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Neoliberalism, Family Law and the Cost of Access to Justice

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Abstract

This paper uses ideas drawn from Wendy Brown's critique of neo-liberal approaches to governance, to argue that the 'economisation' of social policy such as welfare and legal aid and the family justice system, has resulted in an economic re-making of the ideas of justice, fairness and equality, which have traditionally underpinned these policies and the context of the family court. The paper will map the political context to the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO hereafter), in order to understand how it has been possible to justify the cuts to family law that were made under the statute. This will involve considering how attitudes towards social security and welfare have changed, and how a waning commitment to the original aims of the legal aid scheme has manifested in the specific context of family law. The paper will then explore the effects of this approach for the family justice system, specifically the post-LASPO family courtroom. Using recent case reports, the paper will argue that the family court is now 'dilemmatic', in that it is now caught between its traditional obligations of safeguarding fairness and equality, and the economic demands which constrain the ability of judges and court staff to ensure those obligations. Having considered the way in which legal aid policy and the family justice system have been approached through a solely economic lens, the paper will finally turn to examine how LASPO itself was justified in this neo-liberal context. It will be argued here that the re-made notions of justice, fairness and equality have been repurposed for economic aims, and that this is a symptom of a wider loss of commitment to the original substance of these principles. In understanding how traditional notions of justice have been re-drawn in economic terms, this paper concludes by arguing that family lawyers, practitioners and academics operating in a post-LASPO context must explicitly reject the economic terms of value against which these notions are measured, if their arguments against the effects of these cuts are to be in any way effective.

Keywords

LASPO; family law; legal aid; neo-liberalism; justice

Introduction

The purpose of this paper is to use ideas drawn from Wendy Brown's critique of neo-liberalism to map the political context of LASPO, and understand the way in which the

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cuts to private family law legal aid have been implemented and justified through the re-framing of social security, legal aid policy and the family justice system in economic terms. The paper will argue that a renewed commitment to the objectives of fairness, equality and justice as originally conceived, is essential for arguments against the cuts to be effective in the current political context. The structure of this paper will be as follows. Firstly, the 'economisation' aspect of Brown's neo-liberalism critique will be outlined, before using this idea to explore the way in which this economic approach has permeated political attitudes to social security and welfare, which have traditionally been underpinned by a political commitment to social justice and equality. After considering the impact of this approach on social policy, the paper will turn to case law in order to examine the way in which this has manifested in family law, and the family justice system specifically. Here it will be argued that the post-LASPO family court is now 'dilemmatic', in the sense that it is now struggling to meet its obligations to ensure equality of access to justice for all, due to the economic constraints placed upon it by the reforms to legal aid. It will be argued that a consequence of this dilemmatic space is a re-definition of the notion of justice itself, as something that can be measured, limited and valued in economic terms. Finally, this paper will use this context to examine the explicit justifications for LASPO found in government policy. It will be argued here that the neo-liberal colonisation of ideas of justice, fairness and equality has resulted in a repurposing of these ideas for economic aims, and that this is a symptom of a wider loss of commitment to the original substance of these principles. The paper will conclude by arguing that if family law academics and practitioners are to make effective arguments against the cuts imposed by LASPO using the ideas of equality, justice and fairness, it is essential that this involves a commitment to the traditional meanings of these principles, and a rejection of the economic terms in which they have been re-made.

Neoliberalism and 'economisation'

The notion of neoliberalism is used to criticise and challenge market-led approaches to policy and governance in a variety of different contexts (Brown 2015, Harvey 2005, Mayo 2013, Wiggan 2012, Meers 2017). It is not the intention of this paper to undertake a comprehensive review of neoliberalism or its critiques, but rather to draw out some of the underpinning aspects of neoliberal governance which are key to understanding the manner in which the recent legal aid cuts to family law have been

implemented and justified. The tenets of neoliberalism that will be focused on here include Wendy Brown's arguments concerning the 'economisation' of social policy, and the way in which individualised responsibility and a withdrawal of state financial support is reframed as supporting the autonomy of individuals, and giving freedom from state intervention (Brown 1995, 2015).

