

## ARE WE ALL IN THIS TOGETHER? EXPLORING THE IMPACT OF AUSTERITY ON ACCESS TO JUSTICE FOR WOMEN

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**Abstract:** This article examines the impact of austerity on access to justice for women. It attempts to engage seriously with the key concepts of austerity and access to justice, before arguing that the impact of austerity on access to justice has been especially grave for women. This is because women have borne the brunt of the funding cuts both in terms of justice-specific policies and public sector spending more broadly. As there is a strong link between financial hardship and deficient access to justice, the latter is essential in illustrating the ramifications of austerity for access to justice in full. The article goes on to highlight that for victims of domestic violence, these ramifications amount to a violation of the United Kingdom's international obligations under the European Convention on Human Rights and the United Nations Convention for the Elimination of Discrimination and Violence Against Women.

### A. INTRODUCTION

“we’re all in this together”

- David Cameron, speaking at the 2009 Conservative Party Conference in Manchester.<sup>1</sup>

By way of an analysis of the impact of austerity on access to justice for women, this article will demonstrate, to borrow Cameron's platitude, that we are not “all in this together”. Indeed, although austerity has been an assault on access to justice across the board, for women the effects have been felt particularly acutely. The discussion emanates from a broader concern that women are most affected by austerity. It is well documented in media reports and academic literature that women have borne the brunt of the cuts to public spending implemented since 2010.<sup>2</sup> However, there is a paucity of scholarship focusing on the specific effect of these cuts on women's access to justice. This article attempts to fill this gap.

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<sup>1</sup> David Cameron, ‘Full text of David Cameron's speech’ *The Guardian* (London, 8 October 2009) <<https://www.theguardian.com/politics/2009/oct/08/david-cameron-speech-in-full>> accessed 27 August 2018.

<sup>2</sup> See for example Heather Steward, ‘Women bearing 86% of austerity burden, Commons figures reveal’ *The Guardian* (London, 9 March 2017) <<https://www.theguardian.com/world/2017/mar/09/women-bearing-86-of-austerity-burden-labour-research-reveals>> accessed 25 August 2018; Ailsa McKay and others, ‘Economic recession and recovery in the UK: what's gender got to do with it?’ (2013) 19(3) *Feminist Economics* 108.

A gendered examination of austerity's consequences for access to justice is important given the existence of the public-sector equality duty,<sup>3</sup> and thus it is imperative for us to address the difficulties austerity poses for fairness; the first step to securing a more equitable society is to understand where it falls short. It should be noted that while this article considers women in a general sense, I am mindful that women have diverse lived experiences; hence, intersectional analysis has been incorporated into the discussion where possible.

This article will provide evidence to highlight that the impact of austerity on access to justice for women has been especially grave. The attack on access to justice has been two-pronged. First, we have witnessed both specific savings-driven policies undertaken by the Ministry of Justice to reduce the spending of that government department. Second, austerity has been responsible for the retrenchment of the welfare state and the public sector that has made many people, but especially women, poorer. Since, as I will discuss, there is a strong link between economic hardship and deficient access to justice, any meaningful discussion about the ramifications of austerity for access to justice must consider the public sector cuts more broadly.

Furthermore, it will be argued that in the case of domestic violence, the effects of austerity on the ability of victims to seek justice amount to a violation of the United Kingdom's ("UK") international obligations under the European Convention on Human Rights ("ECHR") and the United Nations ("UN") Convention for the Elimination of Discrimination and Violence Against Women ("CEDAW"). Although perhaps not particularly surprising,<sup>4</sup> this is nonetheless striking and marks a backward step for UK's human rights protection.

The article will proceed on the following basis: section B outlines the key concepts at issue, namely "austerity" and "access to justice". Section C explores how austerity's retrenchment of the welfare state and the public sector has impacted upon access to justice for women. In section D, the discussion turns to the consequences of the policies introduced by the Ministry of Justice, under the auspices of austerity, for women's access to justice. Although there are a number of such policies, in this article I examine only Employment Tribunal Fees and the new legal aid scheme under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Section E

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<sup>3</sup> Equality Act 2010, s 149(1).

<sup>4</sup> In their initial response to LASPO, Rights of Women highlighted that the new evidence requirements were "dangerously restrictive". See Rights of Women, 'The Legal Aid, Sentencing and Punishment of Offenders Bill Briefing for the House of Lords, Committee Stage' (Rights of Women, January 2012) <<http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Briefing-LASPO-HOL-2012.pdf>> accessed 30 August 2018.

tentatively suggests the ways in which the deficiencies of the current approach could be addressed, and, finally, section F concludes.

## B. KEY CONCEPTS

### 1. *Austerity*

Understanding austerity is important for our purposes because it has been the justification for an astonishing shrinkage of the public sector over the past decade.<sup>5</sup> Moreover, the determination to pursue austerity has superseded rights concerns and alarm about growing inequality and poor economic growth.

The term “austerity” refers to economic measures undertaken by a government to cut public expenditure and, in so doing, reduce the budget deficit.<sup>6</sup> The advocates of austerity believe that a reduction in spending will restore competitiveness by driving down wages and prices, and inspire business confidence, since the government will no longer be “crowding out” investment, nor contributing further to the deficit.<sup>7</sup> Austerity in the UK has entailed public sector pay freezes and budget reductions for non-ring-fenced government departments. For instance, the changes to the welfare system implemented by the coalition government meant that in 2015-16, the Department of Work and Pensions’ spending was £16.7 billion less than it would have been otherwise.<sup>8</sup> More pertinent to the present analysis, since 2010-11 the Ministry of Justice budget has been cut by 40 per cent in real terms.<sup>9</sup>

Before 2008, “largely understood either in historical terms or as a practice applied in other countries”,<sup>10</sup> austerity was not a word that appeared much in the political lexicon. Yet, the term has come to define British politics for most of the past decade. Indeed, it was – for a time – the economic orthodoxy, to which all of the main political parties adhered. The extent of the consensus was illustrated by the 2015 general election, in which all four main parties – Labour, the Conservatives, the Liberal Democrats and the Scottish National Party (“SNP”) – committed to

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<sup>5</sup> Government spending fell from 47.56% of GDP in 2010 to 40.62% in 2017. See OECD, ‘Government at a Glance 2017’ (OECD, 2017) <<https://data.oecd.org/gga/general-government-spending.htm>> accessed 13 August 2019.

<sup>6</sup> Cambridge Dictionary, ‘Austerity’ <<https://dictionary.cambridge.org/dictionary/english/austerity>> accessed 13 August 2019.

<sup>7</sup> Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2013) 1.

<sup>8</sup> Andrew Hood and David Phillips, *Benefit Spending and Reforms: The Coalition Government’s Record* (The Institute of Fiscal Studies 2015) 1 <<https://www.ifs.org.uk/uploads/publications/bns/BN160.pdf>> accessed 25 August 2018.

<sup>9</sup> Alan Travis, ‘Public services face real-terms spending cuts of up to 40% in decade to 2020’ *The Guardian* (London, 22 November 2017) <<https://www.theguardian.com/uk-news/2017/nov/22/public-services-face-real-terms-spending-cuts-of-up-to-40-in-decade-to-2020>> accessed 19 August 2018.

<sup>10</sup> Nick Anstead, ‘The idea of austerity in British politics, 2003-13’ (2018) 66(2) *Political Studies* 287, 287.

austerity over the following parliament.<sup>11</sup> Although, by now, the edifice of austerity is crumbling as Labour’s anti-austerity stance gained significant support in the 2017 general election,<sup>12</sup> and the Conservative government are beginning to shift their singular focus away from trimming the budget, it remains a potent political, economic and moral force in British politics.

Austerity is a powerful idea for two key reasons. First, it makes sense in the context of the prevailing economic ideology. Austerity has its intellectual roots in the economic liberalism espoused by Locke, Hume and Smith. While, as Mark Blyth notes, a direct argument for austerity was absent from their work, “the conditions of its appearance – parsimony, frugality, morality and a pathological fear of the consequences of government debt – lie deep within economic liberalism’s fossil record from its very inception”<sup>13</sup> and endure today. Indeed, austerity is home in neo-liberal Britain, in which an unfettered market and a minimal role for the state are sacrosanct.

