Towards a Just Society
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Law, Labour and Legal Aid

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This page sets out the Preface, Contents and Introduction to my 1999 book Towards a Just Society – the Introduction contains a summary of the general thesis of the book. Having been the policy "wonk", not my word, who worked between 1992 and 1997 putting together Labour's policy on legal affairs and the justice system, I thought this book would be a timely account of the historical development of Labour's legal affairs policy from the John Smith-led Labour Party through to New Labour and the immediate wake of the 1997 election victory. The politics relating to the legal system is too under-intellectualised – unlike the agonies poured over substantive law the management of the legal system is dealt with simply as a management question without much theorising. Socialists in particular have often treated the legal system as something inimical to them and something outwith their control. This book aimed to think a little more about some of the shibboleths of justice provision and to present a genuinely left-wing account of the reform of the justice system.

Preface

A wise old Labour politician once told me, rather confidentially, in the back of a London taxi pelting down Euston Road, that constitutional affairs and the reform of the legal system "will never become major political issues in this country". I thought then, as I think now, that he was wrong. Writing a year and a half after Labour's landslide victory in the 1997 General Election, Labour has begun to keep its promise to put reform of the constitution at the heart of its programme in the creation of the New Britain. The state of the legal system, and in particular the reform of legal aid, has become a staple in even the tabloid newspapers. The performance of the Lord Chancellor and New Labour king-maker, Derry Irvine, both in terms of his proposals for the reform of publicly-funded legal services and his taste in pineapple-studded, neo-Pugin wallpaper, has elicited the most pronounced satirical and analytical abuse directed at any Labour Cabinet Minister. Both factors have ensured that the politics of the legal system are at the forefront of British politics, alongside reform of the constitution.

The sub-title of this book, "*Law, Labour and Legal Aid*" indicates a central aim to place the issues of law reform and justice provision in the context of the broader discussion of regenerating the constitution and building the much-heralded "New Britain". In particular it considers the history of Labour's attitude to legal services policy. One issue that is explored in detail is the rejection of policies developed under the leadership of John

Smith which pointed towards the need for an integrated set of policies which looked at the justice system in the round. In my time advising the Labour Party on its justice affairs policy, there have been important fluctuations in the party's ideological stance on a number of issues affecting the rights of citizens. Of particular interest at the time of writing is the development of ideas surrounding the Blairite "Third Way" and, in particular for present purposes, the need for a public service ethos to emerge in the legal system.

The most difficult aspect of writing this book has been the composition of its title. In a few words, my aim was to summarise a disparate field of issues, both practical and theoretical, that would be raised in the text. The most common title for reports and policy documents in this area is "Access to Justice". Bodies as disparate as the Labour Party, the Bar Council, Lord Woolf, and the Consumers' Association have produced material bearing that legend. It is the common link between the many sound-bites coughed up in this area. In announcing his proposals for the introduction of conditional fees, Derry Irvine chanted the term "access to justice" a dozen times per interview in a manner reminiscent of someone composing an advertising jingle.

Despite its loss of currency through over-repetition, it is an important starting point. The first problem with the vast panoply of dispute resolution systems that are available in the UK, is that access to them is denied to many citizens. Denial of access is rarely a result of express, substantive denial of access to a remedy. Rather, it is a practical problem of cost, of politics and of allocation of public resources. The result is the prevention of many individuals and groups from being able to pursue their claims and receive the remedies to which they consider themselves entitled. The key to the protection of most forms rights in the UK is the legal system. For the most part, the issue is then the acquisition of legal representation. Many social welfare rights are not activated through the courts per se, but rather through the ever-growing labyrinth of tribunals, appeals procedures and alternative modes of dispute resolution that are available today. The most simple point is therefore that most people cannot afford lawyers and therefore are denied access, in real terms, to the system.

The issue of politics is then 'what resources ought to be made available to ensure access to dispute resolution'. In a perfect world, those who wish to bring claims would have access to the system by means of suitably-trained professionals able to guide them through substantive and procedural rules. This will only work if those professionals are inexpensive or, more realistically, if the state pays for the advice and expertise of those professionals. The problem of public resources is also one of cost - legal aid is far too expensive, as is the maintenance of the legal system, to be sustained in its current form.

