriages of justice occurring and remaining undetected.

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BEYOND ADVICE DESERTS: STRATEGIC IGNORANCE AND THE LACK OF ACCESS TO ASYLUM LEGAL ADVICE

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Abstract

This essay explores the role of strategic ignorance in relation to access to legal advice in England and Wales, drawing on the work of Linsey McGoey (2012; 2019; 2020), taking areas of extreme shortage of immigration and asylum legal advice as an example of the wider phenomenon in access to justice. It argues that there is a misplaced belief in market-based procurement to meet advice needs, which leads to a failure to collect evidence to understand whether the market does in fact achieve this. This avoidance of evidence about market functioning and the relationship between demand and provision is facilitated by fragmentation of both policy and operational responsibilities, leaving large gaps for ignorance, in which the accounts and concerns of advice-users are dismissed as not credible. It argues that, in failing to collect adequate evidence about the functioning of the market, the Lord Chancellor is ignoring a statutory duty to secure the availability of legal aid.

Keywords: legal aid; advice deserts; strategic ignorance; asylum and immigration; LASPO Act 2012 section 2.

[A] INTRODUCTION

In research on access to justice and legal advice, it is common to talk about ‘advice deserts’ and ‘justice gaps’—geographical areas, case types, or cohorts within society that cannot access legal advice or courts because of the lack of advice, the cost of advice, funding cuts, or the physical, linguistic or social obstacles to advice. This essay discusses some of the darkest corners of those deserts and gaps, in relation to immigration and asylum advice and representation: places in which there is no little or no real access to legal advice and where there is also a failure on the part of government bodies to collect any meaningful data about the extent and effects of this lack of access.

In doing so, the essay explores the role of ‘strategic ignorance’ (McGoey 2012; 2019) in relation to access to legal advice. The term strategic ignorance describes actions, most often by the more powerful party in a relationship, to ‘mobilise, manufacture or exploit unknowns ... [or] create or magnify unknowns’, either ‘to avoid liability for earlier actions’ or ‘to generate support for future political initiatives’ (McGoey 2019: 3). It is ‘an active social production’ (Bailey 2007: 77) as opposed to an accidental or non-strategic omission or gap in knowledge. The central point is that, as much as knowledge is power, ignorance can also be an exercise of power so that, in some situations, ‘actors seek to preserve ignorance rather than to dispel it’ (McGoey 2012: 554).

Strategic ignorance has been used as a framework for discussing a wide variety of administrative and public sector policies, including removal of environmental regulation (Pope & Rauber 2004), consideration of risk in hydropower developments (Huber 2019), and the non-acknowledgment of civilian casualties incurred through remote bombardment (Gould & Stel, 2022), for example. In the latter case, the authors point out that ‘denial can be disproven and secrecy has an expiration date ... [but] ignorance is more elusive and open-ended and hence politically convenient in different ways’ (Gould & Stel 2022: 57). The choice instead not to know about civilian casualties enabled the state to claim that remote warfare is less harmful to civilians than the face-to-face alternative.

McGoey distinguishes between micro-ignorance and macro-ignorance and describes the ‘ignorance pathways’ between the two: micro-ignorance describes ‘individual acts of ignoring’ while macro-ignorance is ‘the sedimentation of individual ignorance into rigid ideological positions and policy perspectives’ (2020: 200). This essay first gives a brief outline of how we can ‘read’ the legal aid market to understand demand and provision. It then introduces three examples of what I refer to as dark corners of the immigration legal aid market, as a framework for discussion of the role that strategic ignorance plays in the restriction or denial of access to advice. It then discusses four ignorance pathways which I argue are in operation at the intersection of legal aid and asylum policy, drawing on McGoey’s work, namely: 1) belief in the market to meet demand; 2) the avoidance of evidence about the actual functioning of the market; 3) fragmentation of control of both policy and operations, leaving wide spaces of non-control, non-responsibility and ignorance; and 4) credibility deficits applied to the people caught up in the system, ie those seeking asylum. It concludes by arguing for focused efforts to overcome ignorance with evidence, particularly by the Lord Chancellor, who is effectively ignoring a statutory duty to do so.

[B] READING DEMAND AND SUPPLY IN THE IMMIGRATION LEGAL AID MARKET¹

Only those with a contract with the Legal Aid Agency (LAA) are allowed to do legal aid work in England and Wales. Scotland and Northern Ireland have devolved justice systems in which legal aid operates differently. The LAA divides England and Wales into ‘procurement areas’, which vary in size from one or two local authority areas (in housing law) to just four large areas (in welfare benefits, for example). For immigration and asylum, these procurement areas are subdivided into ‘access points’, but not all areas of England and Wales are covered by an access point. The LAA publishes a Directory of Providers spreadsheet, which lists all contracted provider offices in all legal aid categories and is updated roughly monthly.²

Each provider is allocated a maximum number of ‘matter starts’ which it can open in a year. A ‘matter’ is all of the work done on a file, so it may cover an application and appeal for a single asylum applicant, or a main applicant and their dependants. Equally, one individual might have more than one ‘matter’ if, for example, the Home Office withdraws its decision, bringing the existing matter to an end, with the remade decision constituting a new matter under the legal aid rules. There is no obligation to open all of the matter starts allocated; indeed, the minimum allocation awarded in the 2018 contract tender was 150, and many offices open far fewer than this in a year.

Freedom of information responses show how many matter starts were actually opened in each procurement area or access point or by each office (anonymously), which gives a much better indication of capacity in an area than the matter start allocation does. There are still some caveats. Although most of these cases will have been asylum applications or appeals, because very little else remains within the scope of immigration legal aid in England and Wales, some will have been applications for settlement at the end of a period of refugee leave or applications under the domestic violence rules, for example. Those factors make it more difficult to ‘read’ the provider side of the market, and understand precisely what work is being done. However, we can derive a reasonable idea of provider capacity in a geographical area from the number of matter starts opened and compare that to indicators of demand.

¹ For a more detailed explanation and methodology for reading the legal aid market, see Wilding (2022).

² See Gov.UK, [Guidance: Directory of Providers](#).

Demand can be roughly estimated from statistical data about the number of people within an area who are likely to be eligible for, and in need of, legally aided immigration and asylum representation. These include the number of people receiving asylum support (which is the vast majority of those seeking asylum),³ the number of unaccompanied children who are seeking asylum in the care of each local authority,⁴ and the number of people referred into the National Referral Mechanism for a decision on whether they are a victim of trafficking.⁵ These statistics are readily accessible. Others who should qualify for legal aid (subject to financial means) include those who have completed five years' leave to remain as a refugee, who are eligible for settlement, and those who qualify for indefinite leave to remain under the domestic violence provisions of the immigration rules. From these figures, we can estimate legal need, region by region, in these primary categories of immigration legal aid demand and compare it with provision.

Reading the market in this way will enable us to explore, via the examples in the following sections, how the pathways to macro-ignorance operate to hide the barriers to accessing asylum legal advice.

[C] THREE 'DARK CORNERS'

To discuss strategic ignorance in practice, I draw on three examples in which legally aided advice is available in theory but very limited in practice. These are the new Derwentside immigration detention centre for women in County Durham, the use of Napier Barracks in Kent for the accommodation of men who are seeking asylum, and the Widening Dispersal policy to accommodate people seeking asylum in more areas of the UK, including areas where there is no asylum legal aid provision within a reasonable distance.

Derwentside immigration detention centre was opened by the Home Office in December 2021, to replace Yarls Wood detention centre in Bedfordshire. At Yarls Wood, as in other detention centres in England, there was a rota of firms contracted to provide Detention Duty Advice Surgeries (DDAS). These usually involve up to 10 half-hour advice slots in a day, on two to four days a week, depending on the size of the detention centre, after which providers may open a file for any matter which is in the scope of legal aid: mainly bail applications, asylum claims,

³ See Gov.UK, [Asylum Support](#).

⁴ See [Local Government Statistics](#).

⁵ [National Referral Mechanism Statistics](#).

some kinds of trafficking case, or judicial review applications. The DDAS scheme was already controversial, with questions over the adequacy of access to advice (Bail for Immigration Detainees 2019; Lindley 2021).⁶

The initial proposal for Derwentside was that face-to-face advice would be provided via the same DDAS scheme as at all of the other detention centres in the UK, with firms specifically contracted for Derwentside. The tender for provision was cancelled in the month before the centre opened because too few compliant bids were received.⁷ Instead, a ‘contingency’ service was implemented which is wholly remote until at least June 2022. Those providers with contingency contracts could in theory attend the detention centre to offer face-to-face advice but, because of the distance from Derwentside to any of those contingency providers, the reality is (as set out in an application for judicial review by Women for Refugee Women) that the round trip alone would take longer than a full working day and would be far longer than the five hours’ travel time the Legal Aid Agency considers to be the maximum it should pay for.

The second example is Napier Barracks, a disused army site in Kent which has been used to accommodate asylum applicants since September 2020. Around 300 single male applicants at a time are held there, usually for a period of 60-90 days before they are moved to dispersal accommodation, which may be anywhere in mainland Britain. In a meeting of non-governmental organizations (NGOs) in January 2022, the point was made that these quasi-detention sites, such as barracks, have many of the features of detention centres, like barbed wire, patrols, CCTV, restrictions on support groups coming in, and the residents being advised not to go into local villages. But they lack the protections required for a detention centre, such as an Independent Monitoring Board, onsite health care, or Detention Centre Rules requiring that residents receive a medical examination. Nor is there any provision of onsite legal advice, and residents must instead find a legal aid provider either locally or further afield. As will be shown, despite the men’s theoretical liberty to come and go from the barracks, there are significant barriers to finding legal representation.

The third example, the Widening Dispersal policy, describes a decision to change the geographical distribution of asylum accommodation. The term ‘dispersal’ refers to the practice, since 2000, of moving people who need asylum support to any part of mainland Britain, on a no-choice basis. Originally, the intention was to move applicants out of London and

⁶ See also *R (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin).

⁷ [Legal Aid Agency Cancellation Notice](#), 16 November 2021.

the South East (Robinson & Ors 2003; Politowski & McGuinness 2016). Participation in the scheme was voluntary and, as of 2016, only 121 out of 453 local authorities in the UK were involved (House of Commons Home Affairs Committee, 2017; Hirst & Atto 2018). Even where local authorities agree to participate, there is an incentive for the private contractors which source the housing to do so as cheaply as possible, to minimize their costs, resulting in a disproportionate concentration of often vulnerable people in the poorest parts of the country: 57% in the poorest one-third of Britain and only 10% in the richest one-third (Lyons & Duncan 2017; Hirst & Atto, 2018).

This, combined with the growing number of people accommodated in ‘contingency’ hotels because the dispersal accommodation is full (because of Home Office delays in processing asylum claims), has prompted the Home Office to ask all local authorities to agree to participate in the dispersal scheme under plans referred to as ‘Widening Dispersal’. Many have already agreed to do so,⁸ and the Nationality and Borders Bill contains a clause which would make participation in the dispersal scheme mandatory for all local authorities. At the same time, the National Transfer Scheme for transferring unaccompanied children out of Kent (where the majority arrive) into the care of other local authorities has been made mandatory for all authorities, for at least a temporary period.⁹ This had been voluntary since its creation in 2016. Many local authorities had also volunteered to accommodate resettled refugees under the Syrian and Afghan schemes, and this was often their first experience of accommodating and supporting refugees. But local authorities and the regional Strategic Migration Partnerships have expressed concern about the lack of available legal advice and representation for people seeking asylum, in areas where they have never previously lived.

These three examples provide the substance for the following discussion of four pathways to ignorance operating in current legal aid and asylum policy in England and Wales. The pathways overlap, however, and more than one is evident in each of the examples.

⁸ See, for example, Gwent’s [discussion paper](#) showing one local authority’s proposals on this issue.

⁹ See announcement at Gov.UK: ‘[National Transfer Scheme to Become Mandatory for All Local Authorities](#)’.

[D] PATHWAY 1: BELIEF IN THE MARKET

Current UK Government policy on legal aid for England and Wales is explicitly market-based,¹⁰ implementing most of the recommendations of the Carter Review, published in 2006. Carter advocated market-based procurement of legal aid services, whereby client choice and competition between providers would ensure high quality at the lowest cost. This belief in the free market endures, despite evidence of a market failure in legal aid, with providers leaving the market or reducing their market share (Wilding 2021; Wilding & Ors 2021). McGoey (2019) describes how those sometimes referred to as ‘market fundamentalists’ ignore governments’ roles in shaping markets, whether for good or ill. I argue that this belief in the market is one of the key ignorance pathways in operation in legal aid policy around asylum and immigration, and more generally, as the LAA relies on assumptions that the market *would* expand or adapt without intervention if it were necessary.

The Widening Dispersal plans illustrate this pathway. The statistics for asylum support in 2021 show new areas accommodating people who have applied for asylum, which have never done so before, and which have no legal aid provision. The market was presumed to be capable of addressing this, with new or increased demand attracting new providers into the area (Carter 2006). Indeed, we can see that provision has developed around some dispersal areas. Glasgow is a good example of a city which had no specialist asylum provision until dispersal began in the early 2000s, and now has a good supply, alongside numerous civil society support organizations. But creation of demand through dispersal only makes provision *possible*. It does not *guarantee* that providers will enter or remain in the market: there are some dispersal areas where there is need, but little or no provision (Norfolk and Suffolk, for example) and others where provision is very limited (such as Plymouth, North Wales and Stoke-on-Trent).

Two factors in particular make it less likely that the market will expand and adapt to meet this new pattern of need in 2022. Firstly, dispersal began in 2000, when the legal aid funding scheme was significantly broader, and the auditing regime less intensive than is currently the case, so the conditions for market entry or expansion are very different in 2022. Second, provision is even less likely to develop or move into an area where there is only a small population of people in need. A dozen single people or two or three families will not create adequate demand to

¹⁰ Justice and legal aid matters are devolved in Scotland and Northern Ireland, which means UK policy does not apply.

attract specialist legal aid providers into a geographical area. Outreach is possible, but this imposes even greater pressure on providers, who already face excess demand and either tight financial margins or even financial losses on legal aid work.

This belief in the market is likely part of the reasoning which underpins the next pathway: the non-collection of evidence is (somewhat) rational if one assumes that the market will expand or contract without intervention to meet eligible demand.

[E] PATHWAY 2: THE AVOIDANCE OF EVIDENCE

The general phenomenon of evidence avoidance has been demonstrated in laboratory studies which found that people avoided information about the consequences of their actions on others (Dana & Ors 2007, is often cited as the seminal study). The Legal Aid Agency, which administers legal aid for England and Wales, has no mandate to research need and provision. Its predecessor, the Legal Services Commission, which was responsible for the administration of legal aid until 2013, had a statutory duty to inform itself about the need for legal advice. Under the Commission, from 1996 to 2013 there existed the Legal Services Research Centre, which developed the English and Welsh Civil Justice Survey and carried out or commissioned a range of studies covering legal knowledge and capability (Balmer & Ors 2010) and legal need (Pleasence & Ors 2001) and is described as providing most of the evidence which was then available on the costs and benefits of meeting legal need (Moorhead 2010).

The Legal Aid Agency was never given any such duty, nor relevant resources, and consequently does not conduct any significant amount of research into need or provision. It is criticized for having ‘limited knowledge of the impact of its policies’ (Smith & Cape 2017: 78) and for producing annual reports which are ‘very narrowly focussed on corporate concerns’ and ‘about administrative and operational concerns, rather than giving a view of how citizens are (or are not) being assisted by legal aid’ (Partington 2015). Despite an extensive auditing regime, the LAA has no feedback loops in place for identifying or mapping unmet demand, and very little in place for monitoring the substantive quality of work—perhaps because it has delegated these tasks to ‘the market’.

Although there is a procurement process for legal aid, there is little action and no consequence for the LAA if no advice services are in fact procured. This can be compared with health services, for example, where

local authorities and health trusts have responsibility for commissioning certain services, such as general practitioners. However, flawed that system may be in practice, they have a duty to know where the gaps are, and certain duties and powers to try to fill them (see, for example, Gadsby & Ors 2017). There is a single duty placed upon the Lord Chancellor in section 1 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, the legislation which sets out the law on legal aid: namely, to secure the availability of legal aid in accordance with the Act. In pursuit of this duty, there is a power in section 2 of the Act for the Lord Chancellor to make different arrangements for different areas of law or different parts of England and Wales, including making grants and loans to providers. The power has never been used and there is no procedure for requesting its exercise; without seeking out any evidence on need and provision, it is difficult to see how the Lord Chancellor could know whether there was a need to exercise the power.

However, in certain areas such as the East of England, local authorities and Strategic Migration Partnerships have informed the LAA that there is a shortage of asylum legal aid representation and that the authority and local support groups are struggling to find representatives for people in need. They report being told by LAA contract managers that there is adequate provision because only one-third of the matter starts *allocated* within the region have been used. Yet the providers in the region have not *opened* a larger proportion of their allocated matter starts in any year since the current contracts were awarded, in 2018. The number of matter starts opened in previous years is the better indicator of capacity. To treat the allocated number of matter starts as indicative of available capacity is an exercise of strategic ignorance, since the LAA holds the data showing how many (or how few) matter starts are actually used per year in each geographical area. In effect, this is a deliberate avoidance of evidence, where evidence would demonstrate the need for remedial action.

[F] PATHWAY 3: FRAGMENTATION

A third ignorance pathway arises from the fragmentation of both policy making and operational responsibilities. Although the LAA is responsible for procuring and contracting legal aid services, it is the Ministry of Justice which sets fee rates (which affect the ability of providers to survive in the market), and the Home Office which decides where people seeking asylum will be accommodated or detained. The Home Office outsources the day-to-day work of procuring and running asylum accommodation to three private companies: Mears, Serco and Clearsprings Ready Homes. It outsources the job of liaising with these accommodation providers and

signposting people to legal representatives to yet another organization, Migrant Help. It also outsources the running of detention centres to private companies: Serco, Mitie, G4S and GEO Group, which (among other responsibilities) have to facilitate the operation of the legal advice surgeries which are procured by the LAA.

In this section I will argue that the Home Office makes these policy decisions, which determine where advice is needed, without first enquiring about the likely accessibility of advice because access to advice is the responsibility of other organizations, simply outside its remit. It can ignore what goes on, or does not go on, in its outsourced detention centres, run by private contractors. It has created an asylum decision-making process that drives a need for asylum legal representation far beyond what the LAA can procure, or what the Ministry of Justice (or Treasury) is willing to pay for. It creates delays that are unmanageable for providers, in a system where delays drive up the costs for providers and those costs are not covered by the LAA, and simply ignores the consequences because funding and procurement of legal advice is outside its remit. In this way, fragmentation of both policy control and operational responsibilities facilitates strategic ignorance.

The decision to open a detention centre for women in County Durham illustrates how fragmentation operates as an ignorance pathway. A cursory reading of the legal aid market in the North East of England demonstrates that there was never any realistic prospect of face-to-face legal advice being available at Derwentside. The legal aid access point closest to Derwentside is ‘County Durham East, Teesside, Tyne and Wear, and Gateshead’, which falls within the procurement area of North East, Yorkshire and the Humber. As of 29 December 2021, the update closest to the centre’s opening, the LAA Directory of Providers listed nine different organizations with 13 offices between them doing immigration and asylum legal aid in the access point.¹¹ In fact, one of those offices had closed in August 2021, leaving 12 offices of eight organizations. These offices opened, on average, a total of 1,793 new legal aid ‘matters’ per year on the current (2018 round) contracts.¹² This compares with need—in categories eligible for legal aid—estimated at 5,149 in the North East: a deficit of 3,356. Although the neighbouring regions, the North West and Yorkshire and the Humber, have more providers, they also have a deficit between provision and need of 6,470 and 4,329 respectively.

¹¹ See note 2 above.

¹² Freedom of Information response 210315004 from Ministry of Justice to Jo Wilding dated 14 April 2022.

Furthermore, three of the North East providers cannot undertake judicial review applications because they are regulated by the Office of the Immigration Services Commissioner (OISC) rather than the Solicitors Regulation Authority (SRA). That matters when working with a detained population because the only remedy for an unlawful decision to remove someone from the UK, or for an unlawful refusal to recognize someone as a victim of trafficking, or for unlawful detention (as opposed to a claim for damages for the tort of false imprisonment) is judicial review.

The abortive tender for provision served to confirm that there was inadequate access to legal aid representation in the North East of England, but that tender was carried out after the Home Office had decided to open a detention centre for women on that site, not as part of a planning process or a feasibility study. It delegated the actual knowing to the LAA, but only after the decision was made. A wholly remote advice service is not adequate, from either the client or the provider perspective. The decision to open a new detention centre despite the failure to secure face-to-face legal advice for the detainees at Derwentside is an example both of strategic ignorance arising from fragmentation of policy-making responsibilities and through omission to acquire evidence in advance of making a policy decision. It does also rely on a blind faith in the market to provide, which presumes that the conditions in the market are satisfactory despite evidence to the contrary (Wilding 2021).

These pathways also apply at Napier Barracks, where the fragmentation of responsibility for asylum applications, asylum accommodation and legal aid rules is acutely demonstrated. There are three legal aid providers in Kent, who undertake an average of 362 new cases (or ‘matter starts’) between them per year. Much of this capacity is taken up with unaccompanied children in the care of Kent County Council, and those leaving the council’s care at the age of 18 who need representation for new applications once their leave to remain expires. There is no legal aid provision in Essex, the county to the north of Kent, and nothing in Sussex, to the west, apart from a single small provider in Brighton which is unable to meet the demand from unaccompanied children and adult asylum applicants accommodated in Sussex. It is clear that there is no surplus legal aid capacity in the surrounding area. Realistically, the men accommodated at Napier are not in a position to travel to London for legal advice, since they do not have the funds. Providers cannot afford to travel to the barracks for appointments under the current funding scheme, meaning there is little prospect of the residents receiving face-to-face legal advice.

Even if they are able to find a provider willing to take them on remotely, they face serious difficulties. NGOs working to support the people in the barracks describe the onsite wi-fi as ‘intermittent’. Some do not have phones, since these are often seized on arrival, apparently to investigate human smuggling operations (Taylor 2022; *R (on the application of HM and MA and KH) v Secretary of State for the Home Department; Privacy International intervening*[2022] EWHC 695 (Admin)). NGO workers describe providing phones and phone credit to detainees. Residents say they do not have access to private rooms to speak to their lawyers, meaning they either speak where they can be overheard by guards and other residents, or have to try to instruct their solicitors, including regarding the most traumatic details of their cases, by phone in the street. One NGO which attends Napier regularly described a situation where all but one of the residents they spoke to had been unable to contact their solicitor, even if they knew who was representing them. Many did not know whether they were represented or not. Frequently, they only had contact details for an interpreter, not the solicitor. Very few had received legal advice before they had their asylum interviews. Some had received a Pre-Interview Questionnaire which had to be completed in English within a deadline, but, without legal advice, they had no idea how to complete the form. It means NGOs describe themselves as carrying out a labour-intensive intermediary role.