The 'economisation' of social policy is a critique discussed at length by Brown, who defines the political logic of neoliberalism as 'a peculiar form of reason that configures all aspects of existence in economic terms...' (2015, p.17). Economisation is therefore a logic under which policy is valued only in economic terms, rather than any value it may contribute to other long-standing political aims, such as social inclusion and equality of participation within society (2015, p.22). In practice, this means that the value of policy hinges upon whether or not it is cost-effective, promotes economic growth or contributes to the aim of reducing the national deficit. This also means policies that pursue non-economic aims, such as social security, which pursue aims of equality, fairness and justice, are seen only in terms of their economic cost to the national budget, and as such are inevitably constructed as inefficient and wasteful.

This approach to governance is pervasive because it is posited as a sensible and pragmatic response to the national deficit. However, the ideas that underpin the way in which economy-friendly policies are prioritised over political commitments to the reduction of inequality within society, appear to be rooted in a particular vision about the nature of inequality and the role of the state in enabling those who are structurally disadvantaged by the unequal distribution of resources (Page 2015, p.2). For example, in the lead-up to the Cameron-Clegg coalition government, the emphasis was on "...people and society, rather than of ever-growing government" (Conservative Policy Unit 2002, p. 4). The role of government, under this view, is to stand back and allow individuals to be independent and responsible, rather than attempt to intervene in their lives unnecessarily. In 2002, John Bercow summarised the position of the Conservative party on social justice by stating:

"There are those of us who believe passionately in social justice. However, while many on the left seek equality of outcome, we do not. While they think inequality is synonymous with injustice, we do not. Social justice is not about stopping people from becoming too rich; it is about stopping them from becoming too poor." (p. 21)

It is not the purpose of this article to align with a traditionally 'left' or 'right' political perspective. However, this quote is useful in tracking how social justice policies have been gradually constructed in economic terms, under both New Labour and Conservative governments (Barker and Lambie 2009, Grabham and Smith 2010). While the goal of social justice policies and welfare has traditionally been to minimise inequality, current policy is no longer concerned with the way in which resources are distributed, nor the ever-growing inequality gap in modern society. Rather, allowing individuals the freedom to manage their own affairs is held up as a win-win situation, in which the state is able to both save money and support their citizens, in terms of giving them the unencumbered freedom which to exercise autonomy over their own lives, and reap the benefits of their successes.

Autonomy is, however, never 'free' in the sense that this approach implies. In unravelling this approach, Wendy Brown herself develops the Rousseauian idea that freedom is in practice a constraint, because 'free' individuals are expected to take responsibility for their own varied circumstances, including their own structural disadvantage (Brown 1995, p.23-4). More recently, Alison Diduck has explained, 'autonomy is in many ways the friendly face of individual responsibility' (2013, p.96). A significant consequence of viewing social policy in economic terms, is therefore a reframing of the long-standing political aims of ensuring equality of inclusion and participation, as unjustified and undesirable restrictions on freedom. When social security is presented in this way, the role that welfare such as legal aid plays in enabling people to take control of their circumstances is undermined, if not negated. Further, the re-framing of equality in economic terms, also arguably diminishes the state's commitment to political aims of equality as originally conceived. This paper will now turn to track the way in which this neo-liberal approach to governance has created the political context in which it has been possible for the government to implement and justify the recent legal aid cuts to private family law.