Secondly, the idea became salient after 2008 because the financial crash was framed as a sovereign debt crisis in Britain. For politicians, austerity provided a logical solution in the eyes of the public who, as Paul Krugman points out,<sup>14</sup> tend to – erroneously – consider government and household budgets as analogous.<sup>15</sup> As Blyth pithily summarises, “Austerity is intuitive, appealing, and handily summed up in the phrase ‘you cannot cure debt with more debt’”.<sup>16</sup> Presented as the common-sense antidote to the debt problem, its proponents did not have to defend the epistemological foundations of the policy, or respond to the (albeit limited) oppositional discourses it encountered: its characterisation as “common-sense” served to extinguish the debate. This helps to explain the public support for austerity. In 2015, five years after austerity had begun in earnest

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<sup>11</sup> Rowena Crawford and others, *Post-election Austerity: Parties’ Plans Compared* (The Institute for Fiscal Studies, 2015) 2 <<https://www.ifs.org.uk/uploads/publications/bns/BN170.pdf>> accessed 19 August 2018.

<sup>12</sup> 28 per cent of Labour voters supported the party because of its manifesto, which was broadly perceived as an anti-austerity programme. See Matthew Smith, ‘Why people voted Labour or Conservative at the 2017 general election’ (*YouGov*, 11 July 2017) <<https://yougov.co.uk/news/2017/07/11/why-people-voted-labour-or-conservative-2017-gener/>> accessed 29 August 2018.

<sup>13</sup> Blyth (n 7) 87.

<sup>14</sup> Paul Krugman, ‘The Austerity Delusion’ *The Guardian* (London, 29<sup>th</sup> April 2015) <<https://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion>> accessed 19 August 2018.

<sup>15</sup> They are not: if a household reduces its outgoings the effect on the wider economy will be trivial, whereas a fall in government spending will have a significant impact because government expenditure makes up a substantial portion of the overall economy’s total spending. In addition, a government can borrow money with minimal cost; a household cannot.

<sup>16</sup> Blyth (n 7) 4.

– and despite “dismal” economic growth<sup>17</sup> - 48 per cent of respondents to a YouGov poll felt that austerity was “good” for the economy.<sup>18</sup>

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<sup>17</sup> John Van Reenen, ‘Election economics: austerity past, present and future’ (*LSE General Election 2015 Blog*, 12 March 2015) <<http://blogs.lse.ac.uk/politicsandpolicy/election-economics-austerity-past-present-and-future/>> accessed 19 August 2018.

<sup>18</sup> YouGov, ‘Government Cuts’ (*YouGov*, 2015) <[https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/umkary60am/YG-Archives-Pol-Trackers-Government%20Cuts-040515.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/umkary60am/YG-Archives-Pol-Trackers-Government%20Cuts-040515.pdf)> accessed 19 August 2018.

In short, austerity – the reduction of government spending with a view to curbing the budget deficit – with its foundations in economic liberalism, is an extraordinarily potent idea, and one which almost the entire polity (and a substantial portion of the electorate) coalesced around in the years following the 2008 financial crisis. Next, I turn to access to justice: what it is, and why it is important.

## 2. “Access to what? For whom?”<sup>19</sup>

Access to justice is, as Tom Cornford astutely notes, a rather “nebulous” concept.<sup>20</sup> As such, its content is worth unpacking in order to understand what we mean by it. It is important to remember, as Rebecca Sandefur highlights, that only a “minority” of civil justice problems are resolved by traditional legal means (for example through a court or tribunal).<sup>21</sup> Indeed, as Pascoe Pleasence and Nigel Balmer point out, the court system is “peripheral” to everyday justice:<sup>22</sup> just five per cent of legal issues are remedied in this way. Instead, as the work of these authors reveals, advice is sought from a variety of sources, including from beyond the formal advice sector, for instance from “health professionals, social workers, employers and politicians”.<sup>23</sup> In truth, many people will not recognise their problem as being “legal”, and will take no steps to resolve it. Thus, when we talk about securing access to justice, we are talking about more than guaranteeing access to legal services, although this is an important part. Citizens must also be equally able to recognise their problem as a legal one; because the choice to resolve (or not) an issue through a “conventional” legal route is “unequivocally tied to legal capability, with action more likely among those...who understand their rights and/or see problems as having a legal character”,<sup>24</sup> visible rights and clear information are integral.

Where civil justice problems do reach legal institutions, a demand for equitable access to justice is not simply a demand for fair access to the process. Whilst, as Hazel Genn accurately notes, procedural justice is important because it engenders faith in the system and is, ultimately,

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<sup>19</sup> Deborah Rhode, ‘Whatever Happened to Access to Justice’ (2009) 42(4) *Loy.L.Rev.* 869, 872.

<sup>20</sup> Tom Cornford ‘The Meaning of Access to Justice’ in Ellie Palmer and others (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016) 28.

<sup>21</sup> Rebecca Sandefur, ‘Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy’ (2009) 42 *Loy.L.Rev.* 949, 950.

<sup>22</sup> Pascoe Pleasence and Nigel Balmer, ‘How People Resolve ‘Legal’ Problems’, A report to the Legal Services Board’ (PPSR 2014) 2 <<https://research.legalservicesboard.org.uk/wp-content/media/How-People-Resolve-Legal-Problems.pdf>> accessed 17 July 2019.

<sup>23</sup> *ibid* 4.

<sup>24</sup> *ibid* 3.

“the route to substantively correct decision making”,<sup>25</sup> it is an insufficient end. Indeed, in the context of family justice, for Anne Barlow et al, “the mere fact of those procedures and of an agreement or a decision does not tell us whether they possess the quality of ‘justice’. We have to measure them against a further yardstick to decide that”.<sup>26</sup> They are correct: an examination of justice which fails to make an inquiry about the outcome of the procedures in question is necessarily limited. Richard Abel’s Weberian analysis lends credence to this argument. He considers it right that “a legal system is evaluated by the way it furthers non-legal values in the environing society”, contending that if we value social justice, equal access which “achieve[s] formal justice but continue[s] to contribute to social, political and economic inequality” is unsatisfactory.<sup>27</sup>

Therefore, “justice” requires something more than fair process. In light of this, Cornford’s substantive conception of justice is persuasive. In his view, access to justice demands that “access to legal services is straightforwardly equal”,<sup>28</sup> to the extent that “every citizen should be equally able to protect her legal rights”.<sup>29</sup> In a similar vein, Sandefur asserts that access to justice necessitates that “different groups in a society would have similar chances of obtaining similar *resolutions* [emphasis added] to similar kinds of civil justice problems”.<sup>30</sup> This includes equal capability to recognise a problem as “legal”, as Pleasence and Balmer highlight. Thus, for the purposes of this article, substantive justice, of the kind articulated by Cornford and Sandefur, viewed in the context of Pleasence and Balmer’s findings, will be the metric by which I will assess the state of access to justice in austerity Britain.

### 3. *Why is accessing justice important?*

Finally, before I turn to the question in hand, it is worth highlighting the essentiality of proper access to the legal system, in order to contextualise the gravity of damage to it. As Lord Reed asserted in *R (UNISON) v. Lord Chancellor* (“UNISON”),<sup>31</sup> the law “underpins” our everyday interactions: “People and businesses need to know, on the one hand, that they will be able to

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<sup>25</sup> Hazel Genn, *Judging Civil Justice (The Hamlyn Lectures)* (CUP 2009) 13.

<sup>26</sup> Anne Barlow and others, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017) 6.

<sup>27</sup> Richard Abel, ‘Socialising the Legal Profession: Can Redistributing Lawyers’ Services Achieve Social Justice?’ (1979) 1(1) *Law & Policy* 5, 7.

<sup>28</sup> *ibid* 35.

<sup>29</sup> *ibid* 28.

<sup>30</sup> Sandefur (n 21) 951.

<sup>31</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.



enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them”.<sup>32</sup> Indeed, invoking the Magna Carta, Lord Reed highlights the long tradition of access to justice, which is recognised by the common law and enshrined in the Human Rights Act 1998.

Meaningful access to justice is necessary for the enjoyment of a number of human rights, including the right to a fair trial (ECHR Article 6), the right to an effective remedy (EU Charter of Fundamental Rights Article 47) and equality before the law (ECHR Article 14).<sup>33</sup> Indeed, to claim and enforce any right, people must have meaningful access to justice. As a corollary, the state is under an obligation to ensure that access to justice is not merely illusory, as established in *Airey v. Ireland*,<sup>34</sup> and such tangible access is a right recognised by international human rights frameworks to which the United Kingdom is committed, including the UN Declaration of Human Rights and the International Covenant on Civil and Political Rights. Whilst debate exists concerning the extent to which this access must be guaranteed by legal aid, the UN have been clear that its provision “to those who are otherwise unable to afford it is a fundamental prerequisite for ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms”.<sup>35</sup>

Furthermore, effective access to justice is required to uphold of the rule of law. In *UNISON*,<sup>36</sup> Lord Reed pointed out that “In order for the courts to perform [their] role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter”.<sup>37</sup> It is clear, then, that the law, and material access to its remedies, is the bedrock of our political settlement. Intuitively, equitable access to justice is important on this basis.

There are other reasons to advocate for equal access, too. First, under the Equality Act 2010, public bodies are obliged to eliminate discrimination and advance equality in the exercise of their functions.<sup>38</sup> Thus, the government has a legal duty to take steps to ensure that the services it administers – the justice system included – are delivered with due regard to equality. Second, as

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<sup>32</sup> *ibid* [71].

<sup>33</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>34</sup> *Airey v Ireland* (1979-80) 2 EHRR 305.

<sup>35</sup> UNCHR, ‘Report of the Special Rapporteur on extreme poverty and human rights’ (9 August 2012) UN Doc A/67/278; Amnesty International, *Cuts That Hurt: The impact of legal aid cuts in England on access to justice* (Amnesty International UK 2016) <<https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF>> accessed 29 August 2018.

<sup>36</sup> *R (UNISON)* (n 31).

<sup>37</sup> *ibid* [68].

<sup>38</sup> Equality Act 2010, s 149(1).

Sandefur contends, there is a social justice argument for providing equal access to justice. Indeed, she argues that unequal access to justice can create and reproduce socio-economic inequality, “because different groups of people can experience different consequences from similar justice problems”.<sup>39</sup> Without equal access to justice, individuals are not equally able to vindicate their rights.

Therefore, access to justice – and indeed equal access to justice – is integral to the continued existence of our political settlement, essential in meeting the legal obligations enshrined in the Equality Act 2010 and important from a social justice perspective. This is the prism through which we should view the impact of austerity on access to justice.

### C. AUSTERITY, THE WELFARE STATE AND THE PUBLIC SECTOR

#### 1. *Austerity: the inaugural “women’s issue”*

Even the most cursory analysis can lead us to conclude that women are more likely to be affected by austerity than men: women exist on lower incomes (64 per cent of workers in the bottom wage quintile are women<sup>40</sup>) and therefore they rely on benefits more; women occupy a higher proportion (65 per cent<sup>41</sup>) of public sector jobs; and as primary carers for children, women interact with public services more often. As such, Ailsa McKay et al argue that austerity means women face a “triple jeopardy”,<sup>42</sup> and a “marked deterioration in the[ir] economic welfare”.<sup>43</sup> McKay et al dub this the “womanceSSION”.<sup>44</sup> Their claim has empirical grounding. Women have shouldered a staggering proportion of the austerity burden: according to the House of Commons Library, 86 per cent of tax and benefit changes since 2010 have been borne by women.<sup>45</sup> The Equality and Human Rights Commission’s assessment of the tax and welfare changes made between May 2010 and January 2018 found that “on average, across the whole income distribution, women lose just under £400 per year from the reforms, whereas men lose only around £30”.<sup>46</sup> The disparity can be explained

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<sup>39</sup> Sandefur (n 21) 976.

<sup>40</sup> Jonathan Cribb and others, *Living standards, poverty and inequality in the UK: 2018* (The Institute for Fiscal Studies 2018) <<https://www.ifs.org.uk/uploads/R145%20for%20web.pdf>> accessed 25 August 2018.

<sup>41</sup> McKay and others (n 2) 118.

<sup>42</sup> *ibid* 115.

<sup>43</sup> *ibid* 120.

<sup>44</sup> *ibid*.

<sup>45</sup> Steward (n 2).

<sup>46</sup> Equality and Human Rights Commission, *Pressing for progress: women’s rights and gender equality in 2018* (Equality and Human Rights Commission, 2018) 68

in part by the fact that women are likely to receive benefits and tax credits on behalf of their children, and these have been the focus of the welfare reforms since 2010. However, there have been consequences for gendered income inequality: in 2015, according to the European Union Statistics on Income and Living Conditions, the gap between male and female persistent poverty – disposable income that falls below 60 per cent of the median level “in the current year and at least two of the three preceding years”<sup>47</sup> - was the biggest since data began in 2008.<sup>48</sup>

Most affected are black and ethnic minority women: Asian women are forecast to lose 19 per cent of their income by 2020 (or £2,247 a year), which amounts to “almost twice the loss of white men in the same income group”.<sup>49</sup> The losses are also particularly stark for single parents, “90 per cent of whom are women, who lose around £5,250 on average, equivalent to almost 19 per cent of their net income. This rises to up to 25 per cent for the poorest lone parents”.<sup>50</sup> Astonishingly, the child poverty rate in lone parent households is predicted to “increase from slightly over 37 per cent to slightly over 62 per cent as a result of the reforms – an increase of almost 25 percentage points”.<sup>51</sup>

The disproportionate impact of the cost savings has also been recognised by the UK Supreme Court. In *SG and others v. Secretary of State for Work and Pensions*,<sup>52</sup> the Court considered whether the cap on welfare benefits is indirectly discriminatory on the grounds of gender. The disparate impact of the cap was acknowledged,<sup>53</sup> and while the appeal was dismissed, as the policy was deemed to be pursuing a legitimate aim, Lady Hale, dissenting, stated clearly: “The prejudicial effect of the cap is obvious and stark”,<sup>54</sup> and has “disproportionately adverse effects upon women”.<sup>55</sup>

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<<https://www.equalityhumanrights.com/sites/default/files/pressing-for-progress-womens-rights-and-gender-equality-in-2018-pdf.pdf>> accessed 29 August 2018.

<sup>47</sup> Office for National Statistics, ‘Persistent Poverty in the UK and EU: 2015’ (Office for National Statistics, 27 June 2017) 2

<<https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/articles/persistentpovertyintheukandeu/2015>> accessed 25 August 2018.

<sup>48</sup> *ibid* 17.

<sup>49</sup> Equality and Human Rights Commission (n 46).

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid*.

<sup>52</sup> *SG and others v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

<sup>53</sup> *ibid* [61].

<sup>54</sup> *ibid* [180].

<sup>55</sup> *ibid* [188].

I have established that the tax and benefit changes have been especially detrimental for women. Next, I will consider why this has important consequences for access to justice.

## ***2. The economics of deficient access to justice***

The plight of women as a result of austerity impacts their ability to access justice fairly, effectively and in a timely manner. As a UN Report by the Special Rapporteur on extreme poverty and human rights details, “persons living in poverty face a range of obstacles in claiming and enforcing, or contesting violations of, their rights”.<sup>56</sup> This is not limited to countries in which abject poverty is endemic. In fact, “even in the most developed countries, legal disempowerment is rife”.<sup>57</sup>

There are myriad reasons why persons living in poverty may be denied access to justice. Some of these – such as the cost of legal advice and administrative fees – emanate directly from a lack of economic resources; others are entrenched in the institutional design of the justice system.<sup>58</sup> Moreover, those living in poverty may face additional social obstacles – insufficient education, limited legal knowledge and a lack of social capital, for example – to achieving effective redress. That the direct costs of justice mean it is inaccessible to those without sufficient material capital is self-evident. The other barriers to justice poverty presents – institutional design and social factors – require closer analysis. It is to these I now turn.

### *a) Social barriers*

As the UN report notes, “persons living in poverty are often deprived from a young age of the opportunity to acquire the tools, social capital and basic legal knowledge necessary to engage with the justice system”.<sup>59</sup> This assertion holds weight: in their examination of legal problem resolution, Pleasence and Balmer establish a link between social disadvantage and lower levels of legal capability.<sup>60</sup> As the UN report indicates, legal capability requires an understanding of rights and an ability to characterise a problem as “legal”.<sup>61</sup> If problems are not perceived as “legal”, there may be a tendency for individuals to “lump” them: i.e. seek no resolution at all.<sup>62</sup> In turn, as a report by the Joseph Rowntree Foundation points out, individuals may be unable to “prevent a problem escalating in severity...which may diminish the likelihood of achieving good resolution

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<sup>56</sup> UNCHR, ‘Report of the Special Rapporteur on extreme poverty and human rights’ (n 35) 6.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.* 8.

<sup>60</sup> Pleasence and Balmer (n 22) 100.

<sup>61</sup> *ibid.* 3.

<sup>62</sup> *ibid.* 1.

outcomes”.<sup>63</sup> This is corroborated by Pleasence and Balmer’s work. Their study finds that “inaction is...associated with far poorer prospects of effective problem resolution... problems were much more likely to still be ongoing or simply being put up with”.<sup>64</sup> So, bereft of the tools to see a problem as “legal”, disadvantaged women – as we have discussed, an expanding group as a result of austerity – may take no steps to resolve it and will thus be far less likely to attain a satisfactory outcome.

*b) Institutional barriers*

The legal system does not lend itself to serving the needs of the poor well. This can be explained by several factors. Firstly, the background of judicial staff, especially judges, often stands in stark contrast to the lived experience of people who exist in poverty: 71 per cent of senior judges attended private school, compared with 7 per cent of the UK public.<sup>65</sup> This is only exacerbated in the case of poor women: only 29 per cent of court judges are women.<sup>66</sup> Although we should be cautious of renouncing the possibility of cross-group empathy, “negative stigma and stereotyping” are pervasive and difficult to shake.<sup>67</sup> This may impact the ability of judges to administer impartial justice.

Even before a problem reaches the courts, disadvantaged women are likely to find it onerous to obtain advice because legal practices may not provide services in relation to the “destitution problems” they are likely to face, for example in relation to employment or welfare, where the opportunity for profit may be slim.<sup>68</sup> Indeed, Pleasence and Balmer highlight that “while 25 per cent of all English and Welsh solicitors’ non-corporate income...relates to negligent accidents, 9 per cent relates to employment problems and less than 1 per cent relates to problems concerning welfare benefits”, despite these problems occurring at a similar rate.<sup>69</sup> Moreover, many

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<sup>63</sup> Gráinne McKeever and others, ‘Destitution and paths to justice: Final report’ (The Joseph Rowntree Foundation 2018) 48 <<https://www.jrf.org.uk/report/destitution-and-paths-justice>> accessed 29 August 2018.

<sup>64</sup> Pleasence and Balmer (n 22) 101.

<sup>65</sup> George Arnett, ‘Elitism in Britain - breakdown by profession’ *The Guardian* (London, 28 August 2014) <<https://www.theguardian.com/news/datablog/2014/aug/28/elitism-in-britain-breakdown-by-profession>> accessed 24 July 2018.

<sup>66</sup> Courts and Tribunals Judiciary, ‘Judicial Diversity Statistics 2018’ (*judiciary.uk*, 12 July 2018) <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2018/>> accessed 26 August 2018.

<sup>67</sup> UNCHR, ‘Report of the Special Rapporteur on extreme poverty and human rights’ (n 35) 12.

<sup>68</sup> McKeever and others (n 63) 46.

<sup>69</sup> Pleasence and Balmer (n 22) 3.

firms do not take on legal aid cases: in 2015 the House of Commons Justice Committee found that between 2013 and 2014, fourteen local authorities had no lawyers taking on legal aid cases.<sup>70</sup>

As well as direct costs, there are collateral expenses to pursuing justice, for instance, since courts and tribunals are usually located in cities: transportation to court and overnight accommodation.<sup>71</sup> In addition, the loss of income incurred throughout the time it takes to seek a resolution may be prohibitive; even where it is not, “individuals who have informal or precarious work are unlikely to obtain their employer’s permission to take time off to attend a hearing”.<sup>72</sup> These individuals are more likely to be women than men: 54.7 per cent of people in employment on a zero hours contract are women.<sup>73</sup> For women who have child caring responsibilities, and need to make – and pay for – alternative arrangements, these issues are amplified.

Thus, there are a number of obstacles that women are more likely to encounter in their pursuit of justice as a result of structural inequalities in society, which are augmented by austerity. Beyond this, there are legislative schemes, justified – at least notionally – by austerity,<sup>74</sup> which have transformed the administration of justice in the UK, to the detriment of access to justice for women. These will be considered in section D.

## **D. AUSTERITY AND THE MINISTRY OF JUSTICE**

### ***1. Employment Tribunal fees***

The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 introduced a requirement that Employment Tribunal claimants pay a fee or apply for a fee remission to have their case heard. The stated aim of the Fees Order was to limit the number of spurious claims, encourage earlier settlements and reduce the costs of running the tribunal service.<sup>75</sup> The fees

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<sup>70</sup> Justice Committee, *Impact of changes to civil legal under part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, 311) 35.

<sup>71</sup> UNCHR, ‘Report of the Special Rapporteur on extreme poverty and human rights’ (n 35) 12.

<sup>72</sup> *ibid* 13.

<sup>73</sup> Office for National Statistics, ‘Contracts that do not guarantee a minimum number of hours: April 2018’ (Office for National Statistics, 23 April 2018) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsth atdonotguaranteeaminimumnumberofhours/april2018#future-of-the-experimental-business-survey>> accessed 27 August 2018.

<sup>74</sup> At the Second Reading of the LASPO Bill, the then Justice Secretary Kenneth Clarke remonstrated about the cost of legal aid, and was clear about his motives for the legislation: “in the country’s current financial crisis reform is imperative” (HC Deb 29 June 2011, vol 530, col 987).

<sup>75</sup> During the introduction of the draft order in the House of Lords, the Minister of State for Justice, Lord McNally, emphasised the cost of the free system to the taxpayer and said, “The introduction of fees can support a necessary change in the mindset of users and help to reset the system by encouraging individuals to stop and think about whether

proved to be a significant deterrent: between 2013 and 2017, the number of cases taken to Employment Tribunal fell by 70 per cent.<sup>76</sup> In an age of increasingly precarious work, characterised by an exponential growth in zero-hours contracts, this cannot reasonably be attributed to a reduction in work related disputes. Indeed, the number of employment contracts without a minimum number of guaranteed hours has been on the rise, most recently increasing from 1.7 million in 2016 to 1.8 million in November 2017.<sup>77</sup>

The imposition of Employment Tribunal fees has disproportionately affected women. This has been recognised by the Supreme Court: in *R (UNISON) v. Lord Chancellor*,<sup>78</sup> Lady Hale highlighted that fees for Type B claims (unfair dismissal, discrimination, whistleblowing, and equal pay), which are more likely to be brought by women, constituted indirect discrimination under the Equality Act 2010.<sup>79</sup> Moreover, Lady Hale considered that the higher fees were not a proportionate means of achieving a legitimate aim and so could not be justified, under section 19(2)(d) of the 2010 Act.<sup>80</sup> Although since *UNISON*, which declared that the fees were unlawful, the government has committed to ending Employment Tribunal fees and begun refunding claimants who paid them, the scheme illustrates the willingness of the government to put a price on justice in the name of austerity.

## 2. *LASPO*

As Jess Mant accurately points out, *LASPO* has re-characterised justice “as something that can be measured, limited and valued in economic terms”.<sup>81</sup> With some narrow exceptions, *LASPO* removes the following areas from the scope of civil legal aid: debt, education, employment, housing matters, immigration, private family law, and welfare benefits.<sup>82</sup> Section 10 of the legislation sets out an Exceptional Case Funding (“ECF”) scheme to provide financial assistance where a failure to do so would breach an individual’s ECHR or EU rights, or where the Director

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a dispute can be settled without recourse to a tribunal, and whether it is really necessary to submit a claim” (HL Deb 8 July 2013, vol 747, col 75).