The question of access also operates at a number of levels. While financial barriers are the first hurdle, there are further questions to do with the content of the law itself. This book is not designed to deal with all of the substantive legal issues which might arise, instead it attempts to focus primarily on rights to the home and the treatment of the family in its concluding sections. The entry point to this argument is again political. The content of statutory legislation is a question of politics and of constitutionality. Whether

there should be a Bill of Rights and the contents of that bill, are all important political questions. The further question is then what goes into the common law? The development of common law and equitable rights is a matter for the courts, and returns the vexed question of what is to be done with the judiciary. The focus here is on 'law' as a system. 'Access to law' could have been a title for this text - as an easy bookshelf categorisation as well as a description of the contents. However, this would have meant ignoring a range of dispute resolution systems which are strictly outside law, although they may involve lawyers or may have legal results and ramifications. 'Access to dispute resolution' then presents itself as a clumsy and obscure title - if moving further towards the heart of the matter.

However, the range of political questions requires some definition of the subject matter of the book beyond the systems. While 'Access to Systems of Dispute Resolution' pulls the subject matter further and further into the centre of the issue, it sounds like a title for a doctoral thesis not a book. More significantly, we have yet to mention the 'citizen' as the subject seeking to defend rights and enforce obligations in the legal and quasi-legal systems of dispute resolution. This book will at least shake hands with the categorisation controversy which surrounds the term "citizen". The constitutional lawyer will tend to talk of the rights of citizens but still nod back to the Royal prerogatives and acknowledge that the citizen is really a "subject" of the Crown in legal terms. While this talk of 'subjects' may appear unenlightened, it does contain the seeds of constitutional truth. The legal root of power obtains from mechanisms and ceremonies which still see us as 'subjects', although the British Nationality Act identifies us as 'citizens'. I am also conscious that this book will form part of the Cassell 'Citizenship and Law' series. Therefore, it could carry the title: 'Citizens' Access to Justice' or 'Citizens' Access to the Systems of Dispute Resolution'.

The most important element that then remains outstanding is some purposive notion of the reason for this system - some thesis. To reflect the forward momentum of the text in its title, there would need to be some contextualisation of the term 'justice'. While 'justice' is a laudable term, a book of this sort must necessarily occupy itself with some notion of what 'justice' is. Once 'justice' is discussed, it automatically starts to acquire inverted commas. Unfortunately, the title 'Access to "Justice"' (complete with inverted commas) simply seems too arched. Therefore, some qualification or exposition of the term 'justice' is needed. Justice can be defined in two directions at once. Either it can follow a primarily philosophical path, whose enduring complexity will generally fail to come down to cases. Alternatively, it can come down to cases right away and then struggle to reach any philosophical height greater than altruistic sentimentality.

The thesis behind this book is that it is more specifically 'social justice', in the centre left conception that will be developed below, that should be read into the general term 'justice'. So then, the title becomes 'Access to Social Justice'. A book which really intended this would need to look far further than law and its dispute resolving hinterland. It would need to consider social security benefits, housing, health, employment, education, the family and so forth. These concerns would be within the remit of the book but not capable of full treatment by it.

By now we have reached the following:- 'Social Justice through access to systems of dispute resolution'. Another approach would be to turn the structure around and talk instead of 'social justice through access to dispute resolution'. The temptation is now to call the book 'Susan' and leave it at that.[i] But the quest for the right title introduces some of the main concerns of this text.

The core of the dilemma for the democratic left has been the strife between notions of the individual and the social. With the growth of discourse centred on human rights and the need for the creation of constitutional settlements, the left has found itself caught between a suspicion of centralised power and a desire for communal action. Indeed the greatest export from the liberal Western states has been the democratic and constitutional ideal. The leftist compromise has therefore been the need to sacrifice some of the rights of the individual for the success of the social.

The definition of "the social" has moved towards a synonym with the term "the economy". As Thatcher pronounced that there was no such thing as society, the Right began to define the sphere of action above the individual as being about economic activity. Consequently, unemployment became an acceptable casualty of the achievement of communal, economic goals. The left in Europe has been beguiled into accepting the elusive goal of the "social market" as a result: meaning the achievement of monetarist economic goals but within a framework of generating social justice. The issue for this text is to unpick these attitudes to "the social" in the context of the achievement of social justice.

The title for the book in this rightist context would then have to be "law, liberty and the individual", reflecting the civil libertarian bent that is often given to the role of law as a protector from oppression rather than a tool of social cohesion. However, there is a need to consider the means of the enhancement of those rights and the means of the realisation of those individuals' goals. The creation of a political programme for government to achieve these goals requires an understanding of the social context in which individuals will seek to activate their rights.