Changing attitudes to welfare policy

Access to justice has traditionally been recognised as a fundamental right, emerging from the wave of post-war reforms that established the modern welfare state, alongside rights of access to healthcare and education (Mayo 2013, p.681). Sanderson and Sommerlad go a step further by arguing that access to justice is perhaps the most important of these fundamental rights, as it ensures that those who

are precariously positioned within society are able to effectively enforce their other rights (2011, p.179). This commitment to access to justice meant that state-funded legal advice and representation was provided for two major purposes. Firstly, state provision was seen as a means through which to ameliorate the variety of barriers that may exist to participation and inclusion in the legal system, as a result of structural disadvantage and the unequal distribution of resources in society. Secondly, this support was intended to encourage citizens to be independent and self-reliant in their interactions with society and its institutions, in having the support to overcome these barriers (Page 2015, p. 15).

In practice, legal aid has always fallen short of these idealistic commitments. For instance, Legal Action Group have explained that even since its implementation, the legal aid scheme failed to support a section of society who were too rich to be eligible for state support, but too poor to afford to instruct their own lawyers (Hynes and Robins 2009). Nevertheless, the purpose of the scheme has always been underpinned by these commitments. However, when the value of the scheme is considered in purely economic terms, the interdependence of these aims becomes distorted. As neo-liberal approaches to governance have gradually taken hold, the economisation of social policy has resulted in an almost exclusive political focus on the second purpose of legal aid – the encouragement of independence – without reference to the way in which this is intrinsically enabled by the provision of resources to level the playing field.

A consequence of legal aid and social security generally being framed in this way, is that social policy begins to emphasise the importance of people 'taking responsibility' for their own circumstances, and begins to incentivise citizens who do not make use of state support, regardless of social and structural disadvantages. Therefore, as Jay Wiggan argues, neoliberal approaches 'create the intellectual and political space in which social security becomes framed as something that actually encourages passivity or dependency on the state', rather than as something that enables independence through supporting people by going some way towards ameliorating the barriers and inequalities that arise from the unequal distribution of resources within society (2012, p.384). Instead, independence is emphasised without reference to the resilience needed to achieve it. Further, this has the effect of recasting poverty, unemployment and other precarious living circumstances as individualised

failures of people who have not flourished under the freedom and autonomy gifted to them by the neo-liberal, non-interventionist state.

Along with the rise of neo-liberalism, this reframing of social security has taken place throughout governments headed by parties at both ends of the political spectrum. However, these gradual movements culminated in the drastic cuts implemented under LASPO, by the 2010 coalition government. Having mapped the political context to this reform, this paper will now use these ideas to begin to understand the way in which this has manifested in family law, as one of the areas most affected by these funding cuts.

Changes to family law and legal aid

In April 2013, LASPO came into force and removed legal aid funding for the majority of private family law issues, which included the provision of state-funded legal advice and representation. This was, by itself, an overhaul of the legal aid scheme as well as the way in which the legal system relied upon legal aid as a means through which many people accessed and made use of law to resolve their family law problems. However, by looking at the context in which the legal aid cuts were implemented, it is possible to see that the justifications for LASPO in family law are more complex and far-reaching than an attempt to make the scheme cost-effective in a time of national austerity.

As Rosemary Hunter discusses in her contribution to this special issue, when LASPO was implemented, the coalition government simultaneously placed a huge amount of political emphasis on the benefits of out-of-court family mediation (Ministry of Justice 2010, p.43). For instance, despite the fact that legal aid funding has been removed so starkly from the provision of advice and representation, the government explained that it would continue to fund private family mediation for couples who decide to go ahead with this process instead of going to court (Ministry of Justice 2010, p.37). In addition, in 2014 the Children and Families Act imposed a compulsory requirement for prospective applicants to family court proceedings to attend mediation information and assessment meetings (MIAMs), in order to discuss how they may be able to resolve their problems through mediation instead.¹ This is a manifestation of the way in which family legal aid is now being redesigned as a means to incentivise people to take direction of their own problems, and to divert people away from using the family court at public expense.

Of course, mediation is an incredibly useful alternative to formal court hearings – in cases where couples are able to come to agreement, the process is often much quicker, and agreements have more longevity and are more satisfactory for the couple concerned (National Audit Office 2007, p.8). However, there are of course many people for whom mediation is unsuitable or impossible, and who need to use the family court in order to obtain resolutions for their problems. For instance, adjudication is sometimes the only way to obtain formal legal orders to enforce arrangements for children, as well as protective orders for victims of domestic violence who cannot provide the required forms of evidence under the new eligibility rules for legal aid. Although the legal aid funding that remains is reserved for established domestic abuse victims, not all victims are able to qualify for funded representation. In *R (On app of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* (2015), the government explained that the rigidity of the requirements is to ensure that funded representation is limited to those victims who are ‘intimidated or materially disadvantaged by facing their abuser in court’.² The main problem with this is that while the requirements certainly identify a section of domestic abuse victims who are in circumstances of immediate physical danger, they do not allow the Legal Aid Agency the discretion to grant applications where victims in these circumstances are unable to provide evidence, nor in any of the many other abusive relationships where victims would be intimidated or materially disadvantaged in opposing the perpetrator of their abuse in court without an advocate. In an article I recently co-authored with Julie Wallbank, we have argued that a potentially very serious consequence of a political shift away from formal sources of law such as the family court, may be that the vulnerable subjects of family law are disappearing altogether from these spaces (Mant and Wallbank 2017). It is therefore important to emphasise the very real risk that expectations of independence may divert people who need to access court, not towards mediation, but away from family law altogether. An underpinning principle of the legal aid scheme is the commitment to ensuring that justice is accessible to all, and the diversion of people away from family law is a consequence of this commitment being reconceived in economic terms. As such, this suggests that in the absence of this commitment, the meaning of justice in practice is being redefined as something that is subject to economic constraints, which starkly contrasts with the original conception of justice which has always been foundational to family law and the provision of legal aid.

Cases where such formal orders are necessary, are often chaotic, in that the family law problems are frequently underpinned by other legal problems and socio-economic difficulties such as precarious housing, employment or social welfare arrangements (Genn 1999, Pleasance 2006, Trinder et al. 2014). In order for people in circumstances like these to be able to take direction of their problems, the state has traditionally provided legal aid funding to ensure that they are able to access appropriate advice before court, and effective advocacy during their hearings. However, with a diminishing commitment to this purpose of legal aid, and a focused emphasis on the sole importance of encouraging independence and self-reliance, these individuals are also precariously situated when in spite of the cuts to legal aid, they do attempt access the family justice system. This paper will now consider the way in which this context has manifested in the specific space of the family justice system.

A dilemmatic family justice system

Wendy Brown explains that the economisation of spheres such as the legal system, which were previously governed by other values, has the effect of imposing the rationality of the market on those spheres. Therefore, under the neo-liberal governance outlined at the beginning of this paper, the legal system becomes recast as a context characterised by competition, where some succeed and others fall short (2015, p.31). In addition, Brown argues that as these spheres become re-characterised, so does the knowledge, form and conduct that is appropriate in those contexts. As such, the economic agenda not only dictates the way in which social justice policies are valued, but also reformulates the expectations of individuals in these newly marketised contexts (Brown 2015, p.36). It has been explored so far in this paper that in relation to welfare, expectations of independence and self-sufficiency have been emphasised at the expense of support. This paper will now argue that this approach has created a new set of conditions within the family justice system, in which the meaning of justice itself is being re-characterised in economic terms.

For those who do manage to take their cases to court despite an absence of state-funded support, the family justice system is now a space in which the experience of an individual depends upon their ability to pay for a lawyer. Those who can afford to pay for a representative have the benefit of a hearing as traditionally conceived,

with an advocate to guide them through the often complex processes and customs of the system. Those who cannot, and are no longer able to obtain legal aid to fund representation, must navigate the system as a self-representing litigant. Although self-representation has always been common in family law, there has been an influx of individuals going to court in this way since LASPO came into effect, and now the majority of cases involve at least one litigant in person (Williams 2011, p.1) (Ministry of Justice 2016). It is, however, not simply the case that more people are going to court without a lawyer. Rather, the people that are now appearing in person for family proceedings are contending with an incredibly diverse range of needs and circumstances, such as the intersecting legal problems discussed above, as well as structural difficulties such as poverty, mental health problems, physical disabilities and abusive relationships (Trinder et al. 2014, p.27).

Even for individuals who are familiar with law and legal process, self-representation is an arduous task in the family court. Barnett, as well as Herring and Choudhry, in their contributions to this special issue, consider the pressures that self-representing litigants place on the court in terms of the difficulties that litigants can have in complying with the procedural requirements of the family court and legal context generally. In addition, these difficulties are often compounded by to the emotionality of the issues involved, and the matters at stake in family proceedings, which can be anything from maintaining relationships with children, to gaining protection from an abusive partner (Trinder et al. 2014, p.27). Where many individuals are now also contending with structural and socio-economic difficulties, this process becomes even more complex and demanding, and arguably inaccessible for many people who may no longer see law as a realistic means of resolving their legal problems. As a result, judges and family court staff have been faced with the challenge of maintaining fairness between parties in the courtroom, regardless of whether they have legal representatives. In the context of social policy, Marjorie Mayo (2013) uses Bonnie Honig's idea of a 'dilemmatic space' (1996) to understand the impact that LASPO has had on Law Centres and their front-line service providers, who have also suffered significant funding cuts. This is also a useful idea to understand what is now happening in the family court as a result of the LASPO cuts. Mayo's conception of the dilemmatic space under neo-liberal governance, is one in which there is a conflict between the ethos of a particular context, such as that of those providing free advice

and assistance in Law Centres, and the economic demands that are also placed on them (2013, p.694). Despite the best efforts of judges to maintain equality in the courtroom, without legal aid structural inequalities and barriers can often mean justice is now less accessible for some than others. This is a particular problem in domestic abuse cases, even where victims are able to provide the prescribed forms of evidence.

Where a victim of abuse does manage to obtain funded representation, it is often likely that their ex-partner will have insufficient resources to instruct an advocate in responding. In most of these cases, therefore, respondents will appear in person. Here, although victims are not presenting their own cases, they must nevertheless face their alleged perpetrators by way of cross-examination. Rather than protecting the alleged victim of abuse, this process may allow an alleged perpetrator to undermine the evidence of the victim by familiar means – thereby potentially perpetuating the tensions between them and the abusive influence that initially led them to court. The effects of this were seen in *Re C (A Child) (No 2)* (2014) where arguments made on behalf of the alleged victim expressed that she could not ‘contemplate being asked questions directly’ by the alleged perpetrator and that she would ‘be unable to give evidence or to prove her allegations’ in these circumstances (para 6 (Lord Justice Munby)). The ability of a victim to give evidence of their abuse was also explored in *Re A (A Child)* (2013), where it was concluded that ‘the variables are as plentiful and differing as the variety of human life itself’ (para 33 (Justice Pauffley)). Here, Justice Pauffley demonstrates that these situations are unpredictable and potentially volatile, the consequences of which will depend on the intersecting complications of each case. Moreover, as Baroness Hale emphasised in *Re W (Children)* (2010), hearing this sort of sensitive evidence ‘in relaxed and comfortable surroundings’, is important not only for the protection of the individual concerned, but in order for the court to ensure the reliability of such evidence (para 10). Therefore, judges are placed in a particularly dilemmatic position, in that they are having to come up with innovative approaches in order to meet their obligations of ensuring fairness and equality between parties.

Although the Family Procedure Rules, in Practice Direction 12J, suggest that judges should convey questions on behalf of the respondent in order to protect victims, Justice Wood in *H v L and R* (2006) expressed ‘a profound unease at the thought of

conducting such an exercise in the family jurisdiction' (para 24). This disquiet was reiterated in the more recent cases of *Q v Q*; *Re B (A Child)*; *Re C (A Child)* (2014) and *Re K and H (Children: Unrepresented Father: Cross-Examination of Child)* (2016), where Lord Justice Munby and Judge Bellamy contravened the Lord Chancellor's specific intervention, and ordered the cost of a temporary advocate for the purposes of cross-examination to be borne by HMCTS, although this has now been successfully appealed. The reluctance of the judiciary to undertake questioning is due to the unique way in which family cases are heard - in the context of family proceedings, judges and court officials must act in accordance with their position of trust, and the fragility of this position is no more prevalent than where one or both parties do not have the benefit of an advocate. The costs order in this case sought to protect alleged victims of domestic violence, but with this imaginative judicial intervention now overruled, the judiciary is left without tools with which to reconstruct a fair and equal hearing. Moreover, where assistance is only provided to the respondent for the benefit of the applicant, there is a risk of significantly imbalanced proceedings. These difficulties were evident in the unique case of *Re J (A Child)* (2014), where in a rare set of circumstances, the local authority funded a temporary advocate for the purposes of undertaking cross-examination on behalf of the father. In the interests of protecting the vulnerable witness in this case, the self-representing father was excluded from proceedings while his temporary representative undertook the questioning process. Lord Justice McFarlane, explained the detrimental impact this had on the father's ability to self-represent:

'[The father's] exclusion from the court room when [the witness] was being cross-examined, meant that it was extremely difficult for him, when he came to make his final submissions, to know what [her] evidence had been.' (para 108(d))

Despite the best attempts of the judiciary to protect the parties in this case, the father was inevitably further disadvantaged in his attempts to present a cohesive response to the case. Although it is heartening to see the courts trying to develop novel approaches to circumvent the problems created by the withdrawal of legal aid, it may be impossible for them to effectively balance the interests of both sides in these cases.³ As such, the family justice system is now a space characterised by dilemma, in which the system is struggling to meet its obligations of equality and fairness in the

current neo-liberal context. Further, the traditional idea of justice as something that is accessible to all, is not only being undermined but also remade by the economic terms in which the legal aid scheme and the legal system are now valued.

As demonstrated by the case law discussed in this paper, in terms of domestic violence cases specifically, the consequences of a dilemmatic justice system can vary between inadequate protection for victims of abuse and insufficient support for respondents attempting to defend these allegations. For litigants self-representing in many other precarious circumstances, Lord Justice Aikens in *Lindler v Rawlins* (2015) summarised the concern of the judiciary that ‘this way of dealing with cases runs the risk that a correct result will not be reached’ (para 34). By considering the economisation aspect of neo-liberal governance, this paper has so far demonstrated that, contrary to the government’s expectations, there are sections of society for whom it is not possible or desirable to encourage responsibility and self-reliance without the proper support of state-funded advice and representation. Moreover, by exploring the way that this approach is manifesting in the specific context of the family courtroom, it is possible to see that the idea of justice is itself being remade in economic and market-oriented terms. This paper will now turn to examine this idea more closely, by considering the political justifications for LASPO.

Justifications for LASPO

In examining the government’s consultation paper on LASPO, the main reasoning for the the proposed cuts to legal aid was grounded in economic necessity. For instance, in his foreword, the then Secretary of State for Justice and Lord Chancellor Ken Clarke explained that ‘... [the legal aid scheme in England and Wales] is now one of the most expensive in the world, available for a very wide range of issues, including some which should not require any legal expertise to resolve’ (Ministry of Justice 2010, p.3). This statement is an example of how the scheme of legal aid – and social security more generally – is being viewed in terms of its expense, rather than the non-economic role it has in enabling people to overcome structural barriers and make use of law. In addition, by comparing the cost of the legal aid scheme to those of other jurisdictions, the government is suggesting that this expense is unnecessary and wasteful. Those who have engaged in economic arguments in relation to the legal aid budget, such as