<sup>76</sup> Press Association, ‘Unions blame 70% fall in employment tribunal cases on fees’ *The Guardian* (31 January 2017) <<https://www.theguardian.com/money/2017/jan/31/employment-tribunal-cases-down-70-since-fees-introduced>> accessed 27 August 2018.

<sup>77</sup> Office for National Statistics, ‘Contracts that do not guarantee a minimum number of hours: April 2018’ (n 73).

<sup>78</sup> *R (UNISON)* (n 31).

<sup>79</sup> *ibid* [125].

<sup>80</sup> *ibid* [131].

<sup>81</sup> Jess Mant, ‘Neoliberalism, family law and the cost of access to justice’ (2017) 39(2) *J.Soc.Wel.& Fam.L.* 246, 247.

<sup>82</sup> Amnesty International (n 35) 8.

of Legal Aid Casework decides there is a risk of such a breach.<sup>83</sup> However, the scheme is woefully inadequate: in its first year in operation of the 1,315 applications made, only 16 were offered funding. As Amnesty International’s report on the impact of LASPO notes, this is a success rate of “just over one per cent”.<sup>84</sup> This is hardly surprising: the ECF application is made on a fourteen-page form which requires a detailed assessment of the merits of the case. This can take a lawyer between three and four hours, time for which they are not entitled to legal aid funding.<sup>85</sup> Indeed, the High Court declared the initial ECF scheme unlawful.<sup>86</sup> Although its revision has improved the arrangement marginally, the number of ECF applications (around 1,200 per year), is far lower than the 5,000 anticipated by the Ministry of Justice.<sup>87</sup>

A lack of legal aid stifles access to justice. As the Bach Commission report points out, “the law is meaningless unless people are supported to have the knowledge to understand it and the power to enforce it...if you recognise your problem has a legal remedy but don’t have the means to access the justice system on a fair footing with your adversary, then the outcome that is reached is unlikely to be just”.<sup>88</sup> The cuts to legal aid have led to an exponential increase in the number of litigants in person.<sup>89</sup> Our adversarial common law system makes this problematic: its navigation requires an understanding of the pertinent law and an ability to present a cogent argument to the judge. As well as this, the administration of a case is often complex: individuals are required to adhere to deadlines to file evidence, understand how to draft a position statement and how to fill out the forms for their case correctly.<sup>90</sup> This challenge should not be underestimated. In this context, it is unsurprising that often, the wronged party may relinquish their pursuit of justice. This is borne out by the data: as the Bach Commission report highlights, “the number of civil legal aid matters initiated is down 84 per cent from 933,815 in 2009-2010 to just 146,618 in 2016-17”.<sup>91</sup>

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<sup>83</sup> LASPO, s 10(3)(a).

<sup>84</sup> Amnesty International (n 35) 24.

<sup>85</sup> UK Parliament, ‘The damaging effects of legal aid reforms’ (*parliament.uk*, 19 July 2018) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66906.htm#footnote-117>> accessed 29 August 2018.

<sup>86</sup> In the case of *Gudanaviciene and Ors v The Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, [2015] 1 WLR 2247, the High Court found ECF was not compatible with Article 6(1) ECHR and Article 47 of the EU Charter of Fundamental Rights.

<sup>87</sup> See Amnesty International (n 35) 25.

<sup>88</sup> Bach Commission, ‘The Right to Justice: The Final Report of the Bach Commission’ (The Fabian Society 2017) 11 <[http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)> accessed 29 August 2018.

<sup>89</sup> Amnesty International (n 35) 37.

<sup>90</sup> *ibid* 38.

<sup>91</sup> Bach Commission (n 88) 10.



Thus, there is no doubt that LASPO restricts access to justice, and by the coalition government's own admission, the repercussions of the legislation fall disproportionately on women. The Equality Impact Assessment ("EIA") carried out by the Ministry of Justice during the consultation for the legislation conceded that "overall the proposals have the potential to impact a greater proportion of women";<sup>92</sup> using 2008-09 data, 57 per cent of the cases affected by the statutory changes would be brought by women.<sup>93</sup>

The effects of LASPO are more keenly felt by women because they are more likely than men to require recourse to the judiciary. The EIA revealed that nearly every area of reform was predicted to have a disparate impact on women.<sup>94</sup> This is particularly pertinent in private family law. In this category, 63 per cent of clients are women,<sup>95</sup> which reflects, inter alia, the financial asymmetry between men and women typical at the dissolution of a relationship.<sup>96</sup> The removal of family law from the scope of legal aid exemplifies the neo-liberal emphasis on individualism emblematic of our politics. In her work on the topic, Felicity Kaganas captures the sentiment well: "if [those engaged in family law disputes] insist on going to court they should be self-funding or self-representing; taking responsibility means one should not expect the state or the taxpayer to pay".<sup>97</sup>

### 3. *Domestic violence*

Although an inability to access justice may cause distress in all manner of circumstances, the failure to secure a just outcome in private family law matters – including child contact disputes and injunctions relating to domestic violence – is particularly harrowing for the (usually female<sup>98</sup>) litigant. In cases of domestic violence (overwhelmingly suffered by women<sup>99</sup>), without an adequate solution, the safety of women and, often their children, are at risk.

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<sup>92</sup> Ministry of Justice, 'Reform of Legal Aid in England and Wales: Equality Impact Assessment' (Ministry of Justice 2011) 24  
<<http://webarchive.nationalarchives.gov.uk/20111013060745/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-eia.pdf>> accessed 29 August 2018.

<sup>93</sup> *ibid* 127.

<sup>94</sup> *ibid*.

<sup>95</sup> *ibid* 49.

<sup>96</sup> *ibid*.

<sup>97</sup> Felicity Kaganas, 'Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy' (2017) 39(2) *J.Soc.Wel.& Fam.L.* 168, 183.

<sup>98</sup> 63 per cent of private family law clients are women. See Ministry of Justice (n 92) 24.

<sup>99</sup> Office for National Statistics, 'Domestic abuse in England and Wales: year ending March 2017' (Office for National Statistics, 20 December 2017)  
<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017>> accessed 26 August 2018.

Whilst domestic violence can be dealt with by the criminal law, in many instances, this can be inappropriate, because victims may be reluctant to criminalise their partner. Furthermore, the criminal law is flawed: there is a high attrition rate between arrest and conviction and, as Diduck and Kaganas note, the criminal law offers little support to victims,<sup>100</sup> for whom the best outcome might be “to change their circumstances”.<sup>101</sup> Thus, civil law solutions are an important part of the remedial toolkit.

The key civil safeguards for domestic abuse victims are contained in the Family Law Act 1996. This legislation provides for two types of injunction: non-molestation orders (prohibiting abuse) under section 42, and, per section 33, occupation orders, which regulate occupation of the family home.<sup>102</sup> In addition, victims might seek to protect themselves (and their dependent children) from domestic violence by other means: divorce or separation, to which financial orders and child arrangement orders are often integral. Thus, the tapestry of protection the law offers to victims of domestic abuse goes beyond the s.33 and s.42 orders.

Whilst LASPO section 9 (Part 1, Schedule 1) makes legal aid in relation to the Family Law Act injunctions available,<sup>103</sup> this is not the case for other family matters, except where there is evidence of domestic violence. In these cases, as the government website advises domestic violence victims: “You might be able to get legal aid if you have evidence that you or your children have been victims of domestic abuse or violence and you can’t afford to pay legal costs”.<sup>104</sup> To qualify for legal aid for the private family matters not automatically funded by LASPO, there are two hurdles to surmount: first, as with all civil legal aid, domestic violence victims must be poor enough to qualify for financial assistance (although, with legal aid applications in domestic violence cases, the Director of the Legal Aid Agency may waive the economic eligibility criteria).<sup>105</sup> The second condition, ushered in by LASPO, is proof that the violence occurred. This

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<sup>100</sup> Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Hart Publishing 2012) 576.

<sup>101</sup> *ibid* 569.

<sup>102</sup> *ibid* 578.

<sup>103</sup> LASPO, s 9.

<sup>104</sup> UK Government, ‘Legal Aid’ (*gov.uk*) <<https://www.gov.uk/legal-aid/domestic-abuse-or-violence>> accessed 26 August 2018.