The legal aid rules create an additional obstacle from the legal aid provider point of view. If someone is not newly arrived, there is a risk that they have previously been signed up by another provider. One example given by an NGO worker involved a man who had been in Birmingham for a year before being moved to Napier Barracks. He did not know if he had a solicitor or not. The worker explained that providers risk non-payment and a contract notice if they take on a client who turns out to have already signed up with another provider. To do so, they would either need the earlier provider to commit to not billing the case, or to show that the earlier provider was not going to do the work, or to make a complaint about the standard of that firm’s work. All of these are difficult without knowing who the provider is. Yet there is no central database where they can check whether someone is already signed up. The role of Migrant Help, under contract with the Home Office to provide advice and assistance, is limited to ‘signposting’ rather than proactive referrals or support with accessing lawyers.

This fragmentation means no organization or department has ownership of the overall system, leaving gaps for which none of them has responsibility. In this way, fragmentation is a pathway to ignorance.

[G] PATHWAY 4: CREDIBILITY DEFICITS

The final ignorance pathway discussed in this essay rests on the weak political position of those caught up in the system. Those in need of asylum and immigration advice are not entitled to vote. Even in most other areas of law covered by legal aid, the beneficiaries are usually poor, otherwise they would not meet the financial means thresholds for eligibility, and often marginalized. Their limited political power is often accompanied by limited public sympathy, compared with the recipients of other publicly funded services like health care and education.

These factors in turn lead to ‘credibility deficits’ (Fricker 2007; McGoey 2019) whereby an individual’s account is less likely to be believed. The refusal to listen to the residents of the Grenfell Tower flats is cited as an example (McGoey 2019): they had warned about electrical power surges creating a fire risk before the catastrophic fire in 2017, but were ignored as ‘inferior knowers’. Indeed, personal credibility is often the reason given for refusing asylum or other protection to those applying for asylum, with the Home Office dismissing their accounts as untrue or exaggerated, often with the weakest of reasoning (Thomas 2015; Goodfellow 2020; Yeo 2020). Good quality legal representation can often overturn the Home Office conclusion on appeal, but poor-quality representation means that the decision goes effectively unchallenged. Asylum applicants’ wider credibility deficit with the public and policy-makers means that the poor quality representation is not necessarily identified as such.

The credibility deficit is different from, but related to, ideas around ‘deservingness’. I use the concept of *justice chauvinism* to describe the implicit idea that a non-citizen is both less credible and less deserving of justice than a national of the country. This draws on the concept of welfare chauvinism (Andersen & Ors Bjorklund 1990), the idea that access to a state’s welfare systems should be reserved for the state’s own citizens, regardless of need or contribution. The framework of strategic ignorance enables us to see justice chauvinism not (necessarily) as a deliberate motivation for designing a dysfunctional asylum or legal aid system but rather as a barrier to any motivation to seek out evidence about the functioning of the system.

Although the LAA’s contract managers canvass providers in other regions to find out which ones have capacity to take on cases from Napier, for example, NGO workers argue that the firms which say they have capacity are not always those which do good quality work. One gave an example of a sole practitioner saying they could take on 100 new matters from the barracks, which implies that they expect to do very

little work on each case. Another firm's lawyer did not appear to know what the National Referral Mechanism is (the decision-making system for potential victims of trafficking), much less how to get a client into it. Those which do good quality work are able to take on fewer cases. Yet the credibility deficit means it is likely that, if these men are unsuccessful in their asylum applications, it will be assumed that they were untruthful, rather than that their legal representation was inadequate. In this way, the credibility deficit for the 'end users' creates a pathway to ignorance for both Home Office and legal aid policy-makers about meaningful access to advice.

[H] CONCLUSION

By framing Home Office and legal aid policy-making as strategic ignorance, we can understand the issue as one of (deliberate or reckless) failure to acquire and apply the evidence that would inform a more functional system for access to legal advice. I argue that in this scenario, strategic ignorance is driven by a combination of 1) a genuine (but mistaken) belief in the power of the market to achieve things which it cannot achieve; 2) a consequent choice not to collect or pay attention to evidence about the real functioning of the market; 3) a silo-ized and fragmented policy-making framework which leaves space for ignorance, or makes ignorance easier to dismiss as another agency's problem; and 4) a lack of interest in the particular populations most affected—a kind of 'justice chauvinism' which implicitly holds that some people are both less worthy of belief and less deserving of access to justice than others.

These four pathways combine to create potent pathways to ignorance about what is really happening in asylum legal aid, with knowledge replaced by presumptions. The belief in the market's power to provide, despite the significant changes to the market conditions in recent years, enables the LAA to assume that advice is available wherever its contracted providers have not yet used all of their allocated 'matter starts', without regard to the actual (lack of) capacity of providers to expand. It allows the Ministry of Justice to assume that competition for clients will ensure quality, however low the fee rates fall. Beyond intermittent peer reviews, the scores of which are not published, there is no system for confirming this. The Home Office, meanwhile, makes policy about where people will be accommodated or detained, without reference to whether legal advice is available or not, much less making its decisions in partnership with the Ministry of Justice and LAA to ensure that representation will be developed: an exercise in strategic ignorance by failing to acquire the necessary information in a timely manner.

With policy control fragmented between government departments, and operational control fragmented still further through agencies and outsourced contractors, this leaves knowledge scattered through different organizations with no coherent understanding of the system's dysfunctions, much less coherent ownership of a plan to make it functional. The Nationality and Borders Bill is likely to do precisely the opposite. But the credibility deficit suffered by people seeking asylum means that they themselves are blamed for the dysfunction of the system.

The LASPO Act 2012 imposes only one duty on the Lord Chancellor in respect of legal aid, namely, to secure the availability of legal aid in accordance with part 1 of the Act. In section 2, the Act gives the Lord Chancellor certain powers in relation to the exercise of that duty, including powers to make different arrangements for different areas of law or parts of the country, including the making of grants. Without collecting any meaningful information about the geographical variations in demand and supply, it is difficult to tell whether or not the Lord Chancellor has discharged the duty to secure the availability of legal aid in accordance with the Act, let alone how the powers in section 2 might be deployed to rectify any deficits in availability.

Arguably, there is already adequate evidence to justify the Lord Chancellor concluding that his duty under the LASPO Act 2012 is not being discharged, and that he must exercise the section 2 power to make alternative and supplementary arrangements, including grants in areas of the most severe shortage and those with new dispersal or detention. In the meantime, researchers are urged to seek out the evidence which challenges strategic ignorance in relation to legal aid and access to legal advice, and to make continued ignorance untenable.

About the Author

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REFLECTIONS ON THE JUDICIAL CASE MANAGEMENT EXPERIMENTS OF SIR FRANCIS NEWBOLT*

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Abstract

In two earlier articles¹ published in *Amicus Curiae*, a pioneering form of case management was reviewed. Essentially these essays revealed that Sir Francis Newbolt, an Official Referee, was the pioneer in this processual innovation, in his work between 1920 and 1936. His procedural experiments and advances laid the foundation for a distinctive process adopted by the Official Referees' Court which survives to this day, albeit enhanced and adapted to meet the challenges of the digital age. In many respects, and as suggested in the earlier contributions, Newbolt was far ahead of his times, although it is important to appreciate also that he was driven largely by the impact of post-World War I austerity and the economic pressures of the Great Depression which stretched judicial resources. In some respects, there may be an almost historical correlation between his times and today—a period of austerity followed by an unexpected pandemic, exacerbated by interruptions to trading relationships. The pandemic of 1918 is said to have had greater consequences than the World War, imperial preference, protectionism and the depression. The experience of those times may have some relevance to our own. In this article, however, a comparison is drawn between Newbolt's 'Scheme' and the subsequent access to justice reforms in England and Wales, demonstrating in many respects a certain degree of equivalence in the objectives of Lord Woolf and Sir Francis. This may be equated with my experience as a solicitor who practised in the Official Referees Court, which then became the Technology and

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1 *Amicus Curiae*, Series 2, Vol 1, No 2, 165-200 and *Amicus Curiae*, Series 2, Vol 1, No 3, 389-417.

Construction Court. That court inherited the practice derived from Newbolt's experiments and enabled a more efficient form of case management broadly conforming to the objectives of access to justice.

Keywords: case management; official referees; innovative procedure.

[A] REHABILITATION OF PROCESS METHOD

In any justice system the role of procedure is far greater than generally accepted (Woolf 2008: 16).

What the earlier articles on this subject have shown is the development of a rudimentary form of case management, forgotten perhaps to history, but now rediscovered. Sir Francis Newbolt's 'Scheme' was possibly the best means available to him and colleagues at the time for the expedition of cases saving disputants' time and cost. Judge Fay teasingly described the referees' practice as:

the judges operate what might be termed a limited dossier system: in advance of interlocutory proceedings, they expect to be provided with the relevant papers and to familiarise themselves with the issues; in consequence they not infrequently themselves make suggestions with a view to rendering the trial more manageable or shorter or less expensive (Fay 1988: 17).

But he did not tell us if the 'suggestions' were a significant part of the Newbolt Scheme, nor did he describe the Scheme. Essentially earlier contributions discovered that there was more to the referees' function than a purely judicial role. What Newbolt was compelled by circumstances to do was to use other techniques that today might be described as part of an alternative dispute resolution (ADR) culture. Long before Lord Woolf modernized the Rules of the Supreme Court and encouraged greater recognition of informal means of settlement by the judiciary Newbolt had put this modernizing idea into practice. He acted almost as a facilitator, and in something of an entrepreneurial spirit described the Scheme as one that created an atmosphere in interlocutory hearings for settlement. Importantly, these were on procedural applications, usually with solicitors who were keen on saving client money and resolving matters before trial. Newbolt was aware of the need not to overstep the mark, as he had been warned by Lord Birkenhead (Letter from Sir Claude Schuster 1922) against 'pressure from the Bench' determining or at least influencing outcome. However, by enquiry, in an informal atmosphere in chambers, he could lead the solicitors to appreciate the amount of common ground which might well outweigh the differences between

their clients. In this way, subtle encouragement could lead to earlier settlement. The apparent reason for the Scheme was the lengthy state of the referees' lists when Newbolt became a referee and the weakening state of the national economy. Coinciding with Newbolt's appointment was the acquisition of the non-jury list which trebled references to the court in the three years 1919–1921. He refers to that critical fact in his letter to Lord Birkenhead (Letter to Lord Birkenhead 1920) (Newbolt 1923). He reported that this list 'will occupy my Court for a year'. Two cases in that list took 18 months to reach trial. It is clear that what troubled him is probably what also troubled Lord Bowen in writing anonymously to *The Times*: 'how much is it likely to cost and how soon at the latest is the thing likely to be over?' (Bowen to *The Times* 1892) Newbolt's ingenuity was to link cost and time, utilizing the subordination of his office for the benefit of the parties. He did this by means of an alternative process: informal discussions in chambers. He considered settlement to be at the heart of the legal process in most cases. Lord Birkenhead, on the other hand, whilst not denying the benefits of early settlement, was anxious to preserve the litigant's right to a trial, to preserve judicial independence, and to avoid any untoward embarrassment of any presumption of bias.

Be that as it may, there were some undoubted benefits to Newbolt's Scheme in that:

- 1 the referee, being a Circuit Judge and below a High Court judge in ranking, saved High Court judge time and the need for jury trials;
- 2 the referee acted as a facilitator;
- 3 such interlocutory management had a positive effect in terms of efficiency and economy in technically complex factual cases (Reynolds 2008);
- 4 in quantitative terms that up to a quarter of all cases may have utilized the Scheme and that this produced a possible time saving of 50 per cent to 80 per cent of time at trial (Reynolds 2008);
- 5 the Scheme produced a marked effect on caseflow in reducing the backlog of cases, especially when a more 'activist' approach was adopted.

Having concluded that Newbolt was far ahead of his times, in an earlier study (Reynolds 2008) I also considered how the findings might contribute to the corpus of knowledge on dispute resolution—especially in the context of the competing cultures of the traditional adversarial system and informal alternatives, and perhaps most importantly how it might affect our thinking about what a court is or should be and what a judge is or should be.

[B] ON WOOLF AND NEWBOLT: CONTRASTING CASE MANAGEMENT CONCEPTS

What Newbolt created was essentially a new role for the referee at the interlocutory stage of civil proceedings, utilizing the traditional role of a Master as a judge and considering how a summons for directions before a referee ‘would be most beneficial’. This was also inspired by his knowledge of arbitration: ‘how arbitration, with all its convenience and finality can be obtained in the Law Courts for the ordinary Court fees’ (Letter: Newbolt to *The Times* 1930). In essence the Scheme generated a more facilitative and less adversarial approach at the interlocutory stage when it was likely easier to settle, avoiding the further expense of disclosure, expert evidence and the parties becoming more entrenched in argument. In that sense, the Scheme is a display of ‘soft power’ in informal chambers discussions as opposed to ‘hard power’ in a formal courtroom setting (Reynolds 2008). Newbolt’s facilitative approach in his ‘discussions’ was the catalyst for settlement. It is important to reflect that Newbolt arrived at his approach recognizing the importance of early settlement 73 years before the publication of the Heilbron/Hodge Report in 1993. Newbolt’s rudimentary approach to judicial case management coincides with the objective described in Civil Procedure Rules (CPR) 1.4(2)(f)

helping the parties to settle the whole or part of the case.

It also accords with Lord Woolf’s policy, described in chapter 24 of his *Interim Report* (Woolf 1995)

to develop measures which will encourage reasonable and early settlement of proceedings.

Newbolt was *directly* involved in chambers discussions, as he put it: ‘the mere discussion across a table’ (Newbolt 1923: 437). Newbolt thought there was no more effective way of dealing with cases than for the judge to deal with his own summonses (Newbolt 1923: 437). This corresponds with the ‘Woolfian’ concept of the ‘procedural judge’. It also gives the judge greater managerial responsibility with the intention of encouraging a more effective use of court time and hence controlling cost. The Scheme also mirrors Lord Woolf’s concept of promoting settlement—as Lord Woolf stated in chapter 24 of his *Interim Report* (1995):

[1] Case management will facilitate and encourage earlier settlement through earlier identification and determination of issues and tighter timetables.

Importantly, it also corresponds with Lord Woolf’s idea of judicial case management, which he identified as serving:

to encourage settlement of disputes at the earliest appropriate stage: and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing, which is itself of strictly limited duration (Woolf 1995: chapter 24).

This is consistent with Newbolt's concept of expedition and economy which are also reflected in the CPR 1.1(2)(c) and (d) referring to proportionality and cases being conducted 'expeditiously and fairly'.

Newbolt was much before his time in departing from adversarial tradition displayed by an antagonistic approach to litigation which in his *Interim Report* Lord Woolf likened to 'a battlefield where no rules apply'. Whilst a tiny minority of cases will be fought to the bitter end, as Lord Birkenhead observed in his written response to Newbolt in his letter dated 21 February 1922 (Schuster 1922), Newbolt dampened such adversarialism by his Scheme. This was achieved by the informal atmosphere of chambers hearings, for example, by counsel or solicitors appearing before him remaining seated. This practice was more business-like and more conducive to settlement. It should also be borne in mind that much of Newbolt's work and that of the Official Referees' Court at that time dealt mostly with building cases and some commercial matters not the mainstream flow of tort cases that would be heard in the High Court. Their jurisdiction was limited and consequently (without demeaning their importance) the method of handling such processes was more inclined to a less formal atmosphere on applications before the judge.

Lord Woolf described his approach to case management in his *Final Report* (Woolf 1996) as follows:

Chapter 1 Introduction

1.

... Case management includes identifying the issues in the case: summarily disposing of some issues and deciding in which order other issues are to be resolved: fixing timetables for the parties to take particular steps in the case: and limiting disclosure and expert evidence.

He described case management as:

6.

... The aim of case management conferences in multi-track cases is that fewer cases should need to come to a final trial, by encouraging the parties to settle their dispute or to resolve it outside the court system altogether, and that for those cases which do require resolution by the court the issues should be identified at an early stage so that as many of them as possible can be agreed or decided before the trial.

The pre-trial review should then take further steps to ensure that the trial will be shorter and less expensive. Case management hearings will replace, rather than add to the present interlocutory hearings. They should be seen as using time in order to save more time.

This description certainly is empathetic with Newbolt's Scheme as are the conclusions at paragraph 16 of the *Interim Report* (Woolf 1995):

- (a) Encouraging and assisting the parties to settle cases or at least to agree on particular issues;
- (b) Encouraging the use of ADR;
- (c) Identifying at an early stage the key issues which need full trial;
- (d) Summarily disposing of weak cases and hopeless issues;
- (e) Achieving transparency and control of costs.

Whilst neither of Lord Woolf's reports nor the rules go as far as Newbolt's Scheme in relation to 'discussions in chambers', CPR 1.4(f) provides for:

helping the parties to settle the whole or part of the case.

This rule has not been interpreted by the editors of *Civil Procedure* as enabling the judge to discuss settlement with the parties in chambers, but rather that the judge may refer the matter to ADR processes (*Civil Procedure* 2004:1.4.9). It also encourages the parties to exchange settlement offers or dispose of the case summarily. The beauty of the Newbolt approach was that, in some cases, the referee himself was actively encouraging the settlement. This pragmatic approach is in line to some extent with that taken by the District Judges today in their case management practices.² Roberts also reflected on this when he wrote:

So common law courts are today sites where the profoundly different rationalities that ground rule-based adjudication and negotiated agreement coexist and interact (Roberts 2013: 11).

The Scheme and ADR Concepts

Having compared the concept of Newbolt's Scheme with the Lord Woolf concept of case management, we now take a closer look at ADR critiques in the context of Newbolt's Scheme. According to Auerbach, the modern movement for greater use of mediation had its origins in Cleveland, Ohio, in 1913, seven years before Newbolt's experiments (Auerbach 1983: 96-97). That movement originated outside the legal system and gradually evolved in various urban centres in the United States (US). It has been characterized by the 'father' of ADR, Professor Frank Sander (1976: 79) as

² As observed whilst practising in several County Courts.

‘an alternative primary process’ and its more recent origins illuminated by Carrie Menkel-Meadow in her essay ‘Mothers and Fathers of Invention: The Intellectual Founders of ADR’ (Menkel-Meadow 2000). A process which Sander described as:

particularly appropriate in situations involving disputing individuals who are engaged in a long-term relationship. The process ought to consist of a meditational phase, and then, if necessary, an adjudicative one (1976: 79).

Newbolt’s Scheme followed that pattern in his ‘early chambers’ discussions’. If the parties agreed to his suggestion, Newbolt facilitated settlement; if not, he gave directions for trial.

In an important article Sander describes a dispute resolution centre—the famous ‘multi-door courthouse’—which housed different types of dispute resolution process and which, on reflection, encompassed features of Newbolt’s Scheme (Palmer & Roberts 2020: 308). Newbolt did not go as far as Sander because Newbolt was focused on the micro-management procedural aspects of the case whereas Sander could widen the horizon to the macro-management aspect of the court system. Newbolt had to work with a nineteenth-century organization. Such a co-ordinated centre has not evolved in England and Wales, but a range of organizations which promote ADR have evolved and include the Law Society, the Bar Council, the Royal Institution of Chartered Surveyors, the Centre for Effective Dispute Resolution, the Chartered Institute of Arbitrators, and the London Court of International Arbitration.³

The courts have also been involved with ADR with pilot schemes in mediation being run in the Central London County Court, the Mayor’s and City of London Court (Roberts 2013) and in the Technology and Construction Court (TCC) (Reynolds 2008). In 1996 judges in the Central London County Court established a mediation scheme. That scheme was monitored and became the subject of a report by Professor Hazel Genn (Genn 2001). Whilst practitioners were impressed by the commercial acumen of the mediators, they had reservations about the mediators’ legal knowledge and procedural direction. This echoes the concerns of the Judicature Commissioners regarding the role of commercial arbitrators in the 1860s (Reynolds 2020a). Genn also had some concern about ‘arm twisting’ because in some cases mediators used undue pressure on the parties. Judges do not need to use such pressure and have no commercial

³ We might also note that traditional international arbitration institutions such as the International Court of Arbitration (ICC) and the International Centre for Settlement of Investment Disputes (ICSID) are now promoting ICC and ICSID mediation in international investment matters.

incentive as do commercial mediators. Newbolt did not appear to bully or cajole, but gave an honest assessment of the likely outcome of the case in the course of his discussions. Ten years after the Central London County Court scheme, in 2006, the Mayor's and City of London Court initiated a similar scheme which was the subject of Simon Roberts' report (Roberts 2007). He noted the commitment of the District Judges at the court and the lead they took in designing and operating an effective scheme. Michael Palmer and Simon Roberts and others have examined a shifting culture change away from the traditional trial and judgment concept to 'the primary task of sponsoring and managing negotiations' (Palmer & Roberts 2020: 327). This, in a sense, is what Newbolt envisaged by his approach to 'discussions in chambers' and what may appear a more direct business-like approach of judges of the TCC that I experienced in making interim applications—little did I know in those days the origin of that approach. What I also detected was what Palmer and Roberts termed 'a radical reconceptualization in the offing of the courts' functions' (ibid 329), not only encouraged by the judges but by my colleagues enthused with an interest in digital communications⁴ and ADR processes.

The key to reconciling the two approaches is to be found in Newbolt's letter to Lord Birkenhead (Newbolt 1923: 440) dated 13 February 1922 in which he extolled his confidence in the value of 'friendly business discussions over the table'. This had two fundamental aspects: first, encouraging direct discussion as to settlement; and, second, the advice of an independent judicial authority. Newbolt's discussions might be interpreted by what Owen Fiss called 'the anticipation of the outcome of trial' (Fiss 1984: 1076) in that enquiry as to how the case might proceed and the risks of trial might facilitate discussion with benefit to the parties. To an extent such an approach may have been adopted, but it would be wrong for Newbolt (as warned by Lord Birkenhead) to overstep the mark. Birkenhead's concern would be that this might amount to pre-judging without hearing the evidence and legal argument of both sides. What Fiss in his analysis of the problems of settlement in the US system in the late twentieth century was concerned about was disparities in the resources available to the parties: the imbalance as between a worker and a corporation; the 'ability of one party to pass on its costs which would "infect" the bargaining process'. Newbolt's approach and Fiss's concern may be reconciled in that Newbolt's purpose with early directions was

⁴ Espoused by the Lord Chief Justice in a speech on 3 December 2018 on 'Online Courts: The Cutting Edge of Digital Reform' at the First International Forum on Online Courts and more recently by the Master of the Rolls, Sir Geoffrey Vos, at the London School of Economics on 17 June 2021 considering 'a streamlined online dispute resolution process'.

not just to reduce the backlog but to provide opportunity to facilitate settlement and save unnecessary costs.