The underlying conviction of this book is that the role of legal and justice systems is to act as a servant to all in society to converse about and to formulate their mutual rights and obligations. The concern of the justice system must be to enable the potential of the people to be unlocked. Therefore, the title of the book could become "people's access to justice", in the vogueish spirit of the Blairite government, to act in the name of all the people. However, given that the justice system is then a place to converse about rights and to formulate their practical application to specific circumstances and to specific conflicts, it is political in the broadest sense of that term. It is a conversation about power. Legitimacy is lent to action by means of its sanction from the law or the justice system. Therefore, the title becomes something to do with "people, power and social justice". For the civil libertarian, in the guise adopted by the Blair administration, this is action in the name of the protection of the people by means of empowering them as individuals.

However, if it becomes responsive to a political project perhaps it is concerned with the delivery of social justice by means of appropriate constitutional and legislative change which is required to be enforced by courts and tribunals such that the title becomes "social justice now". Perhaps that is a little too situationist, too much of a slogan. Its underlying purpose is to be found in another possible title: "achieving social justice". The notion of a viable project is captured by this title. It is important to understand that any social change that is attempted by means of the reform of the legal system must be intended as an achievable result rather than a vague aim for some time in the future. However, that title is too portentous and too optimistic for the reform of the legal system alone. The legal system, and the justice system more generally, are merely tools for litigants to establish their rights rather than the sole resolution of the discourse about the content of those rights. What is central to the discussion is the importance law has as the language in which liberal democracies talk about the nature of rights and the mechanisms for their enforcement. Linked back to the earlier consideration of the need for access, a composite title looks as follows: "achieving our potential - access to rights for the citizen".

The synthesis of the foregoing must be to see the justice system as a tool within which both government and citizens are able to generate and produce resolutions to conflicts and re-definitions of rights and obligations as part of the broader context of regenerating the British polity. There is therefore a sense of a processus, an ongoing movement towards a goal of social justice. In a modernist conception it could be said that a just society is something which could be measured and achieved by diligent application of policy. This book is somewhat more pessimistic of the chances of success. Rather, social justice is a goal to be reached for although possibly never attained. A talisman requiring development and improvement, without many concrete expectations that it is a standard which can be met such that sociologists and lawyers can close their offices and walk out into the sunlight.

Hence the eventual title of this book: "Towards a just society - law, Labour and legal aid". In the specific context of the new Labour, or *New* Labour, government, there is a need to set out the necessary course for the progress towards this goal of a just society in the context of access to law and the provision of publicly funded legal services. This is a book which seeks to map some of the ways in which ordinary citizens, individually or collectively, can move towards a just society.

This book is written by a Labour Party member, socialist, loyalist and activist in an attempt to contribute to the debate about delivering justice in Britain. Where it contradicts it is concerned to highlight our core values, where it argues it seeks to warn, and where it recommends it seeks to move us towards our shared conviction in the regeneration of a just society.

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Towards a Just Society: Law Labour and Legal Aid

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CONTENTS

Introduction

> *'It is social justice which requires that there must be access to the law for all'*
> - Tony Blair, 28th January 1995

The central assertion of this book is that reform to one part of the 'justice system' cannot achieve its goals in a vacuum from consideration of all other aspects of that system. As Tony Blair has said, and as John Smith said before him, the purpose behind reform of the justice system is the pursuit of greater social justice. The aim of any programme of reform must be to work towards a "just society".[ii] That involves an increase in access to the system. It also involves a programme of public education and a simplification of substantive legal rules. The procedures of court-based litigation must be streamlined - however, that will not provide a solution in itself. The British people must be brought closer to the means of dispute resolution as a means of enhancing their own liberties and of unlocking their own potential.

The defects in the current legal aid system

It seems to me that you cannot begin to talk about the English legal system without making some reference to Charles Dickens's *Bleak House*. The opening to that novel works every bit as well as an opening to this analysis of the shortcomings in the English system of justice. The following is culled from the opening page:-

> "London. Michaelmas term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. Implacable November weather. ... Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city. ... And hard by ... in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord Chancellor in his High Court of Chancery.
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> "Never can there come a fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition in which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth."
>
> "*Jarndyce -v- Jarndyce* drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to total disagreement as to all the premises."

The metaphor of "fog" is a particularly apposite one for the English legal system at the time of writing. The modes of dress and address have not changed since Dickens wrote of the Courts of Chancery (set in a time before even the Victorian era in which he lived).

Moreover, the confusion caused to ordinary people, let alone lawyers, by the complexity of law and legal procedure continues today. The "groping and floundering condition" in which the British citizen finds herself when confronted by legal matters flies in the face of any assertion that we live in a democracy where all are equally subject to law and protected by it. It would be better put to describe all as being *subjects* of the law. In our democracy, law created both by Parliament and by judges has replaced the monarchy as the locus of political power. A citizenry which is not able to know the laws that affect it, nor of the procedures of that legal system, are as oppressed as subjects of a monarch dispensing arbitrary justice.