<sup>105</sup> Legal Aid Agency, ‘Civil Representation: Guide to determining financial eligibility for certificated work’ (Legal Aid Agency, April 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/698224/guide-to-determining-certificated-work.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698224/guide-to-determining-certificated-work.pdf)> accessed 26 August 2018.

is narrowly defined (although in January 2018 the regulations were subject to tepid reform<sup>106</sup>), and contingent on obtaining verification in one of the forms prescribed by LASPO,<sup>107</sup> which means in practice, many survivors have been deprived of representation because they cannot produce the requisite evidence.<sup>108</sup> In a survey undertaken by Rights of Women, Women's Aid and Welsh Women's Aid, 38 per cent of respondents who had experienced or were experiencing domestic violence did not have the prescribed forms of evidence to access legal aid.<sup>109</sup> Although, following a successful challenge in the Court of Appeal,<sup>110</sup> the UK evidence requirements have been revised, they have not been removed, and it remains to be seen whether the new rules will be sufficiently ameliorating so as to allow a greater number of victims to access legal aid.

Applicants who are not able to obtain legal aid face a binary choice: not to litigate or to represent themselves. The latter is problematic: as I have discussed, the adversarial, formalistic and jargon-heavy nature of the judicial system means its navigation is onerous for those unfamiliar with the process. This is magnified in the case of women who have suffered domestic violence, who's dignity, self-worth and confidence may have been shattered; appallingly, without legal aid for representation, survivors may have to encounter their abusers in court.<sup>111</sup>

As detailed in an Equality and Human Rights Commission report, in the first nine months of 2017, 3,234 domestic violence applicants (27 per cent) going through the family courts were unrepresented. This is a marked increase on the figure for the same period in 2012 (before LASPO came into force), in which 1,309 individuals (16 per cent) went without legal representation.<sup>112</sup> The correlation between an increase in the proportion of unrepresented applicants and the

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<sup>106</sup> Owen Bowcott, 'MoJ scraps legal aid restrictions for victims of domestic violence' *The Guardian* (London, 4 December 2017) <<https://www.theguardian.com/society/2017/dec/04/moj-scraps-legal-aid-restrictions-for-victims-of-domestic-violence>> accessed 26 August 2018.

<sup>107</sup> For example, a letter from a GP. It has been reported that some GPs charge up to £100 for letters to confirm suffering is consistent with domestic violence. See Gareth Iacobucci, 'Ministers seek to stop GPs charging victims of domestic abuse for information' (2018) 361(k1684) *British Medical Journal*.

<sup>108</sup> Owen Bowcott, 'Legal aid shakeup hands lifeline to domestic violence victims', *The Guardian* (London, 23 February 2017) <<https://www.theguardian.com/law/2017/feb/23/legal-aid-domestic-violence-law-courts>> accessed 26 August 2018.

<sup>109</sup> Women's Aid, *Nineteen Child Homicides* (Women's Aid, 2016) <<https://1q7dqy2unor827bjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/Child-First-Nineteen-Child-Homicides-Report.pdf>> accessed 29 August 2018.

<sup>110</sup> *R (Rights of Women) v The Lord Chancellor and the Secretary of State for Justice* [2016] EWCA Civ 91, [2016] 1 WLR 2543.

<sup>111</sup> Rights of Women, 'Domestic Violence Legal Aid changes finally confirmed by Government' (*Rights of Women*, 12 April 2017) <<http://rightsofwomen.org.uk/news/domestic-violence-legal-aid-changes-finally-confirmed-by-government/>> accessed 26 August 2018.

<sup>112</sup> Equality and Human Rights Commission (n 46).

imposition of the evidence requirements is difficult to detract from. Although, as the government's advice on the topic explains, individuals may choose to be a litigant in person so they can "talk directly to the judge, jury or magistrates",<sup>113</sup> given that, in the context of domestic violence, women who have been victims of domestic abuse may be required to cross-examine, or be cross-examined by, their abuser, we can tentatively conclude that the new evidence requirements are the better explanation for the increase in unrepresented applicants.

The reality of abuser cross-examination brings into sharp focus the problems associated with making state assistance in dealing with domestic violence contingent on the victim providing evidence that it occurred. Indeed, it is arguable that this requirement is a breach of the UK's international rights obligations.

The UK is party to a number of human rights treaties which may make the evidence requirements difficult to justify. However, for the purposes of this article, the focus will be on the European Charter of Human Rights ("ECHR") and the UN Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"). This is because the former is the paramount international treaty in the UK rights context; its incorporation into domestic law by the Human Rights Act 1998 demonstrates a special commitment to the rights it enshrines. Moreover, the UK's CEDAW obligations are worth examining because these place specific duties on state parties to confront gender-based discrimination, of which domestic violence is a part.

*a) ECHR*

Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), and 8 (right to respect for private and family life) impose a positive duty on states to protect individuals from violence.<sup>114</sup> As Choudhry and Herring note, "a state will infringe an individual's right under Articles 2, 3 or 8 if it is aware that they are suffering the necessary degree of abuse at the hands of another and fails to take reasonable, adequate or effective steps to protect [them]".<sup>115</sup> This obligation is more compelling where the individual is in a position of vulnerability, as with victims of domestic abuse. Indeed, in the context of domestic violence, the European Court of Human Rights ("ECtHR") has found states to have breached the Convention where they have been aware

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<sup>113</sup> UK Government, 'Represent yourself in court' (*gov.uk*) <<https://www.gov.uk/represent-yourself-in-court>> accessed 26 August 2018.

<sup>114</sup> ECHR (n 33).

<sup>115</sup> Shazia Choudhry and Jonathan Herring, 'A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse' (2017) 39(2) *J.Soc.Wel.& Fam.L.* 152, 158.

that a victim of domestic abuse is suffering violence but fail to take steps to protect her, as in *MC v. Bulgaria*.<sup>116</sup>

As Choudhry and Herring shrewdly observe, in curbing the number of people who can obtain legal aid for family proceedings, the LASPO evidence requirements amount to a violation of ECHR rights per Article 6 (right to a fair trial),<sup>117</sup> because many litigants may be required to self-represent. Drawing on Strasbourg jurisprudence, the authors quoted above convincingly establish that the interference with human rights extends to cases where victims seek financial or child arrangement orders. These categories of cases fall outside the legal aid provision made available by LASPO, and require evidence that domestic abuse occurred to elicit funding.

In addition, interestingly, the authors put forward a compelling argument that Articles 3 and 8 are also contravened: as has been noted, unable to afford representation, victims may be cross-examined by their abuser, a process which may, at the very least, “perpetuate the abuse”.<sup>118</sup> At worst, in some cases “it would be impossible for the examination to proceed in a way which protected the psychological integrity of the victim, as protected under Article 8”.<sup>119</sup> In these circumstances, not only would the state have breached its duty to protect the Article 8 rights of individuals, but, in requiring parties to represent themselves, the state is complicit in a “continuation of that breach”.<sup>120</sup>

Their argument is persuasive. However, I would go further. Since women are more likely to be subjected to domestic violence, a systematic failure to deal with domestic violence adequately is sex discrimination, per ECHR Article 14 (*Opuz v. Turkey*).<sup>121</sup> In this context, LASPO engages Article 14 in conjunction with 2, 3 and 8. Indeed, there is a growing body of ECtHR decisions,<sup>122</sup> which have found, in conjunction with other ECHR provisions, violations of Article 14 in domestic violence cases, demonstrating “a recognition on the part of the Court that one of the principal causes of domestic violence is the structural inequalities within society”.<sup>123</sup> The Court has declared Article 14 to be in breach where the inertia of the state reflects a discriminatory attitude toward

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<sup>116</sup> *MC v Bulgaria* (2005) 40 EHRR 20.

<sup>117</sup> Choudhry and Herring (n 115).

<sup>118</sup> *ibid* 166.

<sup>119</sup> *ibid* 156.

<sup>120</sup> *ibid* 166.

<sup>121</sup> *Opuz v Turkey* (2010) 50 EHRR 28.

<sup>122</sup> See *ibid*; *Mudric v Moldova* (2013) ECHR 685; *TM & CM v Moldova* (2014) ECHR 81; *Kilic v Turkey* (2016) ECHR 592.