Again, according to Palmer and Roberts, the courts have now ‘embraced ADR in their novel enthusiasm for sponsoring settlement’ (Palmer & Roberts 2020: 70). Newbolt perceived this a long time ago as motivated by the economics of litigation, yet, according to modern commentators such as Marc Galanter, the US judiciary took a pioneering role in relying on judges as mediators (Galanter 1986: 257-262) including a settlement role (Galanter 1985: 18; Strine 2003: 593). This extends to the Middlesex (Cambridge) (MDDC) Superior Court near Boston, Massachusetts (Stedman 1996), a novel multi-door courthouse facility with a variety of dispute resolution processes available. Whilst this court model was based on different dispute resolution process applications in a multidisciplinary setting, it may be that the innovations now encouraged by the senior judiciary accelerated by the SARS-CoV-2 pandemic towards a universal acceptance of digitalization. This may enhance both the court-centric view taken by Professor Crespo (Palmer 2014), so people know where to obtain a legal remedy and enlarge the institutional scope of ADR within and without the multi-door courthouse concept. In his article Galanter states:

Most American judges participate to some extent in the settlement of some of the cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work (1986: 257-258).

He goes on to describe the conversion of American judges to this approach, noting the early experiments of Mr Justice Edgar J Lauer of the Municipal Court of New York in the mid-1920s (Palmer & Roberts 2020: 258) just after Newbolt commenced his Scheme. When one examines Lauer’s approach, one is struck by the similarity to that of Newbolt (Lauer 1928):

to call counsel to the bench before me and interrogate them respecting the nature of the case and the prospect of adjusting differences. I have secured many settlements without the exercise of any pressure on the parties to reach settlement

These complimentary developments on both sides of the Atlantic may have been entirely coincidental, for there is no evidence that Lauer had heard of Newbolt’s Scheme.

More recently Galanter described what he termed ‘extra-judicial processes’ which lead to non-judicial outcomes (Palmer & Roberts 2020: 248). These resemble the results of some Newbolt ‘experiments’ but, more importantly, to quote Galanter:

if settlements are good, it is also good that the judge actively participates in bringing them about. He should do this not only by his management of the court ... but also by acting as a mediator (Galanter 1986: 261; also Palmer & Roberts 2020: 248).

We must be very careful, however, to distinguish what Galanter concludes from what Newbolt may have done. Newbolt would not have been acting in the capacity of a mediator but exercising some of the functional elements of a mediator. I would suggest that Lauer's description is nearer the mark than Galanter's, but the objective of such an approach may be the same.

Again, as Palmer and Roberts opine quoting Galanter:

As a result, 'cases that once might have been settled by negotiation between opposing counsel are now settled with the participation of the judge. We have moved from dyadic to mediated bargaining' (Galanter 1986: 262).

Newbolt did not quite take that stance but by his 'friendly discussions in chambers', as he liked to call them, he was able to enable the solicitors to appreciate the gravity of their client's predicament and with that realization the solicitors were well aware of the costs and other risk consequences for their clients.

In this sense it seems that the Newbolt philosophy is now part of the judicial process in the US save that Newbolt did not perceive his role as that of a mediator. When Newbolt used an accountant expert in a case, he noted that this was not the role of an

arbitrator or conciliator or concession, but an intelligent use of a court of justice by businessmen (1923: 438-439).

What Newbolt did was to enable settlement. This did not displace the adjudication process with a negotiation process as perhaps has been the case in the US (Galanter 1985:12-15). Remarkably, Newbolt's Scheme encompassed the philosophy of both the 'access to justice' and ADR movements (Reynolds 2008). We may consider the first as encompassing what Palmer and Roberts describe as:

the contemporary expression of primordial concerns about the costs, delays and general inaccessibility of adjudication, and called for quicker, cheaper, more readily available judgement with procedural informality as its hallmark (Palmer & Roberts 2020: 2020: 51-52).

Newbolt's Scheme satisfied these concerns because of Newbolt's anxiety about costs and delay on the one hand, and the productive results of his informal discussions with the parties and their legal representatives on the other. Another remarkable facet of Newbolt's Scheme was its

creativity. Indeed, we might argue that his Scheme anticipated Derek Bok's prediction that:

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperative and design mechanisms that allow it to flourish, they will not be at the centre of the most creative social experiments of our time (Bok 1983: 582-583).

[C] RECONCILING CRITIQUES

Having contrasted these competing paradigms, we consider the critiques of ADR that are relevant to this study. Laura Nader and Richard Abel suggest that ADR is a way of institutionalizing settlement (Abel 1982; Nader 2002: 162; Roberts & Palmer 2005: 76). But ADR is essentially an alternative set of processes that the parties can agree to employ in the resolution of their dispute; they are free to use this alternative to the court but they are not prevented from using the court. Abel takes the view that the state neutralizes

conflict by responding to grievances in ways that inhibit that transformation into a series of challenges to the domination of State and capital (Abel 1982: 280-281).

It would appear from cases such as *Bickerton v Northwest Metropolitan Hospital Board* (1970: 989) that in England and Wales our highest court is not averse to challenging institutions in the public interest. Abel also says that ADR is anti-normative (Abel 1982: 297-298). Fiss goes further, saying that (1984: 1076):

In truth, however settlement is also a function of the resources available to each party to finance the litigation, and these resources are frequently distributed unequally.

That being the case, Newbolt's Scheme would appear to offer a better way because the judge may be able to assess what process is more effectively tailored to the financial resources of the parties. If that is right, then it suggests that Newbolt considered that he, as a judge, knowing the resources of the court, would be in a position to suggest, as a matter of practicality and common sense, the most appropriate *fora*.

However, Newbolt needed to bear in mind Birkenhead's warning that judges may not impose settlement: instead, settlement must be a consensual process if it is to be allowed to determine the outcome. For this reason Abel's deeper concern that the parties will be bullied by the state

into accepting an unjust compromise may have some justification. Abel argues that ADR is an extension of state authority (Abel 1982: 270-271, 275). But here that argument is met by the incorporation of the Scheme within the court process, and whilst the referee was a state official he acted in the wider public interest as a public servant. The Scheme also resists the critique of Nader (2002: 144) who argued that the 'deficiencies of litigation have been falsely portrayed' and her critique characterized by Palmer and Roberts (2020: 68) in the following terms:

It began to look very much as if ADR were a pacification scheme, an attempt on the part of powerful interests in law and in economics to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion.

Newbolt knew there was certainly no 'imaginary litigation explosion'; it was real. The transfer of the non-jury list and the exponential growth of litigation after the Great War and the 1918-1919 pandemic had placed enormous pressure on the referees. The same was quite true of the necessity for Lord Woolf's enquiry, particularly in relation to the referees in the 1980s where the judge's diary was quadruple booked causing consequent delay in getting a trial date. For the construction industry it served this was especially frustrating and financially burdensome.

Newbolt's Scheme is consistent with Abel's concern that 'informal institutions deprive grievants of substantive rights' and anti-normative processes that 'urge the parties to compromise' (Abel 1982: 297-298.) But compromise is often an ingredient of judgment. The court may accept only particular submissions and evidence. Cases are seldom clear-cut: there are innumerable shades of grey on narrow issues of law and fact. Parties may argue they have rights, when no right truly exists. Often the remedy (usually monetary compensation) may not satisfy the parties, but then there is a limit to what the state can do. In the triadic structure of the court and the parties sometimes it is the judge who must invent the formula which will resolve the dispute. In so doing it may reconcile the competing philosophies of an adversarial system and facilitation of settlement.

[D] A UTOPIAN DREAM OR NECESSITY?

Having considered some of the critiques of ADR we can finally turn to the critical question underlying this study. This was identified in Roberts' essay: 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' (Roberts 1993: 452) in which he asked that fundamental question of whether we should see ADR 'as part of the process of

adjudication, radically transferring it, even making us re-examine our basic understandings of what a “court” is?’ We may surmise that Newbolt would have responded to Roberts’ question enthusiastically and have redefined the judge’s role to encompass that of a facilitator. This resonates with Dean Roscoe Pound’s notion about the judicial role (Pound 1913: 319):

a judge who represents both parties and the law, and a procedure which will permit him to do so effectively.

What may be difficult to reconcile in this digital age is the intermingling of the judicial role and the needs of the twenty-first century where there is demand for a more expedient disputes resolution process. Newbolt’s ‘discussions in chambers’ were revolutionary at the time, just as the invention of the referee’s office was revolutionary when it was created (Reynolds 2020b). What happened was that through facilitation Newbolt was able to narrow issues to the point that in some cases they settled: his pro-active form of micro-case management thus often encouraged and accelerated settlement.

In suggesting such unorthodox accommodation, we must always remember Birkenhead’s warning to Newbolt, which was echoed by Roberts (1995: 457) that there need not be ‘active involvement of the court in sponsoring settlement’.

This challenge has to be met if the courts are to continue to enjoy public respect and if certainty of the law is to prevail, for the key questions of our times are, first, what is a court, but also in this context what should a court be or in more practical terms how can the judge’s role be modernized to keep pace with social change? These are critical questions of civil justice that emerge. What may be required are displays of ‘soft power’ or the facilitative process suggested by the Scheme which, to use Martin Shapiro’s words, is not: ‘an antithesis to judging but rather a component part in judging’ (Shapiro 1981). Newbolt’s ‘discussions in chambers’ reminds us of Shapiro’s discussion of the prototype of courts where the parties and the judge:

Speak on until arriving at some verbal formulation of the law synthesised from their various versions (Shapiro 1981: 13).

It is not suggested that the judge engineers settlement, but that the parties realize that the outcome at trial is unlikely to be different. Often that is the advice the parties have received from counsel and are persuaded, but, in some cases, it may take a judge. This is not usurping the lawyer’s role nor undermining judicial independence in cases where the outcome is clear and inevitable provided the judge has sufficient information

before him or her and the parties' probable outcomes converge. Such intervention may produce a consequent reduction of uncertainty and hasten settlement (Schuck 1986: 337).

Whether the judiciary can change its culture is another matter and is a challenge identified by Adrian Zuckerman who wrote:

unless all levels of the judiciary can be persuaded to embrace the overriding objective that incorporates the requirements of proportionality and expedition, as well as of the need to do justice on the merits, the entire CPR system may become a colossal wreck (Zuckerman: 2006).

Zuckerman's point is in harmony with Newbolt's objectives outlined in his seminal article (Newbolt 1923: 440). So far the 'colossal wreck' has not transpired but the legal vessel has been sailing in some turbulent waters of late when, according to Briggs LCJ, there is a need

in time of radical impending change, to focus on aspects of that which we should cherish, so that they, and the underlying causes of them, are not put at risk in the revolution upon which we are about to embark (Briggs 2015).

In his important (interim) report on civil justice Lord Briggs pointed to the excellence of the Rolls Building housing the TCC and the Commercial Court and their contribution to civil justice and the economy estimated at more than £3 billion per annum (Briggs 2015: 49). He also pointed to a number of other factors: a serious backlog and work overload in the Court of Appeal (ibid 58-61); no reasonable access to justice for people of low incomes (ibid 51); a culture of procedural complexity 'designed by lawyers for use by lawyers' (ibid); 'proportionally high cost of legal representation and advice ... attributed to the current project structure and procedure of the civil courts' (ibid 55); and 'that overall the system was too complex for laymen' (ibid 52-54).

In his subsequent *Final Report* Lord Briggs identified the following factors: the lack of adequate access to justice for ordinary individuals and small businesses due to excessive costs; lawyer's culture and procedure of the civil courts making litigation without lawyers impracticable; inefficiencies arising from 'the continuing tyranny of paper' coupled with the use of obsolete and inadequate IT facilities; and unacceptable delays in the Court of Appeal caused by excessive workload and weakness in the processes for enforcement of judgments and orders (Briggs 2016).

It is significant that Lord Briggs noted in his *Interim Report* that the availability of an early case management conference (CMC) in cases in the multitrack, both in the County Court and the High Court, was an

important factor in the timely and efficient management of civil litigation (Briggs 2015: 59). This supports both Lord Woolf's approach to having a CMC as well as Newbolt's approach. On the other hand, the fusion of costs management and case management increased the burden on judges and caused delay (Briggs 2015: 60) The predominant inclination of some case management judges to case manage single-mindedly for trial, rather than for resolution by other means, may be another issue identified by Lord Briggs which would not accord with Newbolt's Scheme.

The conclusion that Lord Briggs reached in 2015 was that: 'Lord Woolf's expectation of a rise in the status of civil justice is yet to be fully achieved.' (Briggs 2015: 64) In his *Final Report*, Lord Briggs considered that the combination of digitalization and rationalization of court space in fewer, larger, hearing centres and more business centres offered unprecedented opportunities for beneficial reform, rather than merely saving money, although that was an important objective (Briggs 2015: 33). In addition, he welcomed the utility of an Online Court, a creation of the digital age. Would Newbolt have welcomed it? Who can tell? He would be in favour of a more effective and convenient system no doubt, but he would like most judges have some scepticism as to its effectiveness in highly complex cases, especially matters of fact where witness examination is required.⁵

If we take Lord Briggs's reports as some reflection of the reforms advanced by Lord Woolf, we may not have a 'colossal wreck', but the ship may not yet be quite watertight. Having considered Zuckerman's anxieties about the civil justice reforms, it is sobering to recall Michael Zander's reservations in his thought-provoking paper: 'Why Woolf's Reforms Should Be Rejected' (1995: 80-95). His essential concern was that Lord Woolf's *Interim Report* was not properly structured in terms of an 'historical perspective, a rounded in-depth analysis of the problems, a weighing of options and a conclusion' (ibid 79). Lord Woolf said that he and his team had carried out 'what is suggested to have been the most extensive and thorough examination which has ever taken place into the civil justice system' (Woolf 2008: 331). One of Zander's major criticisms was on the subject which forms the basis of my work in this area of civil justice; the efficiency of case management (Zander 1995: 90). He considered that judicial case management would only operate in 'a small proportion of cases' and was therefore an innovation not worth having (ibid). This study, however, suggests that the Scheme operated in up to a third of all referee cases. Zander was perhaps on firmer ground in his

⁵ In his third Hamlyn Lecture on advocacy, 'The Future of Advocacy', Lord Pannick expressed his reservations as to Online Courts in relation to examination of witnesses (Webinar, Faculty of Law, University of Oxford, 11 November 2021).

recognition of the need to get a grip on cases that were ‘dragging’ (Zander 1997). Zander’s concern was perhaps met by Lord Woolf’s understanding of what case management would achieve (Woolf 2008: 339):

It is the court providing a forum in which lawyers and the judge can work out the most satisfactory way a case can be dealt with and the judge then supervising the progress to trial in accordance with that programme. What the judge will prevent is parties not fulfilling their responsibilities, acting unfairly to a weaker party or acting unreasonably.

A study by James Kakalik and others (1997) concluded:

Four case management procedures showed consistent statistically significant effects on time to disposition: (1) early judicial management; (2) setting the trial schedule early; (3) reducing time to discovery cut off; and (4) having litigants at or available on the telephone for settlement conferences.

Kakalik’s conclusions support the findings of the Reynolds 2008 study in terms of the value of early judicial management and settlement discussions. The US may provide further support for the Scheme approach, perhaps most notably in the role of the Settlement Master (Silberman 1989: 2131-2178). The Settlement Master (like the early referees) is empowered to enquire and report, as well as to facilitate settlement which Newbolt devised. Silberman has suggested that the role of the Settlement Master in the *Agent Orange* case was successful because the Master acted with judicial powers and knew the views of the judge. That particular Master was a judicial agent, just perhaps as referees were intended to be when they were created by the Judicature Commissioners to enquire and report to the High Court judge.

[E] ARIADNE’S THREAD

Reconciling the differing approaches to resolving disputes is a conundrum to which there can be no complete answer. It is a matter of dealing with each case in an appropriate and proportionate way according to the merits. But it is to unravel Ariadne’s thread in terms of the essential question posed by Roberts. One may conclude that in certain cases a rudimentary system of case management was effective particularly where the judge was more interventionist. Such a supposition tends to support, from an historical perspective, the former Head of the TCC Jackson J (as he then was) who stated that case management ‘is the principal service which the TCC provides to court users’ and that one of the twin objectives of the TCC judges was: ‘facilitating settlement where this is possible’ (Jackson 2007: 13). In that report Jackson J referred to research being undertaken

at King's College London to identify the types of cases in which mediation most commonly leads to settlement and the stage in the action at which mediation is most effective (Jackson 2007: 21). In a King's College London survey it was reported that mediations in TCC cases were being undertaken by a process involving several stages: pleadings, disclosure, payment in and shortly before trial (Hudson-Tyremann 2008: 79). In a report published by the Centre of Construction Law and Dispute Resolution (Gould & Ors: 2010) reference is made to a scheme suggested by TCC Judge Toulmin whereby the parties could attend a confidential, voluntary and non-binding dispute resolution process to attempt an amicable resolution. The judge hearing the case could offer a Court Settlement Conference. This process is private and confidential and documents are privileged. If the conference is successful then a Court Settlement Agreement could be made and the action terminated. If a settlement could not be reached, then the judge may send the parties an assessment, setting out their views on the dispute—including on the parties' prospects of success on individual issues, the likely outcome of the case and what an appropriate settlement would be. The judge would then recuse him or herself and the action would be transferred to another judge. This formalizes what Newbolt attempted on more informal basis.

The model of Newbolt's Scheme has wider implications for the judiciary in certain cases. Being informal and *ad hoc* may have a benefit so that the parties do not feel that such 'discussions in chambers' are mandatory or that they are pressurized unduly. Any untoward 'arm twisting' would be an abuse of the judicial office (Genn 2007). The Genn study reveals that in 18 per cent of cases the parties enter into mediation because the judge advised them to do so (Genn 2007: 155). Genn also noted 'a significant tendency for more judicial encouragement from 25 per cent of the cases compared to 11 per cent in 1998' (Genn 2007: 156). This is a healthy sign in harmony with Newbolt's philosophy which Genn also indirectly reflects (Genn 1998). The fundamental question posed by Roberts as to what a court is may be answered to some extent by the Newbolt Scheme. This not only involves a change of culture but a radical reappraisal of the judge's role. There is some evidence from the Vice Chancellor of the Delaware Court of Chancery that Newbolt's interpretation of his function remains valid. In his essay Vice Chancellor Strine writes:

the active involvement of a judge in the process of helping parties to business disputes resolve their conflicts consensually (particularly ones that arose from incomplete contracting in the first instance) seems likely to be of economic value and to have social utility. By providing parties with the opportunity to shape their own solutions to litigable controversies with the input of an experienced business

judge, this mechanism should result in more efficient outcomes at less risk and expense than awaiting an up-or-down judgment on the merits (Strine 2003: 593).

We may be moving in this direction. But there is something else of importance here, a factor Newbolt recognized as did the Judicature Commission: user requirements. Lord Woolf also recognized society's demands of the judiciary:

just as the common law has evolved to meet the changing requirements of society, so should the role of the common law judge. It is of critical importance to society that the judicial role evolves in this way (Woolf 2008: 193).

My earlier study (Reynolds 2008) demonstrated how the referees' office evolved and, importantly, the manner in which Newbolt was pro-active in facilitating settlement at an early stage. This again fits the characterization suggested by Lord Woolf:

Where litigation in the courts is unavoidable, then the judges need to be proactive in promoting settlement, the control of costs and the expeditious resolution of the dispute (Woolf 2008: 195).

In this sense, as Galanter (1986: 262) says: 'we have moved from dyadic to mediated bargaining' but also, as Judith Resnick identified (Resnick 1982: 374-448), a shift from the traditional judicial model to a managerial style where in this case the court assumes more control of the process overall. In that respect Newbolt was the pioneer. Perhaps in this sense Newbolt may have been a pioneer in what is termed judicial dispute resolution. In their paper de Hoon and Verbeck consider what judges do and consider the barriers in becoming a 'new judge' (de Hoon & Verbeck 2014: 27). This also accords with the objectives of access to justice and the continuing trend to encourage settlement through judicial interaction as Tania Sourdin and Archie Zarinski have stated:

the work undertaken by judges to encourage, direct or engage in settlement processes for civil litigation, including judicial, conciliation and mediation (Sourdin & Zarinski 2013: 2).

Their approach combines creativity in terms of content, procedural justice by promoting proactivity in terms of process, and interactional justice by promoting respect among parties in terms of their interaction (Roberge 2013). Again we may reflect that Newbolt's Scheme, embryonic as it may seem in today's hi-tech, world met such criteria. But there can be little doubt that the multi-tasking judge of today effecting case management and facilitating settlement by his/her interaction with the parties follows Newbolt's rubric. Thus, it would appear that the judge's role in relation to encouraging settlement must be considered in the context of

their case management powers. Whilst recognizing a culture shift towards more judicial control of the proceedings there is more awareness of the need to facilitate settlement through party participation in chambers-like discussions or through mediation. The lesson of the Scheme suggests a triadic configuration and the interaction of the judge and the parties presents an effective means for earlier resolution avoiding trial. There can be little doubt that the Scheme increased the caseflow and saved time and costs aided by a facilitative and a more activist approach. Such an approach may in certain cases encourage such an activist role in order to avoid the danger foreseen by Zuckerman (2006: 287). The transition to online courts supported by the senior judiciary may also result in a more inquisitorial stance where litigants in person (LIPs) are involved.

This essay and my earlier two articles have described the referee's transition from a nineteenth-century judicial officer to a modern-like facilitator of settlement in certain cases. In many ways this study supports what Melvin Eisenberg said (1976: 637):

the principal area of modern legalised dispute settlement intimately intermixes elements of mediation and dichotomous solution, consent and judicial imposition.

What is suggested here is merely an extension of those principles outlined by the Judicature Commissioners a century and a half ago. If Lord Woolf's objectives and the aspirations of Newbolt are to be achieved in line with what Lord Devlin suggested,⁶ further encouragement along such lines may be required. It is also upon the argument of Lord Devlin that we may agree that something is better than nothing when it comes to providing Online Court services which may be less expensive for litigants. It is always arguable, however, that the price of justice should not be a bar to the quality of justice but this has defied reformers down the ages. How to reconcile both ideals (Colleen 2008: 98) is to try and unravel Ariadne's thread. It may involve an enhanced sensitivity towards settlement but also the appropriate use of digitalization. So far as settlement is concerned, Roberts' report on the Mayor's and City of London Court (Roberts 2013) suggested that the District Judges may have already unravelled that thread to some extent, but an even greater challenge awaits the judiciary, lawyers and litigants with the advent of what has been called 'the fourth industrial revolution'.

⁶ Lord Woolf referred to a broadcast by Lord Devlin in his *Interim Report* (1995). He quoted Lord Devlin who said: 'Is it right to cling to a system that offers perfection for the few and nothing at all for the many?' This was also referred to in *Gregory and Another v Turner and Another* [2003] 2 All ER 1114.

[F] A BRAVE NEW WORLD

In a very thought-provoking article, Carrie Menkel-Meadow questioned whether a decision given automatically online by artificial intelligence will be effective. To illustrate the issue she said that her claim against an airline was simply ‘what the tick boxes or company policy allowed’ (Menkel-Meadow 2016). She also questioned ‘Where in the tick boxes and the email communications will there be room to brainstorm and create a different solution?’ She accepts that in certain cases, such a process may work, but questioned whether it was what was envisaged by mediation and negotiation working in ‘the shadow of the law’. Going further in her reflections at the online dispute resolution (ODR) conference in The Hague in 2016 she referred to the remarks of Lord Justice Fulford that ‘virtual courts’ would replace physical courts so that consumers and complainants would access online on a smartphone or in the local library. While this may indeed bring justice at less cost it becomes impersonal and infers a production-line mentality. This may well suit such organizations as eBay and Amazon but may not suit a complex engineering dispute in the TCC. On the other hand, Colin Rule made some telling points in his response to Professor Menkel-Meadow (Rule 2016: 8). He argued that you cannot separate ODR from ADR because lawyers practice ODR in some form, whether on the telephone, by email, using a spreadsheet, or by using Skype or FaceTime. It must be said that during the pandemic many arbitrators transitioned to hearings and conferences on Teams, Zoom and Skype quite seamlessly. Rule also argues that technology is no stranger to the medical profession for without technology doctors would not be able to perform as they do (Rule 2016: 8).

Rule makes a strong argument in favour of expanding ODR, utilizing the model of the multi-door courthouse. He visualizes a court not just with doors for adjudication, arbitration or conciliation, but possibly hundreds to fit varied dispute requirements (Rule 2016: 9). Perhaps his most telling point is his comment that ‘if the cost of these procedural protections makes redress processes inaccessible to parties, I believe it is worth rethinking their necessity in some contexts’ (Rule 2016: 10). This is a strong argument for those who support the access to justice movement and it is well to remind ourselves of what André Tunc referred to in his contribution to Mauro Cappelletti and Bryant Garth in *Access to Justice in the Welfare State* (Cappelletti & Garth 1981: 352) regarding the pursuit of a justice system that was ‘cheap in terms of cost, not of quality’ but warning that ‘these goals may not be compatible’. That is the dilemma that confronts us now and has always confronted those who wish to make the system more accessible to the poor. Thus it may be that

the development of ODR and Online Courts may alleviate some of the distress caused by the lack of legal aid funding.

In her Birkenhead lecture, ‘Online Courts and the Future of Justice’ Dame Hazel Genn (2017) focused on the societal aspects of the public justice system that cannot be ignored in the drive towards digitalization. She rightly placed concern on our traditional rule of law values and procedures which underpin public confidence and trust. The question that may worry us is her remark that computers ‘can outperform human experts using “brute force processing”’ (Susskind 2015: 45). Thus, computer software is designed to make decisions and supplant decisions. Whilst this has excellent advantages in medical science regarding diagnosis and treatment (Genn 2017: 3) and in many other scientific areas for a litigant or disputant, it may be a leap of faith. For how many of them are computer literate? How many LIPs are?

These issues present problems, but we must ask ourselves what is the greater injustice: not providing what can be provided or making no provision at all? This is no Utopia and times are difficult, but if reasonable means are there it is worth a try. Indeed, Genn points to the many advantages that technology can now provide (Genn 2017: 3). Whilst this will not be an easy transition in the civil, family and tribunal cases and will require robust document and case management systems as promised in the Joint Vision Statement 2016,⁷ it may be possible with the investment the government has promised. This will necessitate training for judicial officers who may be dealing with these cases and serious consideration of the rules that will apply. Maintaining ethical standards and ensuring fairness will be paramount. However, if the system adopts that of the British Columbia Civil Resolution Tribunal which was considered by the Briggs Civil Court Structure Review similar to the Susskind Report (2015), it would entail a three-stage ODR process of an automated ‘triage’ stage, a dispute resolution stage and a determination stage (if the case is not settled) and would not be without difficulty. But is there a choice? Joshua Rosenberg who has followed these developments concluded that it will take time and, whilst there has been advancement, it seems there is little choice, as one judge told him: ‘we have to do this; it has got to be made to work’ (Rosenberg 2019). We are not there yet, but it seems it is getting somewhere subject to the serious questions that Genn raises (2017: 15).

⁷ [Transforming Our Justice System](#) by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals.

Perhaps we are transitioning to a new dimension of a technological revolution necessitating a convergence of processual innovation in the court system with the advent of Online Courts and streamlined case management. Perhaps the words of Lord Devlin echoed by Lord Woolf can only be achieved by this means given current stringencies. Whilst many lawyers and arbitrators have considerable experience in online hearings and ‘documents only’ cases, lessons may be learned from them. However, an essential characteristic of a public justice system—fundamental to the English legal system—is openness and public accessibility to the court. That would be technically a challenge in limited multilateral exchanges online. On the other hand, taking the example of the Supreme Court, they could be televised or made accessible online. But some may have reservations that a foreign British Columbia model can be cut and pasted onto our system *in toto*. Complex commercial, construction and engineering and international litigation—with all the complexities and witnesses of fact, and experts etc that may be required—may not easily be accommodated. Whilst matters of law can be debated in such *fora*, factual evidence is a problem. Those I have served with on national and international arbitration tribunals might agree.

In the final analysis, we should ask: is there any choice? Probably not is my answer. Learning from Newbolt’s experience, he had little room to manoeuvre: too few referees, increasing backlog, low status in the judicial ranking, against a backdrop of a global pandemic of so-called Spanish flu (Spinney 2018), the aftermath of the ‘war to end all wars’ and, in the 1930s, the Great Depression. Today we have emerged from one period of austerity to be followed by another period of economic uncertainty compounded by another pandemic and secession from the European Union amidst rising international tensions across the globe now exacerbated by a European War with serious consequent economic consequences. Practically speaking, there is little choice, if indeed any.

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THE SLOW TRAIN TO REFORMING ANTI-DUMPING MEASURES: CONCRETE SOLUTIONS FOR THE FUTURE

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Abstract

Normative solutions to reform the Anti-Dumping Agreement include a comprehensive amendment of the Agreement. Such a revision has already been suggested in the literature, but this study departs from most others by prioritizing procedural issues rather than substantive ones. The study proposes changes to enhancing procedural justice in anti-dumping processes. Due to the constraints on the substantive reform of the Anti-Dumping Agreement in a short timescale, other possibilities are also discussed in order to improve procedural justice, including: (i) publishing best practice guidelines; (ii) creating a standard questionnaire to be used by all World Trade Organization (WTO) members; (iii) reforming and fixing the WTO dispute settlement mechanism; (iv) raising awareness among exporters that cooperation with investigating authorities may have a significant effect on the anti-dumping measures imposed; (v) improving the accounting systems for Chinese exporters; (vi) introducing a support tool for exporters or exporting countries, such as the Advisory Centre on WTO Law in Geneva; and (vii) providing software to assist exporters to fill in questionnaires.

Keywords: World Trade Organization; Anti-Dumping Agreement; Negotiating Group on Rules; procedural justice.

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[A] INTRODUCTION

Anti-dumping is the most popular international trade remedy, and its effects have been remarkable in terms of bilateral and global trade. At the micro-level, local manufacturers are lobbying for more anti-dumping protection whereas exporters are inclined to circumvent anti-dumping or lobby their governments to submit cases to the Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO). In doing so, local manufacturers seek to restrict foreign competition and increase their market share. Exporters and importers, on the other hand, seek ways to avoid anti-dumping duties. Considering the time allocated for the investigation and the time needed to settle disputes before the DSM, initiation of an anti-dumping investigation adversely affects trade. From a macro perspective, non-tariff barriers have increased significantly after global trade liberalization. With lower tariffs, WTO members needed more protection and anti-dumping became a popular way to restrict imports and competition.

However, the General Agreement on Tariffs and Trade 1994 (GATT) was structured from the perspective of free trade. After World War II, liberalization was the primary concern, with the goal of reaching a better level of global welfare. The WTO was designed to improve global welfare through liberalization and trade. The concept of the level playing field was used to give each member an equal chance to gain from trade. Developing and least-developed countries have benefitted from preferential treatment, while developed countries have needed safety valves for their domestic industries.

In this sense, anti-dumping is unavoidable in the WTO framework. It is the top issue brought before the WTO DSM and has been long debated in the Negotiating Group on Rules. As both developed and developing economies commonly use this tool, it is not realistic to abolish anti-dumping or completely replace it with competition law. Within this context, anti-dumping law has a balancing role in the international trade framework. It functions as an unshaped keystone in the WTO structure. The problem with the negotiations is that substantive and procedural rules are discussed together. It would be better to start with procedural justice where there is more chance for consensus, as it would be beneficial to all members. Then, substantial matters could be discussed with the long term in mind.

In the previous issue of this journal, I attempted to examine the ongoing negotiations on Article VI of the GATT (the Anti-Dumping Agreement) through the Negotiating Group on Rules and show the multipolar positioning of the WTO members (Yilmazcan 2022). As there are three

main groups with different interests, a meaningful revision may not be possible in the short term. Besides, the rules-based system of the WTO has been damaged by United States (US) foreign trade policies, which include the trade war with China and the blocking of appointments of Appellate Body members.

While revisions to promote transparency and objectivity would be an ideal solution for the most litigated topic under WTO adjudication, it is unlikely to happen soon. On the contrary, increasingly, like developed countries, developing countries are adopting anti-dumping measures. However, the number of disputes before the DSM indicates that anti-dumping is an ill-defined and abused tool. Therefore, practical solutions are needed urgently. This article attempts to offer some concrete suggestions until a proper revision of the Anti-Dumping Agreement is achieved.

[B] CONCRETE SUGGESTIONS FOR THE FUTURE

The anti-dumping mechanism has deviated from its original design purposes (Yilmazcan 2021). This study argues that ensuring procedural justice during anti-dumping investigations is essential. Procedural justice is achieved when the procedures are trustworthy, respected and neutral and allow input (Barkworth & Murphy 2015). While guaranteeing the transparency of the process, procedural justice also limits the discretion of investigating authorities. This would also allow standard procedures in different jurisdictions, which would also secure improved opportunities for companies to defend themselves. Greater participation in anti-dumping procedures may enhance the principles of fairness and reduce the political tension between WTO members. Greater participation or input would also reduce the number of disputes about anti-dumping before WTO adjudication. Another positive outcome of improved procedural justice would be that exporters might comply with the investigating authorities rather than attempt to circumvent their duties. Social psychological studies show that

when people are treated with trust, respect, neutrality and are given an opportunity to express their views – all aspects of procedural justice – they are more likely to comply with directives, rules and laws and are more likely to voluntarily cooperate with authorities (ibid).

In this sense, procedural justice improves legal compliance, and this would also reduce unfair trade practices by exporters. Thus, a justifiable level of anti-dumping is possible with improved procedural justice. Otherwise, attempts to reform the Anti-Dumping Agreement substantially may not achieve

consensus. The lack of procedural justice also increases tension between members and triggers retaliation and strict procedural rules causing more protectionism. The underestimation of procedural justice in anti-dumping therefore results in inefficiency or missed opportunities for gains from trade. In this context, some suggestions to increase procedural justice without a revision of the Anti-Dumping Agreement are presented below.

Publishing Best Practice Guidelines

The general tendency of exporters is to avoid cooperation with investigating authorities. Throughout my previous empirical research, one exporter noted: 'Time, energy, fact collection and effort required is so much that most companies prefer to change business model instead of fighting the cause.' (Yilmazcan 2021: 182) Similar views were raised by other exporters as well. Thus, there is a need for best practice guidelines that would benefit exporters and investigating authorities.

Publishing best practice guidelines was suggested by New Zealand, particularly for the transparency provisions of the Anti-Dumping Agreement, especially Articles 5 and 6 (Negotiating Group on Rules 2003 TN/RL/W/137). If such guidelines could be produced only for these two articles, it would still significantly improve the practice of anti-dumping investigations. From a macro perspective, anti-dumping investigations are complicated and costly for exporters from the beginning to the end. Therefore, developing best practice guidelines would clarify the Anti-Dumping Agreement as a whole and bring benefits to the investigating authorities and exporters (Negotiating Group on Rules 2003 TN/RL/M/11: 2). Besides these benefits, best practice guidelines would also prevent the abuse of Anti-Dumping Agreement provisions (Andrews 2008: 36).

Currently, the task of developing such guidelines is assigned to the Committee on Anti-Dumping Practices, which operates as a subsidiary of the Council on Trade in Goods. The Committee works on the guidelines through its Working Group on Implementation. The Working Group is supposed to suggest to the Committee a concrete draft which can be discussed by all members at the Committee meetings (Andrews 2008: 36). Since the task was assigned to the Committee, the Working Group has not been able to develop a general guideline for the anti-dumping investigations.

A Standardized Questionnaire

As there is no standardized questionnaire structured and defined under the Anti-Dumping Agreement, investigating authorities adopt their

own questionnaires. One empirical study suggests that a standard questionnaire would be beneficial for exporters, improving transparency and predictability and so increasing the opportunity for them to defend their rights (Yilmazcan 2021: 238). The official from the Ministry of Commerce (China) (MOFCOM), several WTO lawyers, and exporters supported the idea of having a standard anti-dumping questionnaire to be adopted by all WTO members. One lawyer stated: 'For US cases, the DOC questionnaire process is exhaustive and detailed under tight deadlines. It is a hyper-objectified process that penalises respondents for even tiny discrepancies or errors.' (Yilmazcan 2021: 238)

A standard questionnaire would increase the legal capacity of exporters and increase their chance to cooperate. This point was also made during the negotiations in the Negotiating Group on Rules:

While broad support was expressed for the idea of standardized questionnaires, several participants cautioned that development of a model might best be left to technical bodies. It was noted that a model should serve only as a starting point, to be modified based on the needs of a given investigation, and that no arbitrary limit should be placed on length. It was queried whether any discussion of standardised questionnaires should be accompanied by discussion of whether dispute settlement claims based on an argument that the record contained insufficient information on a particular point should be barred if such information was not requested in the standard questionnaire (Negotiating Group on Rules 2003 TN/RL/M/11: 3).

A standard questionnaire would therefore reduce the abuse of Anti-Dumping Agreement rules. The aim of an anti-dumping measure should be to balance the unfair trade practice of dumping. With the different questionnaires used by WTO members, it is a challenge for exporters to cooperate with the investigating authorities. Andrews suggests that such a standard questionnaire could be developed by the WTO Rules Division (Andrews 2008: 38). Currently, members have the discretion to design the questionnaires in such a way that exporters are not able to defend their rights properly during investigations. By adopting a standard questionnaire, the compliance costs would be significantly reduced for exporters (*ibid*). Reducing the legal costs of anti-dumping investigations is beneficial for small and medium-sized enterprises (SMEs), which would also support sustainable development.

The adoption of a standard questionnaire may not be possible through reform of the Anti-Dumping Agreement because there are other issues to be addressed during a revision. Therefore, the adoption of a standard questionnaire could be achieved through an independent initiative led by a WTO working group or other international organizations, such as

the Advisory Centre on WTO Law (ACWL). On the other hand, the mega Free Trade Agreements (FTAs) could provide an opportunity for WTO-plus rules to be applied in several jurisdictions. FTAs are allowed under Article XXIV of the GATT, although they violate the most-favoured nation principle. In many FTAs, there are rules on anti-dumping investigations improving transparency, such as notification obligations. In this sense, mega FTAs covering several jurisdictions offer opportunities for the adoption of standard anti-dumping questionnaires. This option seems more likely to occur compared to the adoption of a standard anti-dumping questionnaire under the Anti-Dumping Agreement.

Fifteen countries signed the Regional Comprehensive Economic Partnership Agreement (RCEP) in 2020, covering 2.2 billion people and 30 per cent of the global gross domestic product (McCarthy 2020). Apart from trade in goods and services, the RCEP includes issues such as investment, e-commerce, intellectual property, competition, SMEs, economic and technical cooperation, and public procurement as well as trade remedies (RCEP Agreement 2022). The RCEP has a section on trade remedies, covering safeguards and anti-dumping. There are specific provisions that improve procedural justice in anti-dumping proceedings. Article 7.11.2 of the RCEP requires seven days' advance notice of an on-the-spot investigation to the respondent for proper preparation. Article 7.12 also requires seven days' advance notice before the initiation of an anti-dumping investigation, which is parallel with the Chinese submission at the WTO. Article 7.11.3 enables interested parties to receive a hard copy or softcopy of a non-confidential file. Article 7.13 explicitly forbids zeroing, which is being negotiated at the WTO as well (RCEP Agreement 2022). In this context, the RCEP is a perfectly appropriate mechanism for adopting a standard questionnaire. If such a questionnaire were established and adopted by the 15 signatories, this would support the benefit of procedural justice and make a positive impact, with fewer disputes.

Dispute Settlement Mechanism

During my empirical research, one US lawyer stated:

The US AD system has been consistently upheld by the US court system and even the WTO, so there really isn't much chance of arguing the unfairness of the US AD system ... there is zero chance of it changing. It is what it is. DOC's determinations have been overturned by courts when DOC has provided inadequate justification for their decisions (e.g., cannot point to enough record evidence to support their decisions) (Yilmazcan 2021: 194).

Similar views support that DSM is not effective in settling disputes in its current form. However, DSM decisions are strong indicators of members' compliance level with WTO agreements. One of the most controversial issues in anti-dumping is the zeroing methodology applied by the US. The Appellate Body found zeroing to be inconsistent with the Anti-Dumping Agreement in several disputes. The position of the US is that it lost the trade remedy cases unjustly (Lehne 2019: 113). This is one of the reasons for the US blocking the appointments of Appellate Body members, which caused the shutdown of the Appellate Body in late 2019. The US has blocked the reappointment of Appellate Body members in the past. In 2011, US national Ms Hillman was not reappointed by the US as she was not supporting the US positions (Wagner 2020: 67-90). The Appellate Body stated that linking the reappointment of a member to a specific dispute would harm impartiality and trust in the Appellate Body (ibid). However, the constant blocking of Appellate Body members resulted in the shutdown in 2019. This blockade harms the WTO's well-respected DSM.

Previous proposals to amend the WTO's Dispute Settlement Body (DSB) are still under consideration, such as the length of reviews, and annual meetings between the Appellate Body and the DSB. For panel reports after December 2019, Pauwelyn draws four possible scenarios (Pauwelyn 2019). First, under Article 16.4 of the Dispute Settlement Understanding (DSU), the DSB could adopt reports after they are appealed.¹ In this regard, panel reports would be classified as void as they would not have a chance to be adopted by the DSB. The second scenario is that parties to the dispute would not appeal the panel report, but this is very unlikely due to the dissatisfaction of at least one party. The third scenario involves the EU's recent proposal to use Article 25 of the DSU to sustain a two-level DSM. The EU and 22 WTO members have agreed to implement an interim arbitration mechanism (European Commission 2020). This arrangement allows participating members to access a binding and impartial dispute settlement mechanism until the Appellate Body can function again (Pauwelyn 2019). Other WTO members would join if the deadlock with the Appellate Body were to continue. The US, on the other hand, contends that the blockade of appointments is done in order to push reform of the DSB (ibid). The last scenario is that the panel reports would neither be adopted nor appealed by the Appellate Body (ibid). In that case, panel reports would be used during the negotiations of trade disputes.

¹ Article 16.4 of the DSU: 'If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.'

Therefore, reform is also needed of the DSM, especially after the crisis caused by the US. The reforms should strengthen the member-driven nature of the WTO rather than a single member-driven scenario (Lo 2020: 125-139). A stronger DSM would also avoid the misuse of anti-dumping measures to overprotect local industries.

Raising Awareness among Exporters

As mentioned by the MOFCOM official, ‘lightening the burden of responding to questionnaires, reducing the cost of hiring legal assistance, as well as receiving fair treatment are crucial for exporters to undertake cooperation’ (Yilmazcan 2021: 242). Exporters are generally unprepared for anti-dumping investigations. Under Article 6.1.1 of the Anti-Dumping Agreement, exporters have no more than 30 days to submit their responses after they receive the questionnaires. The notification is deemed to be received seven days after the questionnaires are sent to the diplomatic missions of the exporting country (Article 6.1.1 Anti-Dumping Agreement: footnote 15). In this regard, the exporting country should immediately warn exporters about the investigation. This is not an obligation under the Anti-Dumping Agreement, as stated by the Appellate Body in *Mexico—Anti-Dumping Measures on Rice* (DS295 Report of the Appellate Body 2005). The importing country officially announces the initiation of the investigation in the official gazette and notifies diplomatic missions, but notification to exporters and importers is controversial. Mexico argues that there is no obligation for the investigating authorities to find exporters and foreign producers under the Anti-Dumping Agreement (ibid: 14). The Appellate Body agreed that in reading Article 6.1, it cannot be clearly understood that the investigating authority or the exporting country has an obligation to find exporters and importers and notify them directly. In practice, exporters are not expected to follow the official gazettes of their exporting markets. Therefore, they may not be aware of an anti-dumping investigation shortly after its initiation. In this sense, even though it is not an explicit obligation of the exporting countries to notify exporters, it would be beneficial. If exporters are late in the submission of responses, it is highly likely that they will face higher anti-dumping duties.

Apart from coordination between the exporting country government and exporters, it would also be beneficial that exporters are trained about the anti-dumping investigations and their consequences. Exporters’ associations could offer regular training sessions to their members. This would encourage exporters to cooperate with the investigating authorities in order to avoid high anti-dumping duties.

Improving the Accounting System of Chinese Companies

An international accounting system assures transparency and predictability for foreign firms. This also applies to the firms on the stock exchange. International Financial Reporting Standards (IFRS) reduces information asymmetries between markets and, therefore, encourages foreign direct investment (Sun & Ors 2019: 231-250). The full implementation of the IFRS is still an ongoing process in China (IFRS nd). The accounting profession is still under government control (Gong & Cortese 2017: 206-220). Government control can be tracked in the annual report of China Mobile which is traded on the Hong Kong Stock Exchange (ibid). The concern about the report is that there are differences between Mainland China and Hong Kong websites (ibid). The first one reflects the connections with the Communist Party of China while the latter obscures it. The other issues related to the accounting techniques make the figures questionable.

Globalization has enhanced capital flow from one market to another including China. Regulators were motivated to achieve greater harmonization of the IFRS (Judge & Ors 2010: 161-174). In 2007, China introduced the IFRS to increase foreign direct investment and gain an advantage in exports to overseas markets. However, this was mandatory only for publicly listed companies (Liu & Ors 2011). For domestic companies, the IFRS is still not mandatory. Considering that the majority of exporters subject to anti-dumping investigations are not listed companies, accounting systems constitute a barrier to cooperation. With the difficulties being faced overseas, there is resistance to full compliance with the IFRS by Chinese regulators and scholars (Ezzamel & Xiao 2015). An empirical study of accounting standards supports this perspective:

(full) adoption of IFRS may send the wrong political signal to people: How can we just copy from another country and completely Westernize? In addition to direct copying, what about the operationalization of International Financial Reporting Standards? Some of them may not suit Chinese circumstances (Ezzamel & Xiao 2015).

On the other hand, this view may change, bearing in mind the high anti-dumping duties levied on Chinese exporters. Both the European Union (EU) and US anti-dumping investigation questionnaires include detailed questions about the accounting systems of exporters (European Commission nd; US Commerce nd). In this sense, accounting plays an evidentiary role in responding to anti-dumping investigations. However, Chinese exporters are not fully capable of submitting satisfactory

accounting information. First, many exporters do not have a competent accounting team (Wu & Gong 2010). Therefore, the accounting files are not classified, ordered or archived. This makes it difficult to respond to the questionnaire within 37 days. Also, many Chinese exporters use a costing system according to the market they sell into, not the product itself. Factory overheads are not classified so the composition of cost for each product type is hard to track. Thus, in many cases, the accounting information is not regarded as accurate, reliable or integrated to international standards (ibid). International accounting standards are not mandatory in responding to US or EU investigations but, without such standards, it is likely that the information submitted will be disregarded.

Support Tool for Exporters (similar to ACWL)

As expressed by WTO lawyers and Chinese exporters, the financial costs of cooperation and the lack of legal capacity are serious obstacles to cooperation. Even if the exporters are aware of initiation, it is challenging for them to prepare a response within 37 days. In the empirical research, one company stated:

At first, we didn't know where to get the information about non confidential files or enforcement, there was no instruction available, we have to find information by our own effort. So we got late info and sometimes we were not sure if the info is correct, which confuse us at first stage (Yilmazcan 2021: 244).

The legal capacity and cost problems are also concerns of the least-developed and developing countries. Therefore, in 2001, the ACWL was established independently of the WTO (ACWL 2001). The ACWL provides legal assistance to developing and least-developed WTO members who plan to file cases before the WTO DSM. Former WTO Director-General Pascal Lamy states

by ensuring that the legal benefits of the WTO are shared among all Members, the ACWL contributes to the effectiveness of the WTO legal system, in particular its dispute settlement procedures, and to the realisation of the WTO's development objectives (ACWL 2021).

Without the ACWL, numerous disadvantaged WTO members would lose or would not even be able to file a case against developed members. Thus, the ACWL is playing a balancing role in terms of legal capacity for these countries. Therefore, another international organization or a department under the ACWL could support exporters facing anti-dumping investigations at the micro-level. This organization would offer low-cost assistance while employing anti-dumping consultants, thus improving legal capacity in developing or least-developed members. This, in turn, will

increase the rate of cooperation and meaningful participation, promoting procedural justice in anti-dumping investigations.

Software to Assist Exporters to Fill in Questionnaires

Another suggestion to improve the level of cooperation would be developing a software package to fill in the questionnaires sent by investigating authorities. There is currently no technology to help complete anti-dumping questionnaires. Lawyers, consultancy firms or in-house accountants prepare the submissions manually. After the submission of responses by exporters, investigating authorities conduct on-the-spot investigations to cross-check the information in the response with the enterprise resource-planning (ERP) systems of exporters.² Investigating authorities are strict in finding mistakes and generally do not allow corrections, even for simple calculation errors. As a result of these narrow procedural rules, investigating authorities classify exporters as non-cooperating companies, which results in the adoption of higher anti-dumping measures. A software package, on the other hand, could digitalize the whole process. The time spent filling in the questionnaires could be significantly reduced so that the company would have more time for cross-checking. Also, software might even be able to automatically file the questionnaire and transfer information to the relevant government with encryption methods such as blockchain technology. This may help exporters to defend themselves more objectively, so they face lower anti-dumping duties. The transfer of information by blockchain at the same time would reassure governments that exporters had not altered the information submitted. Thus, this solution might simplify a complex compliance procedure by reducing the costs and time consumed by all parties involved. In this scenario, procedural justice would be improved without the need for any revision of the Anti-Dumping Agreement. The WTO or members pursuing greater transparency could adopt a similar initiative.

[C] CONCLUSIONS

The procedural solutions outlined in this article address a significant deficiency in Anti-Dumping measures. I argue that anti-dumping is the most litigated issue under the WTO adjudication because the Anti-Dumping Agreement leaves excessive discretion to members.

These grey areas support hidden trade protectionism, which conflicts with the principles of free and fair trade. As a result, over-protection is

² ERP assists companies with regard to their financials, supply chains, operations, commerce, reporting, manufacturing and other activities.

retaliated against by the target countries and gains from trade cannot be achieved fully. Since its entry into force, the Anti-Dumping Agreement has been negotiated by the WTO members in order to revise controversial articles. Due to conflicting opinions on issues such as zeroing or public interest, a substantive revision of the Anti-Dumping Agreement is unlikely in the short term.

In this context, this article attempts to set out possible solutions to overcome the hidden trade protectionism in anti-dumping investigations. First, increasing awareness among exporters, thereby encouraging them to cooperate, would reduce room for discretion. A support tool for exporters could also increase their legal capacity, especially SMEs. Software that would integrate with the ERP systems and automatically file the questionnaires could also reduce time and costs significantly. One of the most useful improvements in legal capacity would be the standardization of the anti-dumping questionnaires. This idea has already been proposed by some members and scholars, suggesting that it could gain wider support. As anti-dumping questionnaires are different in each jurisdiction, the ability of exporters to cooperate effectively in each investigation is limited. If investigation procedures are burdensome for exporters, they sidestep cooperation and attempt to circumvent their duties. Given the current tensions at the WTO, it is not likely that a standardized questionnaire will be accepted soon. However, mega FTAs would be a good starting point to harmonize anti-dumping questionnaires. There are many promising articles under the RCEP that improve the transparency and objectivity of anti-dumping investigation procedures. After a concrete attempt to harmonize anti-dumping questionnaires, it would be easier to adopt a worldwide recognized questionnaire. These practical measures would reduce the hidden trade protectionism behind the anti-dumping investigations.

The implications of these findings could guide future attempts to revise the anti-dumping mechanism. It should be borne in mind that anti-dumping is a highly controversial matter under the WTO, and it is very unlikely to be abolished completely. On the contrary, increasingly, like developed countries, developing countries are adopting anti-dumping measures. However, the number of disputes before the DSM indicates that anti-dumping is an ill-defined and abused tool. With this in mind, anti-dumping could be addressed as a necessary evil for international trade. It cannot be abolished or replaced with competition laws, but there are clear signs that reform is needed and those reforms should prioritize procedural justice.

About the Author

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Legislation, Regulations and Rules

Anti-Dumping Agreement [Article 6.1.1](#)

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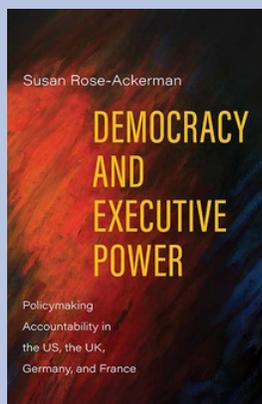
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**DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING
ACCOUNTABILITY IN THE US, THE UK, GERMANY
AND FRANCE (2021) BY SUSAN ROSE-ACKERMAN**

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Susan Rose-Ackerman (2021) *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany and France* is published by Yale University Press priced at \$65.

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Susan Rose-Ackerman has written this book to assess the contribution that administrative law can make to enhancing democratic accountability in the exercise of executive power. Her objective is to highlight the need for representative democracies to go beyond elections, representative legislatures, and the establishment of political parties, important one might add as these are. Can referenda be added? The United Kingdom (UK) Brexit referendum was, according to one view, a vast exercise in democratic involvement promoting *vox populi*; or a sham based on lies, deceit, gross exaggeration and distortion. Both Remainers and Leavers were largely too inept to explain coherently the benefits or disadvantages of membership of the European Union (EU). Six years after the vote, the government has still not explained realistically what the future role of the UK in the world will be or what benefits will accrue. 'Free at last, free at last, great God almighty free at last' is not a justification for such a context-changing decision.

In short, this book addresses executive power, its operation and effective public involvement in that process to reinforce democratic values in fora

and settings beyond representative legislatures. The author's chosen models are the United States of America (USA), UK, Germany and France although other examples are taken on board.

Administrative power, the author observes on page 1, has concentrated on individual rights and ignores the way law can further democratic values in executive policy-making by encouraging consultation, participation and reasoned explanations for regulations, actions or decisions. Not all administrative lawyers have taken an individualistic approach to their subject, although the courts by tradition and dominant culture look for rights to fasten onto when intervening in executive decision-making. Their reluctance to foster surrogate political processes has not, in the UK, prevented them extending the grounds for judicial review and who has standing to bring judicial review in public law. In England and Wales, two Johnson government reviews and consultations on judicial review have been motivated by accusations that English judges have abused their position by extending the parameters of judicial review into the political, accusations that have already shown an emerging caution in judicial approaches to *locus standi* in British courts. Reform of human rights legislation has also been subject to a similar review and consultation (on judicial review, see Birkinshaw 2021).

Given the dramatic developments in executive power in the USA with the unitary executive and President Donald Trump's abuse of office and excesses (still a work in progress) and Boris Johnson's grandiloquent autocratic tendencies in the UK, one might have expected an examination of how the core executive is made more accountable in its operations beyond periodical elections. The author's focus is upon the way that power is delegated by the executive and legislatures, and how those bureaucratic structures may be made accountable and *democratized*. The paradigm is the federal agencies that operate in the USA and the Administrative Procedure Act of 1946 (APA), judicial review and agency rule-making. The author is correct in locating the real power of government in the bureaucracy. Long ago we learned in our constitutional history that the Normans introduced in England a system of governance through a bureaucracy so powerful and durable that it survived weak kings, foolish kings, despotic kings and absent kings.

It is also refreshing to see some erstwhile traditional areas of concern back in the spotlight. The world we inhabit has been dramatized by governmental excesses and scenes of bewilderment and outrageous behaviour. It is fitting to ask how delegated power operates and how its *modi operandi* are, and can be, made more democratic. The power, and powers delegated, are enormous.

Bureaucracy has its enemies and is an easy butt of populists and demagogues. Supply-side economists, the Alt-right and Ronald Reagan's claim that the most terrifying nine words in the English language 'I'm from the government and I'm here to help' (well, wasn't that Reagan's own message?) helped foment not just opposition but antipathy to regulation and its faceless functionaries. Rose-Ackerman is well aware of this and covers the ways in which regulation is opposed, not simply ideologically but through counter-technological and technicist initiatives.

On a personal note, early in my academic career I was intrigued by US administrative law and procedures, rule-making, notice and comment and hybrid procedures, judicial review in a common law system based in written constitutional foundations, substantial evidence, freedom of information legislation and, not really mentioned in this book, government in the sunshine and federal advisory committee legislation. It was a system grappling with capitalist, commercial and private power. For a young public lawyer these contained so much more than the meagre offering of English administrative law in a system built on secrecy (watch proposed UK reforms to official secrecy laws and freedom of information legislation the latter introduced in 2000). My colleague, Norman (Douglas) Lewis and I were taken to task for advocating rule-making procedures which American lawyers claimed had become sclerotic or which English lawyers claimed were too culturally steeped in US legal heritage to be exportable.

Well, those procedures, and many other participatory exercises, are here in this book. Rule-making procedures are, under the APA, the most developed and sophisticated means of sounding out and engaging in public participation in policy development. What the author does is examine the context of APA practices in the USA and attempts to curtail such regulation through devices such as cost-benefit analysis, removal of two regulations for every one proposed (as adumbrated by the *Taskforce on Innovation, Growth and Regulatory Reform* in May 2021¹ in relation to removing EU regulations and directives post Brexit) and explain the weaknesses and shortcomings affecting such procedures. She then analyses whether there are analogues in the systems under study along with the USA: the UK, Germany and France.

The USA is the most developed model for participation, but other systems offer examples of participatory practices, particularly in the field of the environment and the Aarhus Convention. In England, government

¹ Paragraph 10. In H M Government (2022: 27), the government did not recommend this: see details of the taskforce at [Taskforce on Innovation, Growth and Regulatory Reform](#).

invariably does not want the merits of major policy proposals examined in fora outside Parliament where Members of Parliament (MPs) (government MPs forming a majority) can be whipped by government into supporting its proposals. The government learned over many years that inquiries at which the public made representations and examined proposals could all too easily drift into examination of policy, and sometimes very effective examination of policy.

Delegation of power is as old as government. It is a necessity and often perceived as an evil. Critics of administrative power have a long lineage. Lord Hewart and his *The New Despotism* (1929) certainly did not accept the *dicta* of Lord Shaw in *Local Government Board v Arlidge* that if ‘administration is to be beneficial it must be master of its own procedure’ [1915 AC 120]. The emphasis was on the centrality of liberty and property as the basis of our civil society. Fine if one was a person of substance. Everywhere the reliance on expertise and scientific rationality is decried by those who see a threat to their freedom and property by action or regulation in the public interest. Covid restrictions, libertarians proclaim, are part of the deep state’s conspiracy to lead us back to a new feudalism. Environmental protection and climate control are a part of a subterfuge to keep us cold and impoverished. Equality and equal protection are a Woke attempt to thwart those whose wealth and privilege would ensure they sat, or should sit, at the summit of human hierarchies. These movements are invariably assisted by social media platforms, themselves a prime candidate for better regulation to protect the public. The target of attack (abuse) are the *soi-disant* experts and scientists and regulators who are seeking to advance the public welfare. One only has to recall the graphic images of Chris Whitty’s (England’s Chief Medical Officer) assailants besetting him in a London park at the height of the Covid outbreak.

Law should not only limit administration to its authorized parameters. It should assist administration and help make it more effective. It should achieve this, in the words of Rose-Ackerman, by helping to democratize the process of delegation.

A recent book by Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (2021), explains how Donald Trump found administrative agencies an easy target for his fake news allegations and simplistic exaggerations. The mixture of rhetoric and ignorance of the details of what is actually the subject of deregulation has been a common feature of these attempts. Attacking ‘big government’ may be popular, but the public, let alone the former president, have little idea of how public administrators work and the way they assess risk to the public in the activities they seek to regulate on behalf of public welfare.

Fisher and Shapiro explain that, on 29 February 2017, President Trump issued Executive Order 13778, ‘Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States”’ (82 Fed Reg 12497 (3 March 2017)). The purpose of his Order was to demand the reconsideration of a 2015 regulation—the ‘Waters of the United States’ rule, known as the ‘WOTUS’ rule. The rule adopted a definition of the term ‘waters of the United States’ to define the jurisdiction of the US Army Corps of Engineers and the Environmental Protection Agency (EPA) under the Clean Water Act. Trump claimed that the EPA engaged in a massive power grab by deciding that ‘navigable waters can mean every puddle or every ditch ... it was a massive power grab’ (Lee 2017).

Fisher and Shapiro explain in detail how Trump’s exaggerations were themselves part of fake news and gross misdescription. The 2015 rule had been promulgated after repeated calls for a more precise definition of ‘waters of the United States’ so as to enhance regulatory certainty and reflected evolving science and the difficulty in defining navigable waters. The term was used in a Congressional statute (Clean Water Act (CWA) in 1972) with an explicit objective to ‘restore and maintain the chemical, physical and biological integrity of the Nation’s waters’ against discharges. The alternatives: do nothing in the first place; achieve a definition which misses many of the problems and which is useless or next to useless; or develop a definition which protects the public interest. Of course, the determination of the public interest is not a self-defining or incontrovertible matter. An effective definition capturing the problem is central to environmental health. It will also likely upset powerful industrial and commercial interests, as we know only too well in the UK. The 2015 reformulation was the result of years of legal precedent, peer-reviewed science and agencies’ technical expertise and extensive experience in implementing the Act over four decades. Where the public engage in this legitimate and necessary exercise, and engage effectively, is Rose-Ackerman’s burden.

Administrative law should be about both the capacity of agencies to perform their legislation missions, starving them of appropriate funds is the easiest way to stymie them, and their authority to do so. Rose-Ackerman’s brief is to see where in this process the public can best contribute to policy development, and under what conditions—eg openness, explanations, expert assistance—so as to further the democratic ideal. That is, in short, to get those involved and affected in a programme to assist in its unfolding.

Her objective is to explore comparatively how four legal and political systems achieve, or could be made to achieve, greater democratic

accountability, not simply *ex post facto* but *ex ante* by introducing more participatory procedures for greater contribution from the public. Questions are raised about common and civil law background influences. At various stages she examines EU practices, and those in comparable and less-developed backgrounds. Of course, this begs the question of who is invited to participate, at what stage in the process (usually too late), how open will the decision-making basis be? How widely circulated will information be and what is held back and why? What standard is required in the giving of reasons for decisions or rules—should we expect reasons for the reasons? Are reasons simply facilitators of appeal or should they assist in genuine transparency? How independent should the decision-makers be?—the author has written widely on corruption in officialdom. When many years ago I studied possible reforms in prison grievance and disciplinary hearings in England I was taken by examples from California. The running of prisons by ‘self-interested hustlers’ was a widespread phenomenon. What of those who need assistance beyond affected commercial interests (anti-regulation or pro-regulation affecting competitors), professional lobbyists, interest groups, neighbourhood groups and those representing the public interest. Lawyers do not come cheap (usually) and participants need expertise and guidance to match that of officialdom to tackle quantitative assessments of cost–benefit analysis, impact assessments and sheer technicality. What form of judicial review would best assist democratic involvement and are the courts up to this?

On this point a recent judgment of the English and Welsh Court of Appeal² has questioned whether a non-profit group set up to act as a defender of the public interest has *locus standi* to question the allocation of government contracts for communications’ services by the highly controversial special adviser to the Prime Minister, Dominic Cummings. The group was a ‘complete stranger’ to the contract, and the question of standing was ripe for review (paragraph 6). Was it right that a third party who is not a potential bidder has a right to come to court, the Court of Appeal pondered? One had hoped this thinking had disappeared and that government contracting should be seen as an essential means by which government achieves its policies (Birkinshaw 2006) and which amounts to billions of pounds of public expenditure *per annum*. For the Good Law Project was the matter simply a *res inter alios acta* in private law? The judgment was followed by another in which the High Court ruled that highly controversial public appointments by ministers of individuals to

² *R (The Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21 on appeal from O’Farrell J in *R (The Good Law Project) v Minister for the Cabinet Office & Anor* [2021] EWHC 1569 (TCC).

central roles in the war on Covid in the early stages of the Covid episode in England could not be impugned by the Good Law Project. It lacked sufficient interest.³

All four countries under the comparative spotlight are experiencing not dissimilar problems in tackling executive power and its delegation although their constitutional foundations and expectations differ. Rose-Ackerman provides a wealth of detail of the practices in operation and in private sector analogues (pointed out many years ago by Lewis & Ors 1990). On page 266, she offers seven models of reform for rule-making procedures.

Perhaps the shape of US administrative law dominates the book's perspective? My eyebrows were raised at certain points: I did not notice reference to the 1893 Rules Publication Act in the UK which offered a far more public-spirited stage for making delegated legislation in England. The Act was repealed just as the USA introduced the APA! Although prerogative is vitally important in foreign affairs, it is suffused throughout our public life as *R (on the application of Miller) v The Prime Minister and Others* [2019] UKSC 41 testifies on the proroguing of Parliament by Boris Johnson. Is France really devoid of a legal vocabulary and conceptual framework for monitoring the democratic and technical legitimacy of policy-making inside the administration (page 227)?

There is also the deeper question that what has brought about (in the USA and UK, and France and Germany perhaps to a lesser extent though perhaps not) our scepticism of public power is the demotion of representative democracy and the desire to litigate, to confront personally and to win conflicts of belief and ideals absolutely, as in a referendum. Representative democracy is able to depersonalize conflict and achieve outcomes that are based on rational debate, balanced reflection and an element of compromise, one might claim. Opening up the policy-making process to the participatory pressures and inputs described by Rose-Ackerman will personalize differences of opinion, bring about undesirable delay and will not guarantee even and balanced representation and reflection, her antagonists will argue.

To which the reasonable response is that the representative process is heavily networked, partisan, subject to powerful self-interested lobbyist

³ *R (Good Law Project & Anor) v The Prime Minister & Anor* [2022] EWHC 298 (Admin) where the GLP was ruled to lack sufficient interest; see paragraphs 16-29. The Runnymede Trust, a body established 'specifically to promote the cause of racial equality' (paragraph 59) did have *locus standi* to challenge the appointments under the public sector equality duty. See *R (GLP et al) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) and *R (GLP et al) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) paragraphs 77-108.

groups, remote, tending to the secretive and inherently preferential. Surely, she is right to argue that bureaucrats and political appointees will invariably occupy and preside over the vast ranges of policy-making and the task is to encourage a public law that enhances their democratic accountability in a manner which complements the legislature. Those who are interested in such an objective will derive much benefit from this book. Those who are sceptical should nonetheless read *Democracy and Executive Power*. Whether she convinces the reader or not, there is a wide and deep body of material on participatory procedures in the four countries she examines and insightful analysis of the issues raised. The book deserves to be read and studied widely, not simply by public lawyers, but by political scientists and government servants and advisers.

About the author

Patrick Birkinshaw is Emeritus Professor of Public Law at the University of Hull. He was Editor in Chief of the quarterly journal *European Public Law* between 1995 and 2018. He has authored numerous books including *Government and Information* (with Dr Mike Varney, Bloomsbury Professional 2019) and *European Public Law—The Achievement and the Brexit Challenge* (Alphen aan den Rijn: Wolters Kluwer 2020). He worked as a specialist adviser to the Commons Public Administration Select Committee and frequently acted as a government adviser. He was a member of the transparency team for Nirex and the Nuclear Decommissioning Authority where he was an ombudsmen on information requests. He has worked on several national research councils.

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CENTRE FOR LAW IN ASIA

MEMBERS OF THE CENTRE FOR LAW IN ASIA

SOAS University of London

The Centre for Law in Asia (CeLIA) is based in the School of Law at SOAS (formerly the School of Oriental and African Studies) University of London. CeLIA brings together legal expertise on law, legal cultures and legal systems in Asia. Its current Director is Dr Kanika Sharma. The main goals of the centre are to advance research and teaching in the field of law and legal development in Asia and to build partnerships with educational organizations, and legal institutions and practitioners based in Asia.

CeLIA has its origins in the decision made in 1988 by the Law Department (as the Law School was then known) to establish a Centre of East Asian Law (CEAL). The main purpose of this new centre was the promotion of understanding of East Asian legal systems among academic lawyers, legal practitioners and administrators of justice. Through its members, CEAL offered a unique concentration of expertise in the field of East Asian law, especially in Chinese law (both ‘traditional’ and ‘modern’). The Law School and indeed the SOAS Library also had (and continue to have) significant strengths in the laws of Africa, the Middle East and South Asia; CEAL represented a significant broadening of the range of regional expertise in the Law School, and with an important accompanying expansion of teaching and research interests and library provision.

For a number of years, the centre hosted and offered regular seminars to the ‘Chinese Legal Practitioners Group’, engaging with, in particular, London-based practising lawyers on legal developments in the People’s Republic of China (PRC). The importance of understanding legal values and legal change in East Asia, following the founding of the centre, steadily grew, and CEAL came to provide a focus for scholarly research and practical investigation into both developing and developed legal systems in that region, including Japanese law and Korean law. In due

course, its remit further widened, to include law in Southeast Asia, the Republic of China, Central Asia and South Asia. In large part as a result of the impact of globalization in Asia and the development of regional organizations such as the Association of Southeast Asian Nations and the Asian Development Bank, the centre further evolved into its present role as a centre for law in Asia, first as the Centre for Asian Legal Studies (CALS, established 2017) and now renamed CeLIA (2021).

Faculty members of CeLIA teach on a substantial number of Asian law modules at SOAS, contribute their expertise on laws in Asia to more general modules, and research and publish extensively in these fields. Of course, a key issue is whether Asian societies share enough common ground for the idea of examining law in ‘Asia’ to be useful. We argue that there is—for example, in the impact of colonialism, post-Second World War economic development, authoritarian rule, environmental problems and so on—but accept that there may be more common ground in particular areas of law and legal development, and in relation to certain issues, than in others. Sometimes there may be differences so striking that comparative analysis is not possible.

The study of Chinese law within the SOAS Law Department had been an innovative and rare specialization when it commenced in the late 1950s, especially with the appointment at that time of Henry McAleavy as Lecturer (subsequently Reader) in Chinese law (see Liu 1968). Later, it was also greatly assisted by the contributions made by Professor Anthony Dicks (see Palmer 2019; Xi & Palmer 2019), Professor Michael Palmer, Dr Cheng Yuan (see Cheng 1991) and others.¹

From its early days the centre mainly functioned as an academic home for a number of public service professional training and specialized research programmes. These programmes involved academic and professional legal exchanges between the United Kingdom (UK) and East Asian jurisdictions, in particular the PRC. The programmes, jointly organized with various UK and European institutions, included training schemes for lawyers, judges, procurators, legislators and others as well as consultation and research visits to Europe by senior PRC academics and state legal officials. Among the most notable of the training programme contributions was participation in the Lord Chancellor’s Training Scheme for Young Chinese Lawyers (from 1988 onwards), the Lord Chancellor’s

¹ It might be added here that in its early days the centre received a great deal of support and encouragement from the then Head of the Law School, Professor James Read. For an appreciation of Jim Read’s work, focusing mainly on his contributions to the study and practice of law in Africa, see Coldham & Ors (1996).

Training Scheme for Young Chinese Judges (1998 onwards) and the EU–China Legal and Judicial Training Programme (2000 onwards, and leading to the creation of the EU–China Law School in Beijing, PRC, in 2008).

The centre also created a partnership with the Dongguan Intermediate People’s Court (Guangdong Province, PRC) in an informal agreement by means of which that court for a number of years sent to the SOAS Law School young judges to study for postgraduate law degrees. These programmes continued with the centre’s involvement right through to the end of the first decade of the present century, when further renewal sadly was not financially possible. Nevertheless, thereafter, SOAS was able to host Chinese judges on its LLM programme through the competitive Chevening Scholarship scheme. In addition to capacity building and professional legal development in China through its participation in such schemes, the centre worked closely with, *inter alia*, the Great Britain China Centre, the British Council, the Foreign and Commonwealth Office, the Bar Council, the Law Society, the Office of the United Nations High Commissioner for Human Rights, the Danish Centre for Human Rights and the European Commission, as well as leading Chinese law schools, encouraging constructive exchange and dialogue on important issues relating to legal development in East Asia.

In 1999, with the support of Sir Joseph Hotung, the centre also became the academic home for a Senior Research Fellowship on human rights in China, resulting in a series of important publications on judicial abuse of political psychiatry in China by Dr Robin Munro.² The centre also encouraged the development of the ‘Law in East Asia’ book series—launched in 2006 under the General Editorship of Professor Anthony Dicks and Professor Michael Palmer—a series dedicated to the publication of studies of law, legal culture and legal institutions in East Asia and the interaction between the legal systems of East Asia and other parts of the world.³ The centre also enjoys links with law schools in Japan, in particular that at Nagoya University.

Within the broad remit of CeLIA the Centre has continued its focus on issues of Chinese law and legal development. In 2019 Dr Yu Mou hosted a one-day conference entitled ‘Access to Justice: China–UK Dialogues on Criminal Legal Aid and Effective Defence’, an event bringing together

² For an appreciation of the work of Robin Munro see the obituary (‘Robin Munro, 1952-2021’) written by Donald C Clarke (2021).

³ See, for example, Professor Tan’s study (2008) and other titles on the [Wildy website](#).

legal scholars, legislators, legal practitioners and NGO representatives on criminal legal aid from both China and the UK. Members have published major studies in recent years on a range of topics including Chinese legal history, criminal justice, consumer law and dispute resolution, higher education, mediation, and legal education.

From the late 1980s onwards, the Law School developed a series of initiatives focused on law in Southeast Asia. It has sought to develop teaching of and research into the region's legal issues, and specialists (including in particular but not only Professors Andrew Harding, Andrew Huxley and Carol Tan) have published work on a wide range of issues including the impact of colonialism, constitutional development, family and marriage, migrant workers, and the rule of law. These efforts have also from time to time been the subject of international conferences such as that held in 2011 for international scholars to discuss the interfaces and connections between Edward Said's Orientalism and the law. Edited papers from this workshop were later published in the *Journal of Comparative Law* 6:2. In 2015 the centre played a lead role in securing British Council funding for a workshop for the participation of 40 early career scholars from the UK and Indonesia to disseminate and discuss their research on Indonesian Migrant Workers. From 2017 for several years the centre hosted a 'Rule of Law in Thailand' Project, examining issues of legal and constitutional development in Thailand.

Since 2019, reflecting its expanded identity, the centre has also attempted to strengthen its links with new Asian jurisdictions including those in South Asia. This has resulted in a number of talks jointly hosted by the centre and the SOAS South Asia Institute as well as the SOAS Law, Environment and Development Centre. Externally, CeLIA has partnered with the Law and Social Sciences Research Network to host webinars that bring together lawyers and legal scholars to discuss relevant issues in contemporary South Asia. The papers presented at a webinar in September 2021 examined the continuing relevance of colonial legal iconography in modern India and will soon be published in a special symposium in *Law and Humanities*.

CeLIA's specialist areas include law in Central Asia. Here, the concern is with post-Soviet law and constitutional structures (although the Soviet constitutional system continues to influence Central Asian States and the Commonwealth of Independent States). In addition to constitutional issues and legal, institutional and governmental reform, there is concern with questions of law and development (markets and globalization in

developing and transitional states), and post-conflict reconstruction, and human rights.

Today, CeLIA remains a major centre for the study of legal cultures and contemporary legal systems of Asian societies, their interlinkages, and their experiences of international law and globalization (including analysis of the impact of empire and colonialism).⁴ It also continues to develop partnerships with educational institutions and legal practitioners based in Asia. CeLIA welcomes expressions of interest for future projects as well as [applications for visiting scholars](#) with mutually beneficial research interests who would like to be based at the centre.

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⁴ Current members include: Kanika Sharma (Chair), Ernest Caldwell, Philippe Cullet, Vanja Hamzić, Amy Kellam, Michelle Kelsall, Yuka Kobayashi, Amber Lakhani, Martin W Lau, Chulwoo Lee, Grace (Yu) Mou, Michael Palmer, Scott Newton, Patricia Ng, Verapat Pariyawong, Mayur Suresh, Max Wong, Xi Chao, Ling Zhou. CeLIA’s website is currently undergoing revision, but a provisional version is available on the main [SOAS website](#).

REMEMBERING
DR AONGHUS CHEEVERS

YVONNE DALY

School of Law and Government, Dublin City University



In the Irish language the word for condolence is ‘comhbhrón’. Directly translated this means ‘joint sadness’. For a long time during the Covid-19 pandemic the restrictions in place in Ireland allowed for only a handful of people to attend funerals, and for those to maintain social distance from one another. The lack of an opportunity to bring people

together in their sadness, to share the burden of loss, to collectively remember and to celebrate the life of a departed friend, neighbour, colleague, or family member was extremely difficult and added to the grief of many. During this time, our colleague Dr Aonghus Cheevers sadly passed away, and it took a full two years for us, in the School of Law and Government at Dublin City University (DCU), to be in a position to safely bring people together to remember and to celebrate his life, and to share the weight of his loss. This we did on Wednesday 6 April 2022, the second anniversary of his death. While it was a sad occasion, there was comfort too in being together, and joy in the memories that we shared.

We were joined by Aonghus’ family, including his wife Emily, his father Harry, many of his close relatives and friends, as well as academic colleagues from University College Dublin, Technological University Dublin and Maynooth University, and colleagues from the NGO sector.

Speakers at the event included the President of DCU, Professor Daire Keogh; Brian Hutchinson from the Sutherland School of Law at University

College Dublin, who supervised Aonghus' PhD thesis entitled 'Mediation in the Irish Civil Justice System—Use and Understanding'; Aonghus' PhD external examiner, Professor Michael Palmer (Emeritus Professor, University of London); Lorraine Lally BL, the Head of the National Register of Mediators Network; Dr Edoardo Celeste, who completed his PhD at the same time as Aonghus, and was also a lecturing colleague at DCU; Charlie Kinsella, a DCU student representative; Fr Séamus McEntee of the DCU Chaplaincy; and Aonghus' father Harry Cheevers.

As Head of the National Register of Mediators Network, Lorraine Lally announced the establishment of an essay competition on mediation which will be run annually in Aonghus' name. Edward Elgar Publishing have presented the DCU library with an inscribed copy of *Comparative Dispute Resolution* (2020), a research handbook in which Aonghus' chapter on voluntarism in the Irish Mediation Act 2017 was posthumously published. As well as this, Aonghus' wife Emily Waszak has been appointed as one of the DCU Visual Artists in Residence for 2022/2023. Through Emily's work we continue our links with Aonghus, and Emily will present a piece of her textile work, as part of her Grief Weaving project, to the School of Law and Government for display in memory of Aonghus.

Aonghus, who was Assistant Professor in Private Law at DCU, was remembered as an emerging scholar of great intellect. He made a significant contribution to the development and understanding of mediation in Ireland. Aonghus was remembered as a loyal friend, to whom one could turn at any time for support and advice. His encouragement of others and his empathy were recalled, along with his great sense of humour and his ability to engage students in class. Mr Cheevers spoke of the comfort that Aonghus' family found in the reflections which students posted online following Aonghus' death. The students spoke about Aonghus as a wonderful lecturer, who created a warm, open environment for them. One said that he 'was not only a fantastic lecturer but a lovely gentleman'. They said that he always cheered them up with his jokes and witty comments, that he was engaging, caring and accommodating.

It was comforting for us all to share our joint sadness in Aonghus' passing, and to hear of the many facets of his life in which he was respected, appreciated and loved. *Suaimhneas síoraí dá anam* (May his soul rest in eternal peace).

About the author

Professor Yvonne Daly's brief bio and her email address may be found on her [DCU webpage](#).

MONEY FOR LIVES: THE STORY OF THE 9/11 VICTIMS' COMPENSATION PROGRAM

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Worth, the 2021 Netflix film depicting the administration of the 9/11 Victims' Compensation Fund (VCF), focuses on the evolution of lawyer Kenneth Feinberg's approach to compensating the families of those who lost their lives in the terrorist attacks on New York City's World Trade Center Towers and the military's Pentagon building in Washington DC and the Pennsylvania plane crash provoked by the plane's doomed passengers. The attacks killed 2976 people, including approximately 400 first responders, and immediately seriously injured several hundred more (Dixon & Stern 2004: 15-16). In the years following, thousands more developed injuries as a result of the toxic substances that polluted the site and much of lower Manhattan (Hellerstein & Ors 2012). The Fund, authorized within days of the attacks, was a key component of the United States (US) Congress's strategy to protect the aviation and insurance industries from what lawmakers feared would be a crushing number of liability claims emerging from the deaths and destruction immediately wrought by the attacks.

Accepted by business-oriented legislators as the price of securing the protection of industry against litigation, the parameters of the compensation fund were hastily cobbled together by a legislative minority concerned about the fate of the victims' families, assisted informally by a collection of tort law academics perceived to share these concerns.¹

* Judge John W Ford Professor of Dispute Resolution, Stanford Law School. I have known Kenneth Feinberg for four decades. I consulted him about the dynamics of mass tort litigation when I first began my research on the subject, spoke along with him on myriad academic panels focused on mass torts, and currently serve with him on an advisory board to the RAND Institute for Civil Justice. This review draws on the film *Worth* and Feinberg's account of the 9/11 Victims' Compensation Fund on which the film is based, and also on my memories of our interactions over the years.

¹ I was one of the many law faculty consulted during this intense period, but my contribution was modest at best.

The 9/11 Compensation Program—perhaps not surprisingly given its designers—was modelled after state tort law-based regimes that dictate compensation available to families of wrongful death victims who file claims in court against entities and persons who allegedly caused the victims' deaths. Under most states' laws, the amount of money available to families is determined primarily by economic loss: that is, the amount of money that the deceased would have contributed to their family had their lives not been cut short. This doctrine is consistent with the fundamental principle of tort compensation, that it is intended to restore victims to the *ex ante* economic status of which they were deprived by the tortfeasor.

The tort law doctrine that animated the VCF's design distinguished the Fund from many other government-established compensation funds that cap both individual awards and the total amount appropriated for the fund. Adopted at a time when neither the total number of victims nor the scale of the economic loss was known, the September 11th legislation did not incorporate any caps on individual awards; nor did Congress specify how much money would be available to victims in all. Who would be compensated and how much were left to the fund administrator to spell out in rules that would be subject to public review and comment. What was clearly specified was that in order to receive compensation from the Fund, families would have to give up all present and future rights to sue the airlines, insurers, other industries or any other entity that they might conceivably be able to hold liable under tort law, with the exception of the terrorists themselves, whom an amendment to the statute left susceptible to legal action.

Enter Kenneth Feinberg, the ambiguous hero of *Worth* and the author of the book on which it is based (Feinberg 2006). Dubbed a 'Special Master' in reference to the title he and other judicial adjuncts assume in complex civil litigation in the US where they assist judges to resolve cases, Mr Feinberg had a well-established reputation as an effective settlement negotiator. But, unlike his previous roles where his authority flowed from the judge (or occasionally, when he negotiated dispute settlements outside court, from the private parties who hired him), in the 9/11 Compensation Program, Mr Feinberg's authority flowed from the federal government, from the US Attorney General who appointed him and, ultimately, from the President. To many anguished victims' families, Feinberg was the face of an indifferent government that was more interested in protecting the airlines from taking responsibility for their role in facilitating the attacks than in assisting victims' families. Their animus is illustrated in the film by a raucous meeting at which families hurl invectives at Feinberg. Although this meeting is fictional,

it is true to Feinberg's experience dealing with families at the inception of the fund and illustrates the tremendous challenge he faced in gaining victims' trust.

To many (including me), Feinberg was the best and most logical choice for the Special Master position. The statute enabling the Fund left virtually all details about how to allocate compensation to its administrator. In multiple mass tort lawsuits, dating back to the landmark Agent Orange veterans' class action (Schuck 1986), Feinberg had shown his skill at devising complex plans for determining eligibility for compensation and specifying amounts on offer. To my academic colleagues and lawyers who specialize in tort law, Feinberg was the master of 'grids': elaborate multi-factorial tables that sort plaintiffs into categories according to their personal characteristics, injuries and other features that tort law deems relevant for determining compensation. Importantly for Feinberg's evolution as the 9/11 Fund administrator, negotiating the details of these grids rarely, if ever, includes the ultimate claimants: negotiations are hard fought by the lawyers representing defendants and different groups of victims, but the victims themselves are out of sight and hearing, brought into the process only after the deals have been struck.

This process of resolving mass torts in the US—a process that Feinberg helped shape over the years—reflects procedural rules and US Supreme Court holdings. When the nature of the facts and law underlying mass claims incentivize defendants to settle, their goal is to strike a deal for 'global peace'—a settlement that will include all those with viable claims and close off litigation. Two main approaches have evolved over the last 40 years, the rule 23(b)(3) damage class action and the non-class aggregate settlement. By 2001, Feinberg had successfully used both approaches to negotiate settlements. But neither had required him to engage in protracted negotiations with individual victims.

In US class actions, judges are required to review and approve any settlements that are reached between class representatives and defendants, and then only after a 'fairness' hearing which each class member is entitled to attend for the purpose of voicing their opinion on the proposed settlement. Some proposed settlements attract considerable attention, particularly when the class includes organized groups, such as the veterans who brought the Agent Orange lawsuit, or more recently the National Football League concussion victims. But in most instances, only a tiny fraction of class members participates in fairness hearings. And sometimes the details of the claiming process, including the evidence that claimants will have to produce to obtain compensation, are not

hammered out until after the judge approves the aggregate settlement amount and overall compensation plan. Moreover, as a result of two US Supreme Court decisions in the late 1990s, most mass tort lawsuits are not eligible for class treatment. Outside the class action framework, no rules or practice require that the court inquire into the plaintiffs' views of the proposed settlement's fairness, although to receive payment each individual plaintiff must sign a release of their right to sue and defendants may require that a very large percentage of claimants sign such releases before finally agreeing to the settlement.

Although many lawyers and judges believe that tort plaintiffs only care about how much money the dispute resolution process delivers to them, there is a vast empirical literature showing that disputants pay sharp attention to whether the procedure used to decide compensation is—in their eyes—fair. Being heard—being able to tell one's story—is a critical component of perceived fairness, which is also associated with disputants' perception that they have been treated with dignity and respect (Lind & Tyler 1988). As a scholar working in the 'procedural fairness' domain, I had numerous opportunities to discuss this research with Feinberg at academic conferences on mass torts. He routinely discounted the research, arguing that, whatever survey respondents might say, in the end, resolving mass torts was all (and only) about the money.

It is not unreasonable to speculate that Feinberg anticipated that the process of resolving 9/11 victims' claims would resemble the two mass settlement procedures he was familiar with: there would be a challenging process of devising rules for allocating compensation under the public spotlight created by the national trauma of the terrorists' attacks. But in the end, there would be a 'grid', a formula for assigning claimants to categories and calculating compensation owed them according to the formula. Although Feinberg obviously was aware of the high emotion surrounding the process, in the end it would be all about the money. If he was able to devise a formula that was acceptable to most of the victims even though it would fully satisfy none, the Fund—and his leadership—would be deemed a success. The film highlights this metric of success by focusing on the growing percentage of victims who agreed to forgo their rights to go to court in exchange for a monetary settlement. Neither justice nor fairness was central to achieving this outcome; indeed, as he has frequently said, Feinberg believes both are unattainable in the harsh real world in which he is used to operating (Bushey 2021).

Worth depicts Feinberg's ultimate success in resolving virtually all of the 9/11 victims' claims through the Fund as a consequence of his dawning

realization of the victims' humanity. In the film, over the two years of the Fund's initial statutory existence, he morphs from a brooding opera lover whose life is far removed from the lives of most of the victims to a warmer, sympathetic figure, willing and able to relate to their diverse needs. But in the long years of my professional acquaintance with Feinberg, I have never found him insensitive to the human condition or other people's needs. Indeed, he launched his career as Chief of Staff to Senator Ted Kennedy, a Democratic Party stalwart, and then from the position of Special Master to the Agent Orange Veterans' Compensation Fund, appointed by the famously progressive federal Judge Jack Weinstein. In my view, what Feinberg discounted in the early days of the Fund was the need to provide opportunities for individual victims to tell their stories, their need to be heard by the powerful bureaucrat who would determine their economic fate. Ironically, the master of dispute resolution, who discounted the importance of procedural fairness in the formal court system that purports to offer this to all who come through its doors, ended up implementing an alternative out-of-court dispute resolution process that emphasized listening to victims (Feinberg 2021).

Although the film, perhaps inevitably, focuses on the interpersonal dynamics of determining how much compensation victims' families would get, Feinberg's book focuses on the fundamental conundrum of how to translate the value of a life into money—hence the film's title. At first thought, many people recoil from the idea of putting a dollar value on life. 'Stop offering me money,' cries the widow of one of the 9/11 victims; 'I don't want money.' But across time and cultures money has been considered the appropriate form of compensation for injury and death. Myriad government programmes use estimates of the average value of a life as the basis for making trade-offs between investments in health, safety and environmental protection (Appelbaum 2019). What distinguishes tort liability from these administrative programmes is that it requires decision-makers to place *different* values on people's lives, depending on their demographics, education, income and other personal characteristics. Tort doctrine makes explicit that in our society men are worth more than women (because women's income on average is less than men's) (Finley 2004), that whites are worth more than people of colour (because the latter's income is diminished by systemic racism) (Doroshov & Widman 2007), that the middle-aged are worth more than the elderly (because the latter's remaining work lives are shorter than the former's) (Finley 2004). Whether or not these outcomes are just was the nub of controversy over Feinberg's calculations of Fund awards.

Americans recognize multiple norms for achieving what scholars term distributive justice, that is, fair allocation of resources (Hegtvedt & Cook 2000). 'We should all get the same amount of money,' yells one of the family members at the raucous meeting with Feinberg depicted early in the film. Some government subsidized compensation programmes do indeed adopt an *equality* norm, and in the immediate aftermath of the terrorists' attacks, when Americans seemed to draw together in solidarity, it seemed appealing to some. But comments on Feinberg's proposed rules (which he shared on a publicly accessible website) largely supported an *equity* or deservingness norm, with many arguing—as tort law decrees—that the families of the high-powered financial analysts who lost their lives in the World Trade Center Tower deserved more money than the families of the low-wage window washers employed by the restaurant at the top of the tower. Some commentators, deployed a third *need* norm counter-intuitively, arguing that the widows' of the financial analysts needed more money to pay their mortgages and children's private school tuition than the widows of the window-washers who presumably needed neither (Hensler 2003).

As a result of the way the 9/11 statute was drafted, Feinberg had little room to manoeuvre when it came to calculating awards. The statute called for tort-based compensation, meaning the financial analyst's widow was indeed owed more than the window-washer's. Using his rule-making authority, Feinberg found a way to soften the harshness of tort law's reliance on social distinction. The rules he adopted provided a minimum of \$250,000 to every eligible claimant, regardless of economic loss. He specified initially that no claimant, no matter how high the salary of their lost bread-winner, would receive more than \$7 million, although he apparently offered more in a few cases. He also deliberately excluded considerations of gender, race and ethnicity in estimating lifetime earnings (Feinberg 2021). A year into the life of the fund, seven families of high-earning victims sued Feinberg, arguing that he had run rough-shod over the statutory rules by bending them to respond to some individual circumstances but not others (Chen 2003). In the end, the mean and median awards to victims' families were \$2.08 million and \$1.68 million respectively (Dixon & Stern 2004: 25). However, the individual amounts varied dramatically, reflecting the extreme disparity in potential life-time earnings of those who lost their lives.

But many would argue that justice is not only about money, if it is about money at all. *Worth* focuses on the overwhelming majority of eligible claimants who accepted the Special Master's financial offer and signed away their rights to sue. Ninety-six families of victims opted out of the

fund to file suit (Weiser 2009) in the immediate aftermath of the attacks, and subsequently, first responders who were injured by exposure to toxic substances as they worked on the site, filed a class action against the contractors who managed the clean-up and New York City (Hellerstein & Ors 2004). The film implies that those who refused to accept the Fund's offer until the last minute were motivated by their greedy lawyers. But qualitative interviews with some victims' family members suggest they were driven at least in part by a desire for the public accountability litigation might provide, which they valued above money (Hadfield 2008).

Ironically, although the 9/11 Fund formally denied victims' families their right to go to court as the price of accepting the compensation offered by Feinberg and his associates, the rules adopted by Feinberg granted most far more than they would have been likely to recover in court. Under states' wrongful death rules, the aggregate losses of survivors totalled far more than would have been available from the airlines' insurance (Dixon & Stern 2004: 19), meaning that tort litigation to secure benefits would have had to target myriad defendants who might well have been deemed not liable under law. Moreover, it was by no means certain that the airlines would be held liable by a jury for acts perpetrated by terrorists. A long and costly litigation fight would have ensued, and the plaintiffs would have been dependent on contingency fee lawyers' willingness to invest in such a fight. Families whose loved ones had modest future income streams would likely not have been able to secure representation at all. In contrast, many Fund applicants were represented by attorneys *pro bono* (Dixon & Stern 2004: 40). Subsequent successful litigation by first responders and others with long-term injuries from toxic exposure relied on collective litigation approaches. But just four years prior to 2001, the US Supreme Court had invalidated class certification for asbestos litigants and implied that class treatment was not appropriate for tort litigants generally (*Amchem Products v Windsor* 1997; *Ortiz v Fibreboard Corp* 1999). Practically and politically speaking, the VCF offered most survivors their best chance of covering their financial losses.

Ultimately, the small minority of victims' families who filed suit received settlements in court averaging \$5 million, about twice what families received on average from the Fund (Weiser 2009). However, they received these settlements long after the Fund had delivered its last cheque to families. Were it not for the presiding judge's insistence that their lawyers limit fees to 15 per cent of awards—an unusual ruling that would not have been predicted at the time the families decided to sue—they likely would have paid out one-third to one-half of their awards to their lawyers. And in exchange for agreeing to settle they gave up sharing at trial evidence

that they believed would hold the airlines accountable for the terrorists’ success.

Although *Worth* suggests that Feinberg’s success in persuading virtually all of the victims’ families to accept compensation from the Fund and forgo litigation was the consequence of adopting more just rules for estimating the value of lives, Feinberg himself disputes this. Commenting on his appointment as administrator of a \$500-million fund for families of victims of recent Boeing 737 Max plane crashes, he said ‘Money is a very poor substitute for loss. I try never to use words like “fairness” or “justice” because I think those words have no applicability.’ (Bushey 2021)

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Legislation

The 9/11 Victims' Compensation Fund (VCF) was established by the Air Transportation Safety and System Stabilization Act, 49 USC §40101. The VCF operated from 2001–2004. After extensive political lobbying on behalf of first responders and others who suffered long-term injury as a result of the attacks, in 2010, Congress adopted the James Zadroga 9/11 Health and Compensation Act, Public Law 111-347, which reactivated

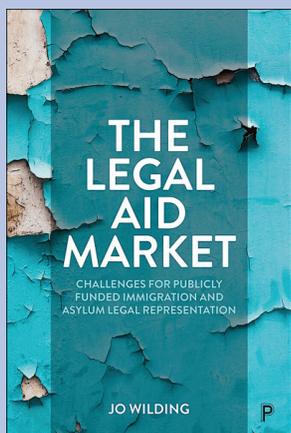
the VCF for a period of five years and included support for medical monitoring. In 2015, Congress adopted the James Zadroga 9/11 Health and Compensation Reauthorization Act, Public Law 114-113, which extended the life of the VCF to 2090 (sic). In 2019, Congress raised the total number of eligible enrollees in the 9/11 Compensation Program. Details on the history of the VCF are available at [World Trade Center Health Program website](#).

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

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

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

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

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

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

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

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

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

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

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‘LOST IN TRANSPLANTATION’: THE *DE FACTO* RECOGNITION IN HONG KONG OF BIGAMY IN *MA SIU SIU VIVIAN v TAM WAI MUN ALICE*

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Anyone who takes the view that ‘the law’ or ‘the rules of the law’ travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage (Legrand 1997: 114).

The recognition of two marriages entered into by a man and one woman and then another in the judgment of *Ma Siu Siu Vivian v Tam Wai Mun Alice* (2020)² (hereafter, *Ma v Tam*) has raised the issue of judicial recognition of bigamous marriage in Hong Kong. This is an interesting case of the legal transplantation of law, where the technical provisions—the forms—were transplanted from another jurisdiction, but the relevant substance such as cultural and historical contexts of the laws were not considered fully by the judiciary. The effect has been a recognition of a bigamous marriage. It is important to note that bigamy has never been legally recognized in traditional Chinese law and nor hitherto in Hong Kong law.

The recognition of Chinese marriages in Hong Kong has been problematic, largely as a legacy of colonial rule. There were two forms of Chinese marriage that existed in the colonial era, and the legislative solution adopted by the colonial government in rationalizing these two forms so as to create a uniform system left unresolved several issues. Before the Marriage Reform Ordinance (hereafter, MRO) in force on 7 October 1971, the two forms of marriage widely adopted by Chinese residents in Hong Kong were Chinese customary marriage and Chinese modern marriage. The former refers to the traditional form of Chinese marriage system which contains some ritual elements—the ‘three books and six rites’ (Chiu 1966: 4). This form of marriage, which was often

¹ The author would like to thank Professor Michael Palmer for his comments and encouragement.

² [2020] 1 HKLRD 267.

a parentally arranged marriage, was recognized in section 39 of the Marriage Ordinance 1950 (Cap 181),³ and before. The latter adopted 'western' marriage celebration as the norm and emphasized freedom of marriage. It had originated in Shanghai in the 1920s and 1930s and was gradually accepted by the Chinese community in China, especially in large urban areas. This form was often characterized as a more 'civilized marriage' (*wenmin hunyin*) and was legally recognized in the marriage reforms provided for in the Civil Code of the Republic of China (hereafter, ROC) in 1931.

This 'civilized marriage' was codified in article 982 of the Civil Code 1931: '[A] marriage must be celebrated by open ceremony and in the presence of two or more witnesses' (Civil Code of the ROC 1931). The key elements of this provision were (and still are) an 'open ceremony' and the presence of 'witnesses'. On the meaning of 'open ceremony', the Judicial Yuan (the highest judicial authority during that time in the ROC) in Yuan no 859 of 1933 explained that an 'open ceremony' means that 'ordinary non-specified persons could see the ceremony' (*The Collection of the Interpretations of the Judicial Yuan* 1998: 751-752). On the meaning of 'witnesses', the Judicial Yuan stated that the witnesses must be present at the ceremony, willing to undertake the responsibility for verifying that marriage (*The Collection of the Interpretations of Judicial Yuan* 1998: 751-752). The Judicial Yuan further explained that, nevertheless, the names of the witnesses were not necessarily required to be shown in the marriage certificate (*The Collection of the Interpretations of Judicial Yuan* 1998: 751-752; Zhang Fenjie 1993: 165; Gau Fehng-shian 2015: 35).⁴

Another important feature of the marriage reforms in the Civil Code was the reaffirmation of the traditional prohibition of bigamy. Traditional Chinese law permitted the taking of concubines by a married man, but not additional wives. Article 985 of the Civil Code 1931 specified that: '[A] person who has a spouse may not contract another marriage. A person shall not be married to two or more persons simultaneously.'⁵ Bigamy was then criminalized in article 237 of the Criminal Code of the ROC 1935: '[A] person who has a spouse and marries again or who marries two

³ Section 39 of Hong Kong's Marriage Ordinance 1950 provides that 'this Ordinance shall apply to all marriages celebrated in the Colony except non-Christian customary marriages duly celebrated according to the personal law and religion of the parties'.

⁴ In the Supreme Court 1962 Taiwan Appeal Number 881, the court held that the term 'open ceremony' means that first, the husband and wife must conduct certain forms of ceremony; and secondly some persons were present with the knowledge that the couples are getting married (Zhao Fengjie 1993: 165; Gau Fehng-shian 2015: 35).

⁵ [Article 985 of the Civil Code.](#)

or more persons at the same time shall be sentenced to imprisonment for not more than five years; the other party to such marriage shall be subject to the same punishment.’⁶ In *Ying Yuanyin and others v Shen Wenqing* (1933), a decision of the ROC Supreme Court, the judge held that, in accordance with the Family Provisions in the Civil Code 1931, if a person has a spouse, he or she should not contract another marriage. The judge further held that even followed the laws before the promulgation of the Civil Code 1931, according to the offence of ‘taking another wife while the husband [already] has a wife’ (*youqi gengqu*) as specified by the Great Qing Code—the main source of statutory law in imperial China and still applied after 1912 in the early years of the new Republic—the second ‘wife’ could not be given the status of wife (Jones 1994: 125-136; Huang Yuen-shang 1994: 487).⁷

It is important to note that the form of marriage as specified in article 982 of the Civil Code 1931 was in administrative and judicial practice in Hong Kong regarded as ‘Chinese modern marriage’. It was widely practised by the Chinese in Hong Kong and *de facto* but not legally recognized in the Colony until the MRO in force on 7 October 1971. Section 8 of the MRO validates all Chinese modern marriages retrospectively before the ‘appointed day’, that is, 7 October 1971, and date their validity back to the date of celebration. This section specified that:

Subject to section 14, every marriage celebrated in Hong Kong before the appointed day as a modern marriage by a man and a woman each of whom, at the time of the marriage, was not less than 16 years of age and was not married to any other person shall be a valid marriage, and shall be deemed to have been valid since the time of celebration.

This provision is similar to and very likely borrowed from article 982 of the Civil Code 1931. And after 7 October 1971 (the appointed day of this provision), the Hong Kong authorities will only recognize registered or religious marriages contracted in Hong Kong.

In the recent case of *Ma Siu Siu Vivian v Tam Wai Mun Alice* (2020), a probate action was brought by the plaintiff, namely, Ma Siu Siu, Vivian. The plaintiff applied to the Court of First Instance in Hong Kong for a grant of letters of administration in respect of the estate her late father, Mr Ma. The latter had died intestate on 8 December 1970. The plaintiff is the daughter born to the first marriage of her father and his wife and her mother, Madam Wong. The first defendant, Madam Tam, is the wife of a

⁶ [Article 237 of the Criminal Code of the ROC 1935](#).

⁷ Article 103 of the Great Qing Code (*Da Qing Lü Li*): ‘If, while he has a wife, he marries another wife, he will also receive 90 strokes of the heavy bamboo’ (Jones 1994: 125-136; Huang Yuen-shang 2014: 487).

second marriage, and the second defendant, Mr Lawrence Ma, is a son to the second marriage. The first marriage was contracted in late 1961, whereas the second marriage was registered on 28 April 1970. The court had to consider two matters. First, whether the first marriage, conducted in 1961, was valid as a Chinese modern marriage under the provisions of the MRO. Secondly, if the first marriage was held to be valid, then the mother of the plaintiff was a living former wife under section 20 of the Matrimonial Causes Ordinance (Cap 179),⁸ and the second marriage which took place on 28 April 1970 between the husband Mr Ma and Madam Tam was or was not bigamous and void.

In determining the first issue, that is, whether the first marriage was held valid under the Chinese modern marriage, the judge investigated the sufficiency of 'two witnesses' as required by the MRO. The judge accepted that all three witness statements were truthful and correct. The judge held that since these three witnesses attended the celebration dinner at Tung Wo Restaurant together, so 'there is no question of sufficiency of witnesses' (*Ma v Tam* 2020: 279).

Then the judge turned to discuss the meaning of 'open' in 'open ceremony'. He first commented that no definition was provided in article 982 of the Civil Code 1931, nor in Hong Kong's MRO, on the elements required for holding an 'open ceremony'. But he then rejected the idea that formal invitations to guests or relatives were necessary. Also, the judge stated that no special clothes were necessary to be worn for the occasion by the husband and wife. Further, the court considered that the grandmother of the plaintiff ('Grandma') had taken the initiative to raise her glass in a toast celebrating Madam Wong's new formal status as a daughter-in-law in the Ma family. The Grandma by this conduct confirmed the marital relationship of Mr Ma and Madam Wong. The court considered that Grandma was 'acting in the open and in all probability in an open manner' (*Ma v Tam* 2020: 280), thereby satisfying the requirement of an 'open' ceremony.

On the meaning of 'ceremony', the judge considered that article 982 and the MRO provided that the ceremony could be held in as simple and unsophisticated manner as the husband and wife might wish it to be, so that the husband and wife 'can contract a modern marriage by going through the simplest of ceremonies. A ceremony can also be conducted in a cheerful manner. It needs not be solemn or courtly' (*Ma v Tam* 2020: 282). The judge added that, first, in 1961, the husband was very poor, so there was no reason for him to be 'lavish' in celebrating the wedding

⁸ This section refers to the nullity of marriage in Hong Kong.

dinner (*Ma v Tam* 2020: 282). Secondly, the judge accepted the evidence that the Grandma was very happy about the event and took the matter seriously—the Grandma also said Madam Wong had ‘formally’ joined the family. The Grandma also provided a ‘confirmation’ of husband and wife relationship between Mr Ma and Madam Wong, so,

though Mr Ma and Madam Wong had not made specific declarations of marriage, they had acknowledged Grandma’s announcement and confirmation of a marriage by their acquiescence and participation in the celebratory toast. The fact that a dish of chicken had been ordered and that more spirits had been consumed also showed that this was a dinner gathering of ‘significance and importance’ (*Ma v Tam* 2020: 282).

The judge further observed that the use of the term ‘teacher mother’ by the pupil in addressing Madam Wong suggested that the pupil knew that Madam Wong was Mr Ma’s wife (*Ma v Tam* 2020: 283). Based upon the above analysis, the judge held that this first marriage was a simple but valid modern marriage ceremony in accordance with article 982 of the 1931 ROC Civil Code and Hong Kong’s MRO.

On the second issue, however, the judge rejected the claim that recognition of the first marriage as a Chinese modern marriage would necessarily invalidate the second marriage, which had been registered—namely that between Mr Ma and Madam Tam. The judge first considered, in Hong Kong law, whether there was any provision to the effect that, if a Chinese modern marriage was contracted before any second ‘marriage’, the second marriage would be void. The judge noted that a draft provision making this explicit had been proposed and discussed in the White Paper on Chinese Marriages in Hong Kong (1967). This important document recommended that, if a first marriage had been entered into as a Chinese modern marriage, but the husband then entered into a second marriage, the first marriage would be recognized in law only for the period that it subsisted:

Legislation to be enacted whereby marriages contracted in Hong Kong, elsewhere than in a licensed place of worship or a marriage registry and prior to a date to be appointed, shall be retrospectively recognized as valid if they were between two persons over the age of 16 and celebrated in a public place before at least two witnesses, provided that—

- (1) at the time of such marriage neither spouse was lawfully married to anyone else;
- (2) where either of the parties to such a marriage has subsequently married someone else, *the earlier marriage shall be recognized in law only for such period as it subsisted* (emphasis added).

However, this recommendation had not been adopted by the legislature in the final version of the MRO in 1971. No reason was given in the official documentation for its omission. So, the reason for its exclusion, the judge surmised, was that the legislature did not want to see 'the implementation of a recommendation which would validate the first marriage and then dissolve it on the day of the second marriage (*Ma v Tam* 2020: 286). But the puzzle was that the legislature had not conferred on the court any authority to invalidate the subsequent marriage (in the present case, the registered marriage *Ma v Tam* 2020: 286).

Since the judge considered that the legislature had 'deliberately' disregarded the draft provisions, so he felt he could not determine that 'the validation of a modern marriage (that is, the first marriage) would invalidate the subsequent valid registry marriage (that is, the second marriage). In other words, the judge considered that, since the above recommendation was intentionally not adopted by the legislature, he could not make a decision to invalidate the second marriage. The judge concluded there was no applicable statutory provision in Hong Kong law for any such invalidation, and he could not see any proper reason for deciding that the second marriage in time was invalid. He then pointed to the interests of the spouse and children: 'if the subsequent marriage should be invalidated automatically, the interest of the other party to the valid subsequent marriage and the children of that marriage may be prejudiced. This can produce unfairness to many people' (*Ma v Tam* 2020: 286). The judge reiterated that the legislature did not want to deal with the problem because 'the legislature did not want to be exposed to the embarrassment of legislating for bigamy if the law should say that the validation of the [Chinese Civil Code] modern marriage would not affect the validity of the subsequent valid marriage'. So, to the judge, the logical conclusion was that both marriages, that is, the first marriage (a Chinese modern marriage) between Mr Ma and Madam Wong, and the second marriage (a registered marriage under the MRO), between Mr Ma and Madam Tam, were valid from the time of their respective celebrations.

The fundamental problem of this judgment is that it recognizes the bigamous marriage. The judge in reaching this conclusion failed to consider the long-standing monogamous nature of Chinese marriage and the strict prohibition of bigamy, in the Great Qing Code of imperial China, and the reaffirmation of the centrality of monogamous marriage in the ROC the Civil Code 1931. Following the *ratio* of the judgment, it would be reasonable to postulate that, a Chinese man could not contract any bigamous marriage in Qing China nor ROC, but he could—if he moved to and became domiciled in Hong Kong—contract a Chinese modern

marriage and also then contract another form of marriage in Hong Kong, with two Chinese women. Both unions would be recognized in law. This is an unacceptable state of affairs.

Further, the judge failed to examine thoroughly the background and context of the legislative changes in the Civil Code 1931. It is important to note that the issue of the recognition of Chinese modern marriage in Hong Kong has its origins in the social movement for the freedom of marriage, including the use of ‘civilized marriage’, soon after the 1911 Revolution in mainland China. This social movement should be regarded as reform from below, not the top-down approach taken by the Republican Government aiming at ‘revolutionizing’ antiquated social practices. And article 982 was only part of the marriage reform package in the Civil Code 1931. The marriage reform proposals also included provisions such as abolition of concubinage, specific prohibition of bigamous marriage, and greater rights to women on dissolution of marriage, and these were all provided for in Civil Code 1931. Thus, it is suggested that, when the judge went about the task of interpreting article 982 of the Civil Code 1931, he should have considered other provisions relating to marriage reform, and to give more consideration to the *raison d’être* and context behind the marriage reforms. The judge had interpreted article 982 too literally and without suitable contextualization in terms of the relevant provisions of the Civil Code 1931.

In addition, the judge might have usefully considered the origins and nature of the recognition of the Chinese modern marriage in Hong Kong. The Chinese community in Hong Kong, heavily influenced by marriage reforms in China, also adopted as a matter of practice Chinese modern marriage. Indeed, Chinese modern marriage became very popular both before and after the Second World War in Hong Kong. Unfortunately, this form of marriage was not provided for and recognized explicitly in Hong Kong law. The Hong Kong Government subsequently decided to develop a legislative solution that would fill the gap. This was the solution offered in the MRO: all marriages henceforth other than those celebrated by a religious ceremony should be registered. But retrospective recognition could be given to the Chinese modern marriages entered into before the MRO came into force. Thus, the validation of Chinese modern marriage in Hong Kong was a response of the social change from below. Since the form of Chinese modern marriage originated from legal changes (and social practice) in China, the Hong Kong Government dealt with the issue by transplanting relevant provisions from the ROC Civil Code 1931 to Hong Kong when drafting the MRO. Indeed, the problem of the ‘modern marriage’ had been brewing for some time. The first proposal to recognize

in Hong Kong law Chinese modern marriage was made in the Strickland Report published in 1953 (Committee on Chinese Law and Custom in Hong Kong 1953: 44). The Strickland Report was an attempt to deal with the felt need to modernize marriage and other aspect of family law on the one hand, and to allow law to be sensitive to local Chinese society in Hong Kong on the other. A marriage reform package—with abolition of concubinage (Wong 2020, 181), establishment of registered marriage, new procedures for dissolving marriage and so on—was proposed by the Strickland Report but unfortunately rejected by the Government. The main reason for such delay was to be found in the opposition of the senior Chinese members of the Legislative Council in Hong Kong on the issue of abolition of the concubinage. Their perception of senior status included the idea that they should continue to be allowed to take concubines. Subsequent reports in 1960 (White Paper on Chinese Marriages in Hong Kong 1960) and 1967 (White Paper on Chinese Marriages in Hong Kong 1967) also made similar reform proposals on Chinese modern marriages. But these proposals were not taken up by the colonial government as, in not only the 1950s but also the 1960s, there was blanket opposition from the Chinese members of Hong Kong's Legislative Council to any legislative proposals on marriage reform. It was only the intervention of the Colonial Office in London which finally forced the colonial government to propose legislation to reform Chinese marriage in Hong Kong. The result was the MRO, promulgated in 1971 (Wong 2020: 156). So, to understand the case better, the judge should also have considered the origins and development of the marriage reform proposals in Hong Kong made in the 1950s and 1960s and examined more closely the legislative intentions of the drafters of the MRO. The statutory interpretation approach taken by the judge in the present case takes the MRO provision too literally. It accepts the technical aspect of provisions but not their substance and intention when the law was transplanted from the ROC Civil Code 1931 to the MRO 1971.

This case, if it stands, may well have profound impact upon the inheritance and succession laws in Hong Kong, especially on the judicial recognition of bigamy on the Chinese modern marriages contracted before the MRO 1971. Consider this: if a deceased husband contracted two Chinese forms of marriages (such as a Chinese modern marriage followed by a Chinese customary marriage) before 1971 in Hong Kong and he domiciled in Hong Kong and then died without a will, how would his two surviving 'wives' inherit his estates? The current laws in Hong Kong such as the provisions of the Intestates' Estates Ordinance (Cap 73) might not offer help because they only govern the inheritance of a monogamous

marriage. Also, traditional Chinese law and custom in Hong Kong might not be able to help because it did not recognize bigamy. Thus, it is important for the Hong Kong Special Administrative Region authorities to examine the judgment closely and to propose legislative solutions that would reassert exclusive recognition of monogamous marriage in Hong Kong law between Chinese parties.

About the Author

Max W L Wong is an Assistant Professor at the University of Hong Kong, specializing in Chinese customary laws, legal history, comparative law and human rights. He obtained his LLM from SOAS, University of London. His significant publications include Chinese Marriage and Social Change: The Legal Abolition of Concubinage in Hong Kong (Singapore: Springer), “Continuity or Empowerment?": Judicial Interpretation of Divorce in the Da Li Yuan in Early Republican China' 15(2) The Journal of Comparative Law 66-87 and Re-Ordering Hong Kong: Decolonisation and the Hong Kong Bill of Rights Ordinance (London: Wildy, Simmonds & Hill). He is currently working on a monograph, Legal Pluralism in Qing China and its Transplantation and Transformation to be published by Brill in 2023.

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- Marriage Reform Ordinance, Cap 178, Hong Kong
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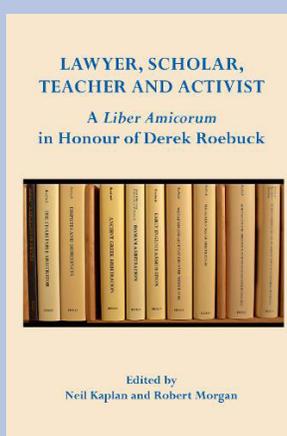
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**LAWYER, SCHOLAR, TEACHER AND ACTIVIST:
A LIBER AMICORUM IN HONOUR OF
DEREK ROEBUCK BY NEIL KAPLAN AND ROBERT
MORGAN (EDS)**

LING ZHOU

Institute of Advanced Legal Studies, London



Neil Kaplan and Robert Morgan (eds) (2021) *Lawyer, Scholar, Teacher and Activist: A Liber Amicorum in Honour of Derek Roebuck* is published by HOLO Books: The Arbitration Press in hardback, priced at £40 ISBN: 978-0-9572153-9-9

Professor Derek Roebuck's wide-ranging work on arbitration, its history and other scholarly fields is commemorated and celebrated in the varied contributions to this absorbing and very readable volume.

The co-editors, Neil Kaplan and Robert Morgan, offer a short but helpful 'Preface' to their edited book. A sensitive, warm and informative memoir of academic collaboration and marital happiness is provided by Susanna Hoe in her essay 'A Room shared: My Late Husband as Feminist'. This opens the volume immediately after the 'Preface' and is followed by a chapter that is a reproduced and slightly repolished obituary of Professor Roebuck written by one of the two co-editors of the volume, Neil Kaplan. This provides other sensitive and appreciative recollections. Reminiscences about Professor Roebuck and his work are contained at many points in the edited book, reflecting appreciation not only of his wide-ranging scholarship but also his support for other scholars and good causes (including, for example, gender equality). His time as a scholar

in Australia, New Zealand and Papua New Guinea prior to arriving in Hong Kong, and at Oxford and London after departing Hong Kong, are touched on from time to time. Professor William Twining's encounters with Professor Roebuck led him to conclude that 'Derek seamlessly combined theory and practice in his teaching, writing and many other activities connected with the law' (page 59).

The book offers more than 30 contributed essays, with dispute resolution, especially the history of arbitration, being a predominant concern. The collection is divided into four parts. The first comprises personal and often very interesting reflections on Professor Roebuck as a scholar and friend. The second provides some of Professor Roebuck's writings on arbitration while the fourth includes Professor Roebuck's inaugural lecture in the Roebuck Lecture series at the Chartered Institute of Arbitrators, beginning in 2011. The academic core of the book is to be found in the third part, entitled 'Contributed Scholarly Articles'. These are varied in nature but linked in substantial part to Professor Roebuck's academic concerns, especially arbitration and its history. As Sir Stephen Sedley points out at page 427 in his appreciative review of Professor Roebuck's 2008 book on *Early English Arbitration*, 'until Derek Roebuck set about it, nobody had attempted a panoptic history of arbitration'. A comprehensive and supportive essay by one of the co-editors Robert Morgan examines the publications by Professor Roebuck in the area of arbitration and dispute resolution in one of the longest chapters in the book: 'Derek Roebuck, Historian: Literature Review'.

In this book, stretching to more than 550 pages, there is much interesting material and many valuable insights. This publication is beautifully produced, has a structure and content that reflects well the intellectual and professional concerns of Professor Roebuck, and offers a very helpful analytical index. It will perhaps be most useful to all those interested in the development of arbitration and, more generally, ADR. It might be added here that, given Professor Roebuck's efforts in promoting the work of young Chinese scholars in Hong Kong while the Dean at City University Law School, it is a little surprising that the volume lacks contributions from such scholars. And in focusing primarily on Professor Roebuck's published work on arbitration, the volume perhaps underplays his contributions in developing City University Law School—now globally very highly rated for the legal education that it offers.¹

¹ The author thanks Professor Michael Palmer for some observations on the experiences of Professor Roebuck as Dean at City University Law School, Hong Kong.

This is a collection of essays that contributes to the fields of dispute resolution, legal history, comparative legal studies and legal education. It is very enjoyable to read, and expertly edited. Above all, it is compilation that reminds us of the value of dedicated scholarship. And love of learning.

About the Author

Please see **Dr Zhou's** [IALS webpage](#).

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

'Law, Humanities and Pedagogy' Summer School

As a member institution of the School of Advanced Study, IALS is committed to contributing to the School's mission to be the national centre for the promotion and facilitation of research in the humanities. The School benefits from a special, dedicated funding stream from Research England to support this unique remit for the 'promotion and facilitation of research'. In October 2021 the School was awarded an additional investment—a one-off sum of £0.5 million—from Research England, with the purpose of advancing its new strategy; in particular, strengthening working with other institutions and external partners, promoting sustainability, and enhancing research culture. In response, the School launched a funding competition for proposals which would, *inter alia*, 'anticipate benefits for the humanities community generally' and be sustainable in the medium and long term.

One of the successful bids submitted by IALS builds upon its commitment to position itself as a

hub for the study and practice of legal education as well as a focus on the relationship between law and the humanities. The proposal is for a pilot project to support the development and delivery of a one-week summer school for advanced doctoral and early career academics in law on 'Law, Humanities and Pedagogy'. The target audience consists of those with a commitment to developing expertise in legal education from an interdisciplinary, 'law and humanities' perspective.

The call for applications to participate in the inaugural summer school will be launched this autumn. The summer school will be delivered in July 2023. It is hoped that it can be a regular feature of the Institute's calendar of training activities.

IALS Archive designated an 'Accredited Archive Service' by the National Archives

The Institute of Advanced Legal Studies' (IALS) Library's small specialist legal archive has recently been designated an 'Accredited Archive Service' by The National Archives (TNA).

IALS is very pleased to be recognized by the TNA with this national archive award which demonstrates the quality of its archive service and the good management of the unique legal archives deposited there for the long term. For the future, the TNA accreditation award will help IALS apply for external funding for

archive conservation projects and archive cataloguing projects which will help to improve and develop the IALS Archives still further. The significant upgrade of the IALS Archive Room to national archive standards (as part of the IALS Transformation Project) was key to achieving this award.

Selected Upcoming IALS Events

IALS Law and Language Conference: Legislative Drafting as a form of Communication

Date and time: Wednesday 6 July 2022, 10:00-18:00

There seems to be general agreement that legislative drafting is a form of communication and it is generally taken for granted that this topic is covered under the general principles of the ‘philosophy of law’. But there is precious little research on legislative drafting as a form of communication.

What kind of communication is it? Does it comply with communication theory models? Is it political communication or is it something else?

This conference will try to set the parameters for this original research and hopefully produce a special issue for the *European Journal of Law Reform*.

This seminar is organized in collaboration with the Department of Political Science and International Relations, University of Palermo

IALS Fellow’s Seminar: Regulatory and Supervisory Approach(es) to Artificial Intelligence—Implications for the Financial Sector in the European Union and Beyond

Presenter and Moderator:

Professor Gudula Deipenbrock, Professor of Business Law, HTW Berlin, IALS Associate Research Fellow 2021/2022

Date and time: Friday 29 July 2022, 13:00

In April 2021, the European Commission submitted a Proposal for a Regulation laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain European Union (EU) legislative acts (COM (2021) 206 final). The legislative procedure will have—it is expected—further progressed at the time of the event. The

presentation will discuss, against the backdrop of the (then) current state of the law-making procedure, the implications of the regulatory and supervisory approach at European level for the financial sector and beyond.

The event will address one of the most important legislative approaches to artificial intelligence worldwide. By narrowing the perspective to its (legal) implications for the financial sector it will allow specific insights into how the rapidly further-progressing digital transformation of the financial sector is responded to by the law. The pivotal realm of financial technology, here use cases of artificial intelligence in the realm of financial services and products, is of utmost importance not only for regulators and supervisors, but for the finance industry and thereby for London particularly in the aftermath of Brexit.

**ILPC Seminar Series:
*Landmark Cases in Privacy
Law Book Launch***

Chair/Moderator: Professor Paul Wragg & Dr Peter Coe

Date and time: Wednesday
14 September 2022, 15:00

This new addition to Hart's acclaimed Landmark Cases series is a diverse and engaging edited collection bringing together eminent commentators from the United Kingdom (UK), the United States (US), Australia, Canada

and New Zealand, to analyse cases of enduring significance to privacy law.

The book tackles the conceptual nature of privacy in its various guises, from data protection to misuse of private information, and intrusion into seclusion. It explores the practical issues arising from questions about the threshold of actionability, the function of remedies, and the nature of damages.

The cases selected are predominantly English but include cases from the US (because of the formative influence of United States' privacy jurisprudence on the development of privacy law), cases from Australia, Canada, the Court of Justice of the EU, and the European Court of Human Rights. Each chapter considers the reception and application (and, in some instances, rejection) outside of the jurisdiction where the case was decided.

**IALS 75: Cryptocurrencies,
Smart Contracts, and
Alternative Payments:
Regulating the 'Wild West'—
Centre for Financial Law,
Regulation & Compliance
(FinReg) Conference**

Dates: 13-14 October 2022

2021 was a busy year for cryptocurrency. China banned Bitcoin, whereas El Salvador declared Bitcoin to be legal tender. The UK started exploring the

possibility of a Central Bank Digital Currency (CBDC), while Nigeria went a step further and introduced its own CBDC, the eNaira. Cryptocurrency was described as key to greater financial inclusion across Africa, though some Central Banks (eg Kenya) issued warnings about the dangers. 2022 promises to be a similarly important year in the crypto-sphere. In January, UK politicians established a cross-party 'Crypto and Digital Assets Group' with the aim of creating law and rules that will support innovation, while also ensuring that consumers are protected. The European Commission continues to develop its Regulation on Markets in Crypto-Assets (MiCA) as part of the Digital Assets Strategy; similarly the US is currently considering legislation that would regulate cryptocurrency. Regulation is also being explored by UK regulator, the Financial Conduct Authority (FCA).

2021 was also 'the year of the NFT'—indeed NFT (or non-fungible token) was declared Collin's Dictionary Word of the Year 2021. Christie's Auction House sold a Beeple NFT for \$69m. Multinational companies (eg Sony, Ferrari, Marvel, Visa) issued their own NFTs. Miramax sued Quentin Tarantino over his 'Pulp Fiction NFTs'. And there have been concerns that NFTs are used to launder criminal proceeds. Away from the media headlines though, NFTs are touted as a trusted digital asset, with checks, monitoring,

smart contracts and distributed blockchain ledgers. Thus, there is significant potential in the context of, for example, cross-border payments; international trade; healthcare records; and financial services.

While there are concerns relating to, amongst others, money laundering, criminal hacking and extortion, and environmental impacts, law enforcement, regulators and policymakers are increasingly looking at the need for, and the form of, regulation in this sphere. The head of the US Securities and Exchange Commission has described the crypto sector as a 'Wild West' and called for regulation. The chair of the UK FCA has suggested that legislators need to consider 3 issues when considering the role of crypto-regulation: **1.** how to make it harder for digital tokens to be used for financial crime; **2.** how to support useful innovation; and **3.** the extent to which consumers should be free to buy unregulated (speculative) tokens and to assume personal responsibility.

Law videos on SAS IALS YouTube channel

Selected law lectures, seminars, workshops and conferences hosted by IALS are recorded and accessible for viewing and downloading.

See [website](#) for details.

ABOLITION OF CONCUBINAGE IN INTERNET GAMES IN THE PEOPLE'S REPUBLIC OF CHINA

MAX W L WONG

University of Hong Kong

The marriage system of traditional Chinese family law was unique and characterized by the institution of concubinage. A Chinese marriage was not a free marriage between a man and a woman, but an arranged marriage made by the parents of a couple, and it was unnecessary to register the marriage with government authorities. A Chinese marriage was officially contracted and recognized as valid after the ritual ceremony of 'Three Books and Six Rites'. In traditional Chinese family law, Chinese descent was patrilineal, and one of the main purposes of marriage was to have an heir, in other words, a son, who could succeed to the male line of the family. A question then arose: what if the wife could not give birth to a son in the family? Who could succeed and take care of the rituals such as ancestor worship in a family if there was no son? In those circumstances, the institution of concubinage functioned to

allow the husband to father sons with the concubines, and so deal with the issue of inheritance and succession in the traditional Chinese family.

Seen in this light, the institution of concubinage was very important in traditional Chinese family law. In imperial China (pre-1911), a husband could only marry one wife, but he could contract a union with an unlimited number of concubines (romanized as *qi* in Hanyu Pinyin and *t'sip* in some Cantonese-speaking jurisdictions such as Hong Kong and Singapore). With the migration of many Chinese to various southeast Asian jurisdictions, the institution of concubinage was recognized in common law systems such as Hong Kong, Singapore and Malaya. It also came to be regarded as one of the unique elements of 'Chinese customary marriage' in these common law jurisdictions, with the concubine sometimes

characterized by the colonial courts as a 'secondary wife'. However, the growing impact of the principle of gender equality of women finally brought an end to the institution of concubinage in these jurisdictions. The Women's Charter 1961 in Singapore, the Marriage Reform Ordinance in Hong Kong in 1971 and the Law Reform (Marriage and Divorce) Act 1982 in Malaysia all abolished concubinage, though the concubines taken before the effective date of such laws are still legally recognized. Overall, in almost all common law jurisdictions in Asia, Chinese customary marriage has been replaced by a western system of monogamous and registered marriage.

The evolution of family law took a different route in mainland China. Historically, as we have mentioned, the most notable reason for a husband to take a concubine was for her to bear him one or more sons for purposes of inheritance and ritual succession. Although in the Ming dynasty (1368–1644), under the provisions of the Great Ming Code, and with the intention of limiting the widespread use of concubinage, only a husband aged 40 years or more and without a son had the capacity to take a concubine. These restrictive measures were repealed in the Qing dynasty (1644–1911), during

which the Great Qing Code made an institution of concubinage more lightly regulated by repeal of these limitations. Subsequently, the Chinese Civil Code of 1930 only recognized monogamous marriage, though concubinage was arguably indirectly acknowledged through legitimation of the male issue of the concubine by a process of paternal recognition. A more modern and socialist system of monogamous marriage was proposed after the introduction of Chinese Communist Party rule in 1949, and the institution of concubinage was then legally abolished by the Government of the People's Republic of China (PRC).

No ceremony was required for a husband to take a concubine. The husband did not need the consent of his wife to take a concubine, although, in some customary practices, a husband might seek the wife's opinions before doing it. The husband, in most customary practices, purchased a woman for purposes of concubinage through a go-between. The status of concubines was inferior to that of the wife in the family: for example, the institution of concubinage could be dissolved by the husband unilaterally without offering any reason. And, if a husband died intestate, his concubine was entitled only to receive

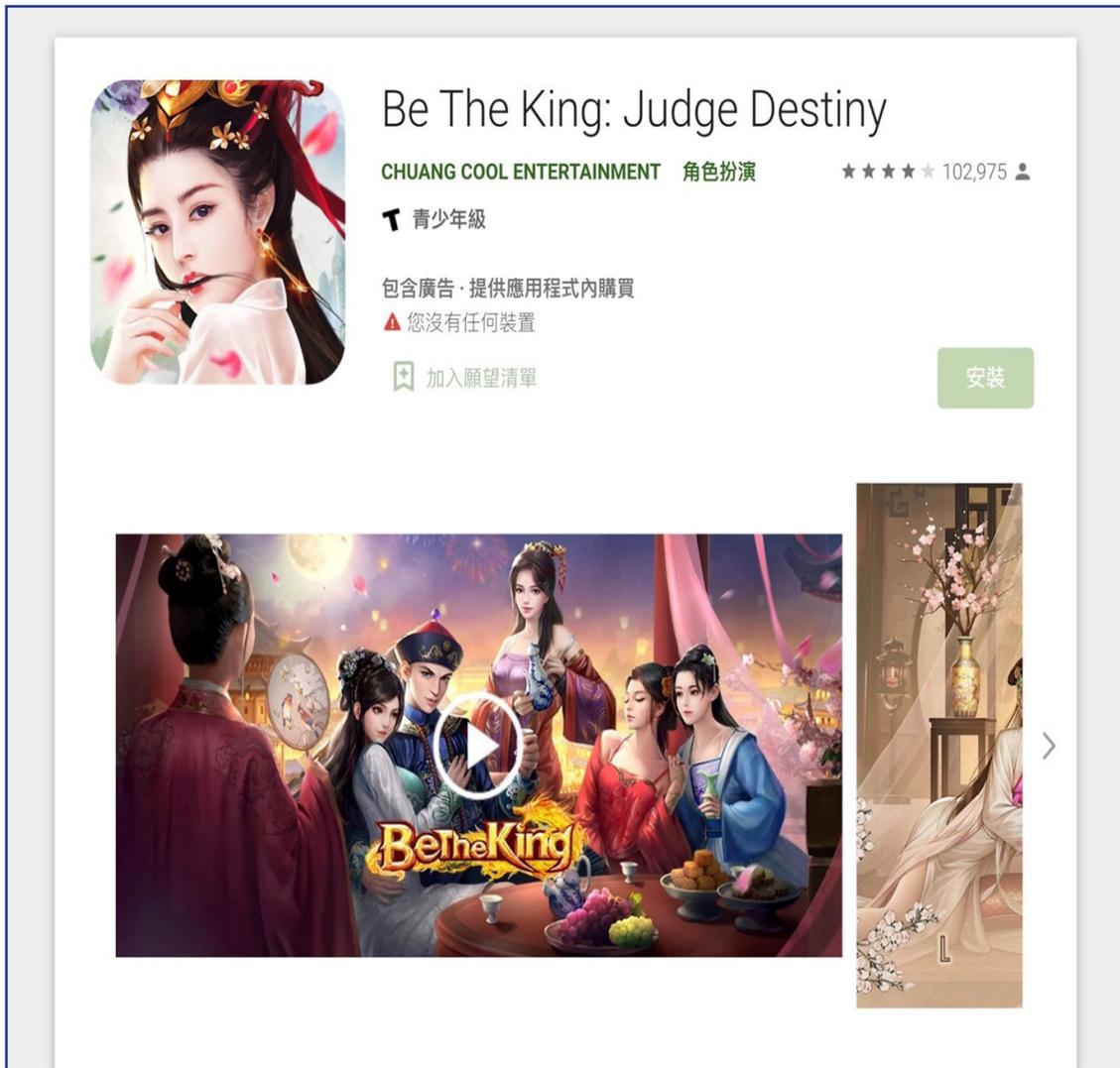
maintenance under customary practices. Starting from the late Qing (the late-nineteenth century), with the spread of new ideas of gender equality, concubinage came to represent and symbolize a backward, barbaric and discriminatory dimension of Chinese culture. Importantly, however, many rich businessmen, members of the rural elite and senior government officials considered the institution of concubinage as a legitimate public manifestation of their wealth and social power, and so themselves took concubines as members of their extended families. In the Republic of China (1911–1949), the 1931 Civil Code only indirectly recognized concubinage, which was hailed as the first significant step towards the equality of men and women in the Chinese marriage system. In the 1950 Marriage Law of the PRC, concubinage was characterized as an unwelcome relic of ‘feudal society’ and explicitly banned.

Control over internet gaming is a significant aspect of life in contemporary China. This is a present-day manifestation of a long-standing socio-political concern to educate young people as successors to the socialist cause in China. All internet games must be approved by the National Press and Publication Administration of the Chinese Government. Rules have been

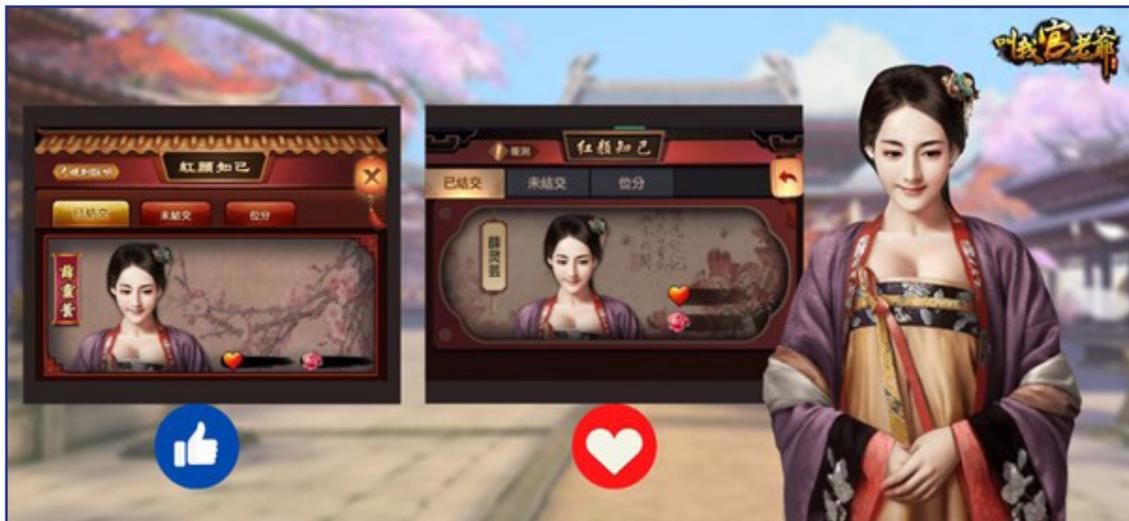
tightened in recent years: for example, a regulation was passed in 2021 so that children under 18 years old were restricted in their access to gaming—they could play online games for just three hours a week—specifically, 8 to 9pm on Fridays, Saturdays and Sundays. But the most important restriction has been a robust censorship of the substantive contents of games, so that, for example, skeletons, ghosts and blood may not be shown in internet games, and games relating to historical events must show the positive sides of the heroic figures portrayed. In keeping with this spirit of moral control, internet games relating to the emperor’s concubines in imperial times have been banned by the authorities.

Concubinage, which, as a social practice, has become more common in the post-Mao era of economic reforms—as newly wealthy businessmen have entered into such relationships in increasing numbers despite the legal ban—continues to be considered by the Chinese authorities as a practice that represents decadent aspects of traditional Chinese culture and does not help to establish the so-called ‘correct world view’ for the young generation in China.

Sensitive games in question include:



Sensitive games: Be the King (above) and Be the Emperor (below)



- ◇ *Be the King*, a role-playing game (RPG) about the life of an emperor who takes concubines in his imperial palace, has not been approved by the PRC Government. Users outside China, however, can still download this game in their Google Play store.
- ◇ Another RPG game, *Be the Emperor*, also has elements of selecting concubines in the imperial palace. It has two versions. The version that may be downloaded in mainland China has more ‘moral cleanliness’ than the international version.

About the author

Max W L Wong is an Assistant Professor at the University of Hong Kong, specializing in Chinese customary laws, legal history, comparative law and human rights. He obtained his PhD at SOAS, University of London. His significant publications include, *Chinese Marriage and Social Change: The Legal Abolition of Concubinage in Hong Kong* (Singapore: Springer), “Continuity or Empowerment?”: *Judicial Interpretation of Divorce in the Da*

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