***"To no one will we sell, to no one will we deny or delay right or justice."* Magna Carta Clause 40: Is the state financing the criminal justice system properly and, if not, is privatisation a possible solution? Would this mean selling justice?**

On a winter morning in January 2021, a judge handed down her sentence in Blackfriars Crown Court. The 'justice' administered here, however, was purely fictional and part of Netflix's hit drama 'Top Boy'. The court had in fact closed in 2019 after its sale to a property investor, and the filming had taken place despite a Crown Court backlog of 53,000 unheard cases.[1] Clause 40 therefore has a caveat: 'to no one will we delay right or justice, unless Netflix offers a lucrative deal'.

A similar caveat exists for preventing the denial of justice: 'to no one will we deny right or justice, unless one alleges an offence under the SOA 2003.' 99% of rapes reported result in no proceedings brought against the suspect.[2] While suspects await trial in a Crown Court which no longer exists, rape victims are, in Dame Vera Baird QC's words, 'betrayed' by the lack of funding to both constabularies and the CPS. It is a damning reflection on the system that some complainants in Scotland have even resorted to tort law for vindication.[3]

The lack of adequate legal aid only compounds the delay and denial of justice. Beginning with the Criminal Defence Service Act 2006 and culminating in LASPO, the state has eroded criminal legal aid through cuts to fees and eligibility. In the 2021 Independent Review of Criminal Legal Aid, Sir Christopher Bellamy QC has warned of undermining the principle of equality of arms under an adversarial system, as the defendant is placed in a position of weakness viz. the state.[4] It is difficult to think of a clearer case of a denial of justice. Legal aid cuts have also prompted an exodus of criminal barristers from the profession, leading to demand for legal assistance far outstripping supply. Without adequate providers of defence, we can expect the system as a whole to 'grind to a halt'.[5]

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[1] Criminal Justice Joint Inspection, 'Impact of the pandemic on the Criminal Justice System' (2021).
[2] The Crown Prosecution Service, CPS data summary Quarter 4 2019-2020.
[3] *AR v Stephen Daniel Coxen* [2018] SC Edin 58.
[4] Sir Christopher Bellemy, 'Independent Review of Criminal Legal Aid' (2021), 9.
[5] Ibid, 9.

Suspects, victims and lawyers alike are experiencing the repercussions of the state's inability to finance the criminal justice system properly. However, it is a fallacy to suggest that privatisation is the solution, since it is a concept *already* deeply ingrained into the history and logic of the English system. Until their respective nationalisations in 1878 and 1938, the prisons and the Probation Service were fully privatised.[6] Even today, there are 13 privately operated prisons, and until 2020, there was substantial private sector involvement in probation. Since its introduction through the Legal Aid and Advice Act 1949, the 'judicare' legal aid system has always followed an outsourcing model where the state funds private practitioners.[7] Viewed in this light, the current failure of financing takes place within an environment already operating under a degree of privatisation.

Therefore, has justice already been sold? This requires consideration of the mischief of the 'sale' element in Clause 40. Its origins relate directly to a historical act *against* privatisation, namely the institution of the Royal Courts by Henry II replacing the feudal administration of justice under the baronage. Clause 40 represented an agreement between King John and the barons that the latter would not be subjected to fees in using the Courts. The 'sale' element of the provision therefore ensured there was no barrier to accessing justice.

Access to justice is now viewed as an integral element of the rule of law.[8] Insofar as the lack of legal aid prevents defendants from accessing the Courts with suitable representation, the modern system falls foul of Clause 40 already. However, the extent to which this is attributable to privatisation is questionable. Even at its inception, the privatised nature of legal aid did not prevent 80% of the population from being eligible, nor was there a cap placed on spending.[9] It was not until conscious efforts were made by the state to reduce spending from the 1980s that the current condition of selling justice emerged. The issue therefore stems from the lack of political will, not privatisation per se.

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[6] A James, A Bottomley, A Liebling and E Clare, 'Privatizing Prisons: Rhetoric and Reality. Sage Publications' (1997), 10–11.
[7] C Ahlgren, 'Access to Publicly Funded Legal Aid in England & Wales and Sweden – A Comparative Study' (2021), 6.
[8] *R (Unison) v Lord Chancellor* [2017] UKSC 51
[9] S Moore and A Newbury, 'Legal Aid in Crisis: Assessing the Impact of Reform' (2017), 17.

Taking access to justice as the mischief of the provision, the privatisation of prisons and probation do not breach Clause 40, since they do not erect a barrier between the individual and the courts. By contracting out only the institutions concerned with the *delivery* as opposed to *administration* of justice, the state retains a monopoly over its determination. It is an arrangement more appropriately described as *buying* justice rather than *selling* it: probation and prison service companies offer their services (the delivery of justice) to the state, who in turn pays to see that service fulfilled. Nevertheless, these practices hardly make a strong case for privatisation: the premature termination of privatised probation services contracts, coupled with the high incidence of violence in private prisons do not bring much cause to be optimistic.[10]

More fundamentally, inherent to criminal law is the coercive institution of punishment, which the state is uniquely placed to wield for the public interest. Any delegation of this coercive duty, however partial, erodes the legitimacy and authority of criminal justice. Even though the current system only delegates the *delivery of punishment*, as opposed to the *administration of justice*, to private entities, the ECtHR in *Del Río Prada v Spain* held that penalty and punishment cannot be wholly separated.[11] Thus, the coercive power which buttresses criminal law is weakened when exercised by anyone other than the state. It is in this sense that privatisation cannot be viewed as a sustainable solution.

There is clearly delay and denial of right and justice. Insofar as access to the Courts is inhibited by the inability to access legal aid, justice is also in danger of being sold. Privatisation, involving the *contraction* of the state, is not the solution, for it undermines the state's non-delegable duty as the guardian of criminal law. Instead, an *expansion* of the State's role, through the injection of money and political will, is the only solution. Only then might we see a return of justice from television back to our world.

Word Count: 985

[10] J Grierson and P Duncan, 'Private jails more violent than public ones, data analysis shows' in *The Guardian* (2019).
[11] [2013] ECHR 1004.