Logically, the only institution which can stand in the way of this oppression is the legal profession, able to advise citizens how to respond to law and (in the case of judges) to interpret and apply law in a way that is fair. The fundamental issue is that the costs of bringing a dispute to law are so prohibitive that most citizens are unable to do so. Alternatively, if some money can be found to meet the fee, lawyers are able to drag out proceedings and increase cost and complexity such that many are forced into settlement against their real interests. In this way law is capable of being oppressive. The business of this book is to examine this democratic shortcoming and to explore some of the means of reforming the system to alleviate some of the problems that result. At a fundamental level, this is a book about social justice. A concept difficult to define in the abstract but dealt with for the purposes of this book as a result of ensuring equality of access to law and an equally accessible means for all citizens to activate and protect their civil rights.

As the introduction to Labour's policy document 'Access to Justice' says:-

> '... the principle of equality before the law ... is now under threat because, in practice, it is meaningless and worthless to the millions of people who can no longer get proper access to legal advice, assistance and representation.'[iii]

Both the legal system, and the legal aid scheme that funds it to the tune of £1.7 billion annually, are too reliant on lawyers and expensive court-based litigation. The heart of the political problem is that there is no new money to spend on publicly-funded legal services and the maintenance of the court system. To manage the increase in demand and spiralling cost, there is therefore a need for a more fundamental refocusing of the structure of publicly funded legal services.

The grail for this discussion is a means of enabling all citizens to access legal and quasi-legal structures. Political priorities urge the system to find a way of achieving that without cost to central taxation. The current legal aid system, whether seen as a US-style judi-care safety net or as part of the welfare state, has become very unfashionable. In its place are urged a number of initiatives to place the onus on lawyer and client to find alternative means of paying a lawyer's fee - whether based on insurance or a parcelling out of the winner's award of damages. However, it appears that there is no single replacement for a legal aid system funded directly out of taxation, by contributions from clients and through costs awards, which will meet this book's call for greater social justice. There is no single, comprehensive system of justice provision in this jurisdiction or in any other which could

replace legal aid in its entirety. The question is, then: how can legal aid be provided differently in particular types of case so that the citizen receives an equivalent or improved form of representation and justice, in line with the pursuit of social justice. And, furthermore, what fundamental alterations can be made to the courts and tribunal systems to improve their responsiveness to the needs of ordinary citizens.

As considered in the remainder of this book, it is possible that the development of franchising of legal aid services can contribute the control of cost and the monitoring of quality of legal advice and representation, despite having been formulated originally as a cost-cutting measure. The cost of legal aid can be monitored because the fees of these firms can be controlled by a dialogue between them and the Legal Aid Board as to the line between cost-effectiveness for the firm and for the Board. The result would be that by maintaining the level of the legal aid budget at present levels, more representation could be provided for more people than at present. Rather than rely upon central legal aid funds, there *may* be circumstances in which it would be reasonable for some parties to take out insurance against successful litigation. While some suggest movement towards a system similar to the Japanese system of compulsory insurance for health (payment through taxation to purchase insurance for legal costs), this movement away from the welfare state motivation of the 1949 Legal Aid Act is resisted on grounds that it transforms all citizens, weak as well as strong, into independent economic actors to be dealt with as consumers rather than afforded viable democratic rights as citizens.

In continuation of this political theme, it can be argued that where public resources are being used, there ought to be some public recognition that some types of case are of greater utility than others. The argument runs: why should a Centre-Left administration allow millions of pounds to be used by the apparently wealthy (as in the Maxwell litigation), when other taxpaying individuals are not able to bring actions against their employers using legal aid? The extreme cultural shift that the Blair administration's proposals for a Community Legal Service proposal represent, is personified most clearly in the movement towards a system of *vertical* eligibility for legal aid, rather than simple *horizontal* eligibility on the basis of income. These issues are developed in Part III *Publicly-funded Legal Services* below.

The essential element to be borne in mind about publicly-funded litigation is that legal aid is a payment of money from central taxation directly into lawyers' pockets. The question whether or not the legal aid bill is too high, is really a question about whether or not too much money is being paid to lawyers. The important measure to be taken is the number of citizens who are enabled to enter into the justice system and participate in the discourse about the nature and content of their rights and responsibilities, rather than whether or not lawyers ought to be entitled to receive higher fees from the public purse. Restrictive practices in the legal system which parcel out work between QC's, junior barristers and solicitors, nothing less than an informal cartel formed by professional expectations, maintains standard fees at a high rate which leads to the current high level of the total legal aid bill. It is important to consider the extent to which voluntary agencies and advice agencies should be enabