Can court fees ever be consistent with access to justice and the rule of law?

Magna Carta boldly proclaimed in 1215 that 'to no one will we sell, to no one deny or delay right or justice' (Cited in Bingham, 2011, p. 10). 800 years later, is justice being denied to those who cannot afford it? Are court fees incompatible with the rule of law? This essay will examine the issue from four perspectives. First, it will reflect on the moral and legal principles that underpin the concepts of access to justice and the rule of law, drawing on the writings of Ronald Dworkin and Tom Bingham. Second, it will consider the economic and political factors behind the Government's policies on court fees and state-funded legal aid. Third, the practical effects of those policies and the implications for access to justice will be evaluated. Fourth, the law on court fees will be outlined following the Supreme Court's ruling on *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 ('*Unison*'). Governmental, parliamentary, judicial and legal professional sources will be used. From these four themes a summary and a conclusion will be offered.

The importance of people's rights was addressed by Dworkin (2014, p. 547) in *A Trump Over Utility* where he asserted that rights are 'trumps over some background justification for political decisions that states a goal for the community as a whole' and it would be wrong for officials to violate those rights even if the rest of society would benefit. The centrality of the rights of individuals has a long pedigree in Western thought, including Locke, Kant and the constitutions of 18th century revolutionary America and France (Freeman, 2014, pp. 500-501). This was challenged by Bentham

and the utilitarians who advanced a goal-based theory commonly expressed as 'the greatest happiness of the greatest number' (Freeman, 2014, p. 196). A rights-based approach would logically regard court fees and other litigation costs as impeding an individual's exercise of rights. Conversely a utilitarian might argue that most citizens - the taxpayers - would benefit if the civil justice system were wholly funded by the minority who actually use it, even if the imposition of fees excluded some from applying to the courts. But this utilitarian argument is false on two grounds. First, following Dworkin's principled thought, the majority's preference must not prevail when it involves overturning the minority's fundamental rights. Which rights are fundamental is often contentious, as we have seen recently with same-sex marriage and assisted-suicide. But access to justice, that is the ability of all people to seek remedies through the legal system for wrongs committed, is surely one as without it other legal rights are unenforceable and useless. To impose the tyranny of the majority on the minority is to deny our equality as human beings. Second, an empirical approach: general happiness is in fact enhanced if everybody can apply to the courts. It helps preserve public order as otherwise some complainants might turn to unlawful and violent alternatives. It develops the law though precedent and statutory interpretation. It promotes economic development by providing stable means to resolve commercial disputes. These lines of reasoning suggest that court fees are incompatible with access to justice.

Bingham (2011, p. 8) identifies the core of the rule of law as that 'all persons and authorities…should be bound by and entitled to the benefit of laws…publicly administered in the courts'. This he derives from the tradition of the 1689 Bill of Rights,

the 1948 Universal Declaration of Human Rights and other landmarks in the development of the rule of law (2011, pp. 10-33). From this core he develops eight supporting principles, including that courts should be available to resolve civil disputes at reasonable cost and speed (2011, p. 85). This implies that court fees, and litigation costs generally, must never prevent anybody from using the courts.

Economics and politics have their own impetus. An enduring truth is that the country's expectations of Government exceed the means at its disposal. There are many demands on the state's resources but also limits on the levels of taxation. Bingham quotes one scholar's assertion that the case for legal aid is paramount because the state is responsible for the law (2011, p. 87). No doubt doctors, soldiers, teachers and others would say that their fields of endeavour deserve priority. Any Government must make choices based on its political beliefs and recent ones have sought to increase revenue from court fees and to reduce legal aid spending, policies that impede access to justice.

The Government's main reason for introducing or increasing fees was to reduce the net cost to the taxpayer of running the courts and tribunals, about £1.2 billion in 2015/16, which it believed to be unsustainable, arguing that more of the burden should be on the users (Ministry of Justice ('MoJ'), 2016, p. 3). In a paper on probate fees the Government pointed out that there have been court charges since the 13th century (MoJ, 2017, para 8). Charges can be fair: for example wealthy companies using the courts to settle a £100 million contractual disagreement should pay the court's costs.

The House of Commons Justice Committee's ('JC') 2016 report on court and tribunal fees identified additional Government objectives in the case of employment tribunals ('ETs'): to encourage alternative dispute resolution processes, to discourage vexatious claims and to maintain access to justice through the remission schemes that exempt some from paying (JC, 2016, para 36). The Committee did not in principle oppose charging fees, believing that they would instil discipline in potential claimants and that users should contribute to the costs, but it stressed that the amounts charged must not prevent people accessing justice (JC, 2016, para 45).

Both the Justice Committee and the Supreme Court evaluated the practical effects of ET fees. Following their introduction in 2013 - with the main charges set at £390 for simpler claims and £1,200 for the more complex - the number of ET cases fell by almost 70% (JC, 2016, paras 8 and 61). The Committee concluded that the high fees prevented many claimants from pursuing valid cases (JC, 2016, para 69). The Committee also heard evidence that some employers may not have negotiated to resolve disputes with their employees knowing that the fees discouraged claims being brought to the tribunal (JC, 2016, para 64), undermining the parties' relationship and respect for the rule of law. The Supreme Court had similar findings in *Unison,* describing two hypothetical scenarios showing how some families would have to make unreasonable sacrifices to afford the fees (paras 50-55). The Court also found that the remission scheme was ineffective, that the revenue from the fees was much less than the Government had expected because of the large drop in the number of cases, that unmeritorious claims had not been especially reduced, and that higher fees had not

brought about earlier dispute resolutions (paras 43, 56, 57, 59 and 95). So not only did ET fees deter access to justice, but the other objectives were not met.