Graham Cookson have, for instance, explained that the LASPO cuts were predicated on a comparison of the UK to New Zealand, which spends approximately a quarter of the UK's pre-LASPO legal aid budget (2013, p.22). This funding disparity has been posited as evidence that the UK was unnecessarily overspending on legal aid prior to the reform – suggesting that people are 'too willing to litigate rather than negotiate', and that this behaviour was in need of reform in order to ensure that the UK is not wasting scarce resources (Cookson 2013, p.22). However, due to the major differences between the way in which budgets are distributed across different legal systems, it would however be impossible for the government to make any realistic assessment of whether any legal aid scheme is or was more 'expensive' than another. For example, while the courts in England and Wales remain adversarial in format, the role of the German judiciary is inquisitorial, and so while they have a far smaller budget for state-funded legal representation, this is because they have a much larger budget for judicial training. This argument is an important one, but one that falls beyond the scope of this paper, as the purpose here is instead to argue against the use of economic terms of value in relation to the family justice system. This is because this economic approach also imposes a normative idea about which legal problems require the help of lawyers, and thus construct citizens as unnecessarily dependent, when they fall short of unrealistic expectations of self-sufficiency in dealing with their family law problems.

Clarke also asserts that 'legal aid must play its part in fulfilling the Government's commitment to reducing the fiscal deficit and returning this country's economy to stability and growth' (Ministry of Justice 2010, p.3) This is another example of how the scheme has been deprioritised politically, due to the fact that it pursues aims of social justice, rather than economic growth. However, the power of these statements really comes from the fact that they posit the cuts to legal aid as a sensible and necessary response to the national deficit – it creates the context in which an overly expensive scheme of legal aid for family law is something that as a nation, we can simply no longer afford. As explored at the beginning of this paper, the neo-liberal approach to governance is presented as pragmatic, but in practice is rooted in a particular set of views about the nature of society, and the extent to which the state has a duty to intervene in minimising inequality within society. For example, if economic necessity was the only driving force for the government to cut legal aid funding to family law cases, then the political context would be free of these normative expectations of self-

sufficiency and stigmatisations of dependency. In addition, the reforms would have been instated on a temporary basis, rather than with the permanency of constructing the legal aid scheme as an unnecessary drain on public resources, and a distortion of the original aims of welfare and social security more broadly.

Rather than being a pragmatic response to financial constraints, LASPO was therefore justified on an additional, ideological basis. In reiterating the political emphasis on the value of mediation for couples contending with the legal problems surrounding family breakdown, Clarke explained that the government ‘... [encourages] people to seek alternative methods of dispute resolution, rather than going to court too readily at the *taxpayer’s expense*’ (p.6) and ‘...[expects] individuals to work to resolve their own problems, rather than resorting to litigation at a significant cost to the *taxpayer*’ (p.31), so as to ‘ensure the best possible value for money for the public purse (p.141) [all my emphasis]. These are a select few examples from several references to ‘the taxpayer’ used in this document and in the later response of the government to the results of their consultation (Ministry of Justice 2010, 2011). This is a particularly interesting development of the economic approach being taken to social security, because it uses the same ideas of expense, cost and value that have been used to depict the scheme as a drain on national resources, to construct the users of legal aid as unnecessarily using the individualised resources of other citizens, who are also contending with the effects of state-imposed austerity measures. The cuts to legal aid are therefore also justified on a very different basis – the basis of providing justice and fairness to the individual taxpayer, by ensuring that public money is being spent efficiently, and not wasted on funding legal aid for family law problems which the government has suggested people should be able to resolve without legal help.