<sup>123</sup> Ronagh McQuigg, ‘Domestic Violence as a Human Rights Issue: Rumor v. Italy’ (2015) 26(4) EJIL 1009, 1021.

women,<sup>124</sup> and where there is a failure to understand the seriousness of domestic violence.<sup>125</sup> It is arguable that in requiring victims to provide evidence of the harm they have suffered in order to receive the necessary legal assistance, the UK government's attitude to domestic violence risks being similarly deficient. Certainly, as McQuigg notes, the ECtHR has, since *Opuz*, attempted to engage with a "gender-sensitive interpretation and application of [the ECHR's] provisions",<sup>126</sup> and it is not out of the question that, taken together with the Court's approach to legal aid under Article 6,<sup>127</sup> access to justice in domestic violence cases could be a new frontier of this approach.

*b) CEDAW*

The UK's approach to legal aid funding for domestic violence victims enshrined in LASPO is also discriminatory from a CEDAW perspective. CEDAW is an international agreement which aims to eliminate all forms of discrimination against women and, in so doing, moves towards a more equitable society. Relevant in respect to domestic violence are Article 5, which contains an obligation for states to tackle social and cultural practices which reinforce harmful stereotypes, and Article 16, which imposes a duty on state parties to eliminate discrimination within marriage and family relations.<sup>128</sup>

Certainly, as Diduck and Kaganas assert, "the roots of domestic violence can be traced to women's inferior status and to dominant constructions of masculinity";<sup>129</sup> violent men are "simply living up to cultural norms and endorse dominance and the enforcement of that dominance".<sup>130</sup> A failure to challenge these gendered patterns should be viewed as a failure to comply with CEDAW. As I have discussed, the LASPO evidence requirements make it more difficult for victims to use the state apparatus to deal with domestic abuse effectively and, as such, represent a regressive step in the UK's efforts to address toxic gendered socio-cultural practices.

Indeed, in 2013, the CEDAW Committee raised concerns that LASPO "unduly restricts women's access to legal aid", especially since "the Act conditions legal aid upon proof of...abuse

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<sup>124</sup> *ibid* 1021; See *TM and CM v Moldova* (n 122) para 62.

<sup>125</sup> McQuigg (n 123) 1019; See *Mudric v Moldova* (n 122) para 63.

<sup>126</sup> McQuigg (n 123) 1020.

<sup>127</sup> In *Steel and Morris v UK* (2005) 41 EHRR 403, the Court said a state may be required to provide legal aid where its absence deprives one party of the opportunity to present their case effectively, and the facts of the case mean a great deal is at stake.

<sup>128</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>129</sup> Diduck and Kaganas (n 100) 558.

<sup>130</sup> *ibid* 561.

suffered by victims”.<sup>131</sup> The Committee, which reviews periodical reports provided by the state parties and complaints concerning state compliance with the Convention submitted by individuals,<sup>132</sup> has been critical of states which place an onerous burden of proof on the victim in domestic violence cases. *VK v. Bulgaria* is an example of such an approach.<sup>133</sup> In this case, the applicant was unable to secure a protection order against her abusive husband because she was required to demonstrate “beyond reasonable doubt” that she had been subject to abuse.<sup>134</sup> Crucially, the entire history of violence was not taken into account: Bulgarian law stipulated that no more than 30 days could lapse between the incident occurring and the filing of the complaint; evidence obtained before this was disregarded. The Committee found that these demands meant the Bulgarian Court had placed an “excessively high” standard of proof on VK.<sup>135</sup> In their view, the approach “lack[ed] gender sensitivity” and “reflect[ed] the preconceived notion that domestic violence is to a large extent a private matter...which, in principle, should not be subject to State control”.<sup>136</sup> In perpetuating this stereotype, the Committee concluded that the Court was in breach of Article 5.

Although the UK’s legal aid requirements under LASPO are more lenient – evidence of domestic violence which has taken place within the last five years will be accepted – the case demonstrates the willingness on the part of the Committee to condemn procedures which hamper victims dealing with domestic violence and therefore stall progress toward eradicating it. Certainly, the LASPO evidence requirements lack gender sensitivity: they demonstrate a deficient understanding of the complexities of domestic violence, which a victim may be unable to ‘prove’.

Thus, it may be the case that the LASPO evidence requirements run contrary to the UK’s CEDAW obligations. Certainly, they do not represent a positive step towards securing the aims of the Convention. Rather than being used as a tool to combat discrimination, the law is reinforcing unhelpful gender stereotypes, and, given that these norms contribute to violence against women, they contradict the duties that CEDAW imposes.

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<sup>131</sup> UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland’ (30 July 2013) UN Doc CEDAW/C/GBR/CO/7, para 22.

<sup>132</sup> UN Women, ‘Committee on the Elimination of Discrimination against Women’ (UN Women, 2009) <<http://www.un.org/womenwatch/daw/cedaw/committee.htm>> accessed 26 August 2018.

<sup>133</sup> UN Committee on the Elimination of Discrimination Against Women, ‘Communication No. 20/2008, *VK v Bulgaria*’ (27 September 2011) UN Doc CEDAW/C/49/D/20/2008.

<sup>134</sup> *ibid* para 9.9.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid* para 9.11.

I have established that the domestic violence evidence requirements contained in LASPO curb access to legal aid and run contrary to the UK's human rights obligations. However, as well as the legal aid evidence requirements, there are other ways in which austerity has made it harder for women to access justice with respect to domestic violence. It is to these I will now briefly turn.

#### **4. *The availability of shelters***

For Diduck and Kaganas, any response to domestic violence must be a holistic effort that enables abused women to “access support networks and housing” as well as legal remedies.<sup>137</sup> Non-legal solutions are especially important in the context of domestic violence because the paramount concern of victims may be an end to, and protection from, abuse; often, the law may not be the most effective way of achieving this end. For example, it is difficult to get an occupation order (s.33 Family Law Act 1996) without demonstrating that there has been severe violence,<sup>138</sup> even though domestic abuse includes a range of non-violent behaviours, such as emotional or financial coercion. Thus, protecting the legal rights of women affected by domestic abuse requires a response that goes beyond the law. These aspects of the state's administration have not been immune from austerity.

As a starting point, as I have discussed, austerity has made women poorer, which makes it harder for them to flee abuse: a lack of financial resources is often an obstacle to leaving an abusive relationship. In addition, between 2010 and 2016, as part of the fiscal package to reduce the deficit, central government grants to local authorities have diminished by 37 per cent in real terms.<sup>139</sup> Local councils have managed these reductions by limiting the number of services they provide. Amongst other things, this has grave implications for women's refuges, which are an important lifeline to women who suffer domestic abuse and, crucially, rely on local government funding to operate. Between 2010 and 2017, 34 refuges closed;<sup>140</sup> specialist centres, such as those for black and ethnic minority, disabled or homeless women, are the worst affected. For example, in Sunderland, the only provider of shelter to women fleeing domestic abuse has had its funding slashed by a third since 2010. In response, its services tailored to the homeless and those with

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<sup>137</sup> Diduck and Kaganas (n 100) 613.

<sup>138</sup> *ibid* 594.

<sup>139</sup> National Audit Office, ‘The impact of funding reductions on local authorities’ (National Audit Office, November 2014) <<https://www.nao.org.uk/wp-content/uploads/2014/11/Impact-of-funding-reductions-on-local-authorities.pdf>> accessed 26 August 2018.

<sup>140</sup> The Week, ‘Fact Check: The truth about British funding for women's refuges’ *The Week* (UK, 12 December 2017) <<http://www.theweek.co.uk/90364/fact-check-the-truth-about-british-funding-for-women-s-refuges>> accessed 26 August 2018.



mental health issues have been cut, and, faced with the council rescinding their grant in full, the shelter is set to close.<sup>141</sup> Moreover, research by Women’s Aid has found that 60 per cent of referrals to refuges were declined in 2016-17, typically due to a lack of available space.<sup>142</sup> Without refuges, and with nowhere else to go, women will find it more difficult to escape domestic violence. In this way, austerity has impacted access to justice for domestic abuse victims.

In *VK v. Bulgaria*,<sup>143</sup> the Committee considered that the unavailability of shelters for the applicant and her children constituted a violation of CEDAW under Article 2 (c), which requires state parties “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.<sup>144</sup> This includes “a sufficient number of State-funded shelters” offering safety to women.<sup>145</sup> The refuge landscape is less bleak in the UK: Bulgaria had just three shelters for domestic violence victims;<sup>146</sup> there are over 500 in the UK. Nonetheless, it would be difficult to argue that the UK’s provision of shelters is sufficient to deal with the number of women who require access to such services. Not least because the fact remains that two women are killed each week by a current or former partner.<sup>147</sup> Thus, the lack of shelter spaces for women – exacerbated by austerity – is an obstacle to women’s access to justice and arguably contrary to the UK’s CEDAW obligations.

## E. THE FUTURE

There are no easy answers to the challenge austerity poses for access to justice. However, there are some innovative ideas in the literature which the polity would do well to engage with, which will be considered in the following.

It goes without saying that any attempt to equalise access to justice requires taking steps to alleviate poverty and improve economic circumstances: we must commit to a radical conception

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<sup>141</sup> Frances Ryan, ‘They’ve endured domestic violence. Now they’re victims of austerity’ *The Guardian* (London, 26 January 2017) <<https://www.theguardian.com/commentisfree/2017/jan/26/endured-domestic-violence-victims-austerity-sunderland>> accessed 26 August 2018.

<sup>142</sup> Women’s Aid, ‘SOS: Save Refuges, Save Lives’ (*Women’s Aid*, 2018) <<https://www.womensaid.org.uk/what-we-do/campaigning-and-influencing/campaign-with-us/sos/>> accessed 26 August 2018.

<sup>143</sup> UN Committee on the Elimination of Discrimination Against Women, ‘Communication No. 20/2008, *VK v Bulgaria*’ (n 133).

<sup>144</sup> CEDAW, art 2(c).

<sup>145</sup> UN Committee on the Elimination of Discrimination Against Women, ‘Communication No. 20/2008, *VK v Bulgaria*’ (n 133) para 9.16.

<sup>146</sup> UN Committee on the Elimination of Discrimination Against Women, ‘Communication No. 20/2008, *VK v Bulgaria*’ (n 133) para 3.9.

<sup>147</sup> Office for National Statistics, ‘Domestic abuse in England and Wales: year ending March 2017’ (n 99).

of social justice which reckons with the underlying power imbalances that structural inequalities produce in order to ensure individuals have the socio-economic capital to recognise their problem is a legal one. As a starting point, the welfare state must be reformed so as to address need: that is its purpose. The changes to the benefits system ushered in by austerity have broken the link between benefit and need. The benefits cap and the two-child benefit limit illustrate this particularly well. As Lady Hale noted in *SG and others v. Secretary of State for Work and Pensions*,<sup>148</sup> in the context of the benefit cap, claimants will “by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children”.<sup>149</sup> In its report, ‘We can solve poverty in the UK’, the Joseph Rowntree Foundation asserts: “when someone is working as much as society expects, the combination of in-work benefits, minimum wages and tax policy should enable them to escape poverty”.<sup>150</sup> This is difficult to argue with. To this end, the report suggests the welfare system be reformed, including, amongst other things, increasing working age benefits in line with the cost of essentials, removing the two-child benefit limit. Importantly, because many people in poverty are also in work, the report recommends improving the minimum wage, improving the supply of genuinely affordable housing and increasing the availability of quality and inexpensive childcare. There are many other possibilities for constructive reform, and within the confines of this article, I am able to consider the options only briefly.<sup>151</sup>

In addition, access to legal aid needs review. In his work on the topic, Tom Cornford argues that “something like a National Health Service for access to justice” is required.<sup>152</sup> an ‘NJS’. However, the author envisages an important difference: “whereas it remains possible to pay for private health care, it ought to be impossible to obtain legal services outside the scheme of state assistance”.<sup>153</sup> Richard Abel proposes a similar solution which involves “socialising” the legal profession, in other words “subsidising lawyers for those who lack them and withdrawing lawyers from those who have them”.<sup>154</sup> Like Cornford’s idea, Abel’s proposal is convincing because, by

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<sup>148</sup> *R (SG and others)* (n 52).

<sup>149</sup> *ibid* [180].

<sup>150</sup> Joseph Rowntree Foundation, ‘We can solve poverty’ (Joseph Rowntree Foundation, 6 September 2016) 27 <<https://www.jrf.org.uk/report/we-can-solve-poverty-uk>> accessed 27 August 2018.

<sup>151</sup> See *ibid* for a more in-depth examination.

<sup>152</sup> Cornford (n 20) 36.

<sup>153</sup> *ibid* 35.

<sup>154</sup> Abel (n 27) 12.

improving access to legal advice for the poor and middle class and curbing access for the most affluent, the idea takes a bold step towards securing equal access to legal advice.

Moreover, enshrining the availability of legal assistance in an NJS acknowledges the essentiality of access to justice, which is a special case of government responsibility. As Lady Hale observed extra-judicially, “access to justice is even more important than access to other public services”.<sup>155</sup> In *UNISON*, Lord Reed was unequivocal on this point: “the courts do not merely provide a public service like any other”.<sup>156</sup>

There are compelling critiques of installing an NJS, not least the practical and political difficulties of introducing such a scheme, and these should not be understated. Indeed, Abel acknowledges the challenges faced by a radical answer to the access to justice question in his paper, asserting that his proposal should be understood “heuristically, as a mental exercise”.<sup>157</sup> That said, Cornford and Abel’s ideas are underpinned by a conviction that we should be mindful of upholding what is right in principle, which is particularly persuasive in the context of access to justice since, as I have noted, it is the bedrock of our democracy. An understanding of this is absent from the UK’s current approach, which “involves the effective abandonment of the ideal of equal access as utopian or impossible of attainment”.<sup>158</sup> Whilst, as Cornford points out, the introduction of an NJS is, at present, “unlikely”,<sup>159</sup> this does not consign the idea to being a heuristic one for eternity: it would be a mistake to view it as such.

## F. CONCLUSION

As this article establishes, austerity measures have adversely affected women’s access to justice. Not only have women paid a disproportionate price for the UK’s supposed fiscal “health”, but the outcome of the cost saving reforms undertaken by the Ministry of Justice has had a particularly detrimental effect on the ability of women to access justice. This has been especially damaging for women who suffer domestic violence, to the extent that the UK is infringing the ECHR (per Articles 2, 3, 8 and, crucially, 14) and contravening its obligations under CEDAW.

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<sup>155</sup> Baroness Hale of Richmond, ‘Magna Carta: did she die in vain?’ (Grays Inn, 19 October 2015) <<https://www.supremecourt.uk/docs/speech-151019.pdf>> accessed 15 July 2019.

<sup>156</sup> *R (UNISON)* (n 31) [68].

<sup>157</sup> Abel (n 27) 12.

<sup>158</sup> Cornford (n 20) 35.

<sup>159</sup> *ibid* 38.

If the UK is to take its human rights obligations seriously, urgent action is required to both address structural disadvantage and reform legal aid provision so that it is a better tool for delivering justice. Certainly, it is heartening that the inadequacy of the legal aid scheme is increasingly recognised by politicians. The government has promised to review LASPO,<sup>160</sup> and the 2017 Labour Party manifesto promised to remove the domestic violence evidence requirements, legislate to prevent the cross-examination of victims by their abusers, and consider reinstating other legal aid entitlements.<sup>161</sup>

However, given the current government's disdain for legal aid and the myopia which characterises its approach to access to justice, it is not unreasonable to assume that its review of LASPO will achieve very little. Even the Labour manifesto's proposals, although welcome, do not go a long way to address the inequality in accessing the justice system produced by austerity. Much more is required.

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<sup>160</sup> New Law Journal, 'Lawyers welcome LASPO review', (*New Law Journal*, 3 November 2017) <<https://www.newlawjournal.co.uk/content/lawyers-welcome-laspo-review>> accessed 28 August 2018.

<sup>161</sup> The Labour Party, 'For the many, not the few' (The Labour Party, 2017) <<https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf>> accessed 29 August 2018.