The Justice Committee also considered the Government's proposal to increase immigration tribunal fees by 600%, expressing concern that higher fees would bar often destitute applicants from challenging the state on decisions concerning their immigration or asylum status, potentially pushing vulnerable people to obtain money by unsafe or illegal work (JC, 2016, paras 90-92). On divorce, the Committee felt a fee increase to £550 - about double the actual cost to the court - was unjustified and was effectively a divorce tax on a captive market (JC, 2016, paras 87 and 89). The Government rejected the Committee's views on both immigration and divorce, contending that the remission schemes would protect those unable to afford the fees (MoJ, 2016, pp. 7-9), but the Supreme Court's negative opinion of ET remissions may raise some doubt over this.

The impact of fees on people's ability to seek remedies should also be considered in the context of changes to the provision of legal aid. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the scope of state-funded aid for legal advice and representation, and tightened the means and merits testing. Most cases involving housing, welfare, employment, immigration, debt and medical negligence were excluded, and aid for judicial reviews and child custody cases restricted (Halsbury's Law Exchange ('HLE'), 2016, pp. 2-3). Professional advice is often necessary to pursue a case properly and the legal aid cuts, combined with the high fees, have had a severe adverse impact on access to justice and the rule of law. The Act led to a two-thirds drop

in the number of people helped by civil legal aid, excluding court representation, and nearly a 90% fall in social welfare cases (HLE, 2016, pp. 1-2). The Law Society (2017, pp. 6 and 12) highlighted the effect on children and young people with an estimated 75,000 losing their entitlement each year, and the creation of legal aid deserts - areas of the country with little or no assistance available through legal aid. Meanwhile the Government is investing some £700 million to modernise the courts and tribunals so that they work more effectively for everyone (MoJ, 2016, p. 3); it remains to be seen to what extent this will reverse the deterioration in access to justice.

The law on court and tribunal fees was the subject of the *Unison* judgement. The issue before the Supreme Court was whether the ET fees were unlawful because they restricted access to justice (para 1). ETs are the only forum for most employment disputes (para 2) and their fees are equivalent to court fees. The Court echoed Bingham, insisting that unhindered access to the courts is a constitutional right and an essential part of the rule of law without which the laws made by Parliament would be pointless and Parliamentary elections a 'meaningless charade' (paras 66 and 68). Constitutional principles, the writings of legal scholars and judicial rulings reaching back to Magna Carta were invoked (paras 73-85). The Court accepted that fees can be levied to help fund the justice system, but they must be affordable to everyone taking into account the available remissions (paras 86 and 91). The Court analysed the practical impact of the ET fees and concluded that they were prohibitive for many people on low or moderate incomes (paras 91-94). Even when affordable the high fees made low value claims economically unviable (para 96). The ET fees were therefore

ruled unlawful (para 98), a judgement consistent with the European Convention on Human Rights and with European Union law (paras 115 and 117). *Unison* not only quashed ET fees, it established the considerations that the courts will apply if other fee regimes are challenged and more generally strengthened the constitutional safeguards for the protection of fundamental rights against state encroachment, so its importance is far-reaching.

The question posed for this essay specifically concerns court fees. Five aphorisms summarise the position. All individuals have rights by virtue of their humanity. All individuals are entitled to have their rights protected by the rule of law. The legal system must provide the means to protect those rights by settling civil disputes through the courts without undue cost. A reasonable court fee can be justly charged to claimants who can afford it without hardship. Those who cannot afford the fee must be helped from public funds to ensure that they can exercise their right to legal remedies.

In conclusion, court fees can be consistent with access to justice and the rule of law but they - and other necessary litigation costs - must be such that the disadvantaged and vulnerable are not excluded but instead can experience, in Sir Henry Brooke's words, 'one of the most valuable rights a state can bestow on its citizens: good legal advice and access to a court' (HLE, 2016, p. 6).

Word Count: 1,970

References

Books

Bingham, T. (2011) *The Rule of Law*, London, Penguin Books.

Dworkin, R. (2014) 'A Trump Over Utility' in Freeman, M.D.A. *Lloyd's Introduction to Jurisprudence*, 9th edn, London, Thomson Reuters (Professional) UK Limited.

Freeman, M.D.A. (2014) *Lloyd's Introduction to Jurisprudence*, 9th edn, London, Thomson Reuters (Professional) UK Limited.

Cases

R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51

Legislation

Bill of Rights 1689

Legal Aid, Sentencing and Punishment of Offenders Act 2012 c 10

Magna Carta 1215

International Instruments

European Convention on Human Rights

Universal Declaration of Human Rights 1948

Other sources

Halsbury's Law Exchange (2016) 'A state of the nation report on legal aid: Can we safeguard access to justice?' [Online]. Available at: http://www.halsburyslawexchange.co.uk/ wp-content/ uploads/ sites/ 25/ 2016/ 09/ SA-0916-016-HLE-Event-Access-to-Justice-Paper-Final.pdf (Accessed 7 February 2018).

House of Commons Justice Committee (2016) 'Courts and tribunals fees' [Online]. Available at https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf (Accessed 28 February 2018).

Ministry of Justice (2016) 'Government Response to the Justice Committee's Second Report of session 2016/17: Courts and Tribunals Fees' [Online]. Available at: https://www.gov.uk/government/publications/government-response-to-the-justice-committees-second-report-of-session-201617 (Accessed 28 February 2018).

Ministry of Justice (2017) ‘Court fees: The Government Response to consultation on proposals to reform fees for grants of probate’ [Online]. Available at: https://www.gov.uk/government/consultations/fee-proposals-for-grants-of-probate (Accessed 06 March 2018).

The Law Society (2017) ‘Access Denied? LASPO four years on: a Law Society Review’ [Online]. Available at http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/ (Accessed 01 March 2018).