As explored in relation to the family justice system, this is a remaking of the meaning of justice and fairness, which have traditionally been the underpinning principles of the legal aid scheme and family law. The economic approach taken under neo-liberalism has essentially repurposed these notions, and used them as tools with which to undermine the idea of state-funded support and legal aid provision, as well as the political aims of social inclusion and equality that these schemes pursued. Rather than being a pragmatic and temporary response to our financial circumstances, the reform is rooted in a specific ideology about the responsibility that citizens are supposed to have for their own circumstances, regardless of structural barriers they experience. Those who need these resources in order to take direction of their

circumstances are subsequently demonised and stigmatised for draining the limited resources of individual taxpayers. In exploring this justification for LASPO, it is possible to see that contrary to Clarke's economic arguments, it is not just the legal aid scheme that is expected to 'play its part in fulfilling the Government's commitment to reducing the fiscal deficit' (Ministry of Justice 2010, p.3), but the sections of society living in precarious circumstances, who require its assistance in order to gain meaningful access to justice and full participation in the legal system.

By tracking the economic approach through both the broader political context, and the specific context of the family justice system, it has been possible to unravel the way in which the idea of 'justice' is being remade at the level of the individual. In turn, this demonstrates the permanent and pervasive manner in which the reforms to family law legal aid have been implemented. In examining these ideas, it is possible to argue that a broader consequence of LASPO is not only a diminishing commitment of the state to providing financial resources for legal aid, but the reformulation of the principles that have underpinned the scheme, which signals a far more permanent loss of commitment to political aims of equality of inclusion and participation in the family justice system, and society more generally. Therefore, the argument of this paper is that for arguments against the LASPO cuts to be effective, it is imperative that justice, fairness and equality are valued not in economic terms, but for the role that they play in ensuring that family law is accessible to all who need it.

Conclusion

This paper has drawn from Wendy Brown's work into the economic approach of neo-liberal governance, in order to map the political context in which the legal aid cuts to private family law have been implemented and justified. In doing so, it has been possible to identify both immediate and long-term consequences of the way in which the cuts have been made. The immediate effects are already being seen in the family justice system, where the political emphasis on self-sufficiency and the diversion of people towards mediation means that there is now a real danger of people no longer making use of family law to resolve their legal problems. This is cause for serious concern, as for many this may mean a worsening of circumstances and perhaps even risks to the personal safety of victims of domestic violence and children of families who are unable to make use of the legal system. The paper has also argued that even those who are able to access the system, are now positioned precariously within it, as

many are now expected to navigate the family justice system without legal advice or representation. Despite the best efforts of judges and court staff, this has resulted in the remaking of the family court as a dilemmatic space, characterised by success and failure, in which justice and fairness have been reframed in economic terms which are incompatible with the principle of equality of access to justice that has historically underpinned this context.

In exploring the ways in which both policy and contexts such as the justice system have been reframed in economic terms, this paper then considered the specific justifications for LASPO by examining the proposals for reform published by the Clegg-Cameron coalition government. Here, it was possible to use these ideas to explore the way in which the reframing of justice in economic terms, has enabled the concept to be repurposed for use as a tool with which to undermine the legal aid scheme that it has traditionally underpinned. This has involved reconstructing ‘justice’ in economic terms, rather than as something accessible for all. Although the legal aid scheme has never fulfilled the arguably idealistic vision with which it was conceived, this paper argues that the reframing of the conceptions of justice and fairness that provided the basis for its provision are a symptom of a wider lack of commitment to political aims of social justice within society. Therefore, if family law academics and practitioners are to make effective arguments against the cuts imposed by LASPO using the ideas of equality, justice and fairness, it is essential that this involves a commitment to the traditional meanings of these principles, and a rejection of the economic terms in which they have been re-made.

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Notes

1. This affirmed the existing expectation of potential applicants to attend MIAMS, which has been in place since 2011 under the ‘pre-application protocol’.
2. See also: *R (on app of Rights of Women) v the Lord Chancellor and Secretary of State for Justice* (2016), which slightly loosened evidence requirements for instances of financial abuse, but retains many of these difficulties.

3. Many thanks to Julie Wallbank for this point, and for her tireless reading of my early case law analysis.

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