**"*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?**

The refusal to sell justice is driven by an egalitarian concern: access to quality justice ought not to depend on the financial means of the parties. Privatisation *prima facie* stands in opposition to this idea. Moving the control and funding of justice into private hands raises the spectre of its marketisation. This essay contends that the opposition between these ideas is not necessary. Forms of privatisation can offer credible solutions to the consequences of a decade of funding reductions. Yet where these ideas are opposed, it gives rise to a choice between more equal justice and better justice for all.

The Crown Courts are under serious pressure to deliver speedy justice. Coronavirus induced court closures and pre-existing pressures have resulted in a backlog of over 60,000 cases, threatening the collapse of cases through the withdrawal of witnesses and victims. The resolution of these problems is jeopardized by structural problems. The National Audit Office concluded that a shortage of judges and funding both pose serious risks.[1] Even before the pandemic, difficulties with court administration were widely recognised.[2]

It is instructive to begin with an anti-egalitarian solution: private judges. Such judges would be selected and paid for by the prosecuting party but unlike an arbitrator they would have the full powers of a judge. California has adopted this model for civil cases to supplement the existing system.[3] Private judges there are typically retired members of the judiciary, with current judges barred from serving. The Californian experience indicates that private judges significantly reduce delays even for those in the public courts by easing the volume of cases they serve.

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[1] National Audit Office, 'Reducing the Backlog in the Criminal Courts' (HC 732, The Stationary Office 2021). Available online: <https://www.nao.org.uk/wp-content/uploads/2021/10/Reducing-the-backlog-in-criminal-courts.pdf#page=7&zoom=100,0,0>

[2] Maeve McClenaghan, 'Justice delayed: Administrative Problems Delay Some Serious Trials' (The Bureau of Investigative Journalism, 31 July 2013) <https://www.thebureauinvestigates.com/stories/2013-07-31/justice-delayed-administrative-problems-delay-serious-trials>

[3] For detailed examinations of the system see: Anne Kim, 'Rent-a-Judges and the Cost of Selling Justice' [1994] 44 Duke LJ 166; Wendy Kennett, 'It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution' (2016) 30 IJLPF 1

This solution illustrates the potential incompatibility of speedy justice for all and equal access to justice. While effective, the policy splits access to justice between those with and without the ability to pay. By contrast, the present system has elected to ensure equal access but is failing to reduce delays. If what motivated the authors of Magna Carta was only a desire to avoid the denial or delay of justice, this clash is curious. An absolute refusal to sell justice involves a commitment to what philosopher Derek Parfitt termed 'levelling down': a preference for greater equality even at the cost of everyone being worse off.

For those who find this choice distasteful, there are modes of privatisation that even an egalitarian could support. Take the Coalition Government's proposal to introduce more outsourcing by transferring court buildings and administrative staff to the private sector.[4] As privately recognised by the then Lord Chief Justice, Lord Judge, whether or not they would have obtained the promised efficiency gains, a form of the proposals were compatible with avoiding having access to justice depend on financial means.[5]

The state's current provision of legal aid already threatens to bifurcate access to justice between rich and poor. As it stands, legal aid is a pillar of the welfare state, a publicly funded benefit providing a safety net to enable those unable to afford private counsel access justice. Yet this has made legal aid subject to changing budgetary priorities. The substantial cuts under the Coalition Government[6] have undermined access for all: it is the subject of campaigns by the Criminal Bar Association,[7] the Law Society[8] and this reduction has been openly recognised by senior members of the judiciary.[9] Access to suitable criminal defence is threatening to become defined by financial means.

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[4] Owen Bowcott, 'Lord Chief Justice Warns Chris Grayling on Courts Privatisation Plans' *The Guardian* (London, 24 June 2013) <https://www.theguardian.com/law/2013/jun/24/lord-chief-justice-grayling-warning>
[5] Joshua Rozenberg, 'Privatising the Courts: If Anyone Needs Advice, It's the Judiciary' *The Guardian* (London, 25 June 2013) <https://www.theguardian.com/law/2013/jun/25/privatising-courts-chris-grayling>
[6] cf House of Commons Library, *Spending of the Ministry of Justice on Legal Aid* (CDP 2020/0115, 21 October 2020) <https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf>
[7] Criminal Bar Association, 'CBA Response to The Ministry of Justice Consultation' (29 May 2020) <https://www.criminalbar.com/resources/news/the-criminal-legal-aid-review-clar/>
[8] Law Society, 'Criminal Justice System in Crisis: Parliamentary Briefing' (29 January 2019) <https://www.lawsociety.org.uk/topics/criminal-justice/criminal-justice-system-in-crisis>
[9] Lord Thomas, 'The Legacy of Magna Carta: Justice in the 21st Century' (Speech to the Legal Research Foundation, 25 September 2015) <https://www.judiciary.uk/wp-content/uploads/2015/10/the-legacy-of-magna-carta-lcj.pdf> [12] – [13]

Replacing legal aid with compulsory private insurance for criminal defence offers a compelling solution. Insurance would be mandatory. Should persons fail to insure themselves, the state would enrol them into a minimum scheme. In tandem with this, income thresholds for legal aid would be substantially reduced. Like compulsory insurance schemes for medical care in continental Europe, the system would serve to spread losses between everyone in the adult population.

This scheme could uphold egalitarian access to better quality justice. Those removed from the legal aid system would benefit from a properly funded defence: the level of insurance mandated would not be subject to the same political pressures as it would not be financed through public funds. Residual claimants of legal aid would benefit from the prospect of using the reduction in expenditure to achieve a more reasonable funding settlement. The public system is approaching the sale of justice by failing those on the most modest incomes; a private insurance model offers a way out.

Privatisation ought not to be treated monolithically. The case of private judges illustrates its potential to undermine equal access to justice, and yet reforms to legal aid show how it can correct the inequalities arising from the state's financing of the criminal justice system. Where the clash occurs, it raises a form of a long-standing philosophical problem: is an egalitarian view of justice so important so as to tolerate sacrificing better access to justice for all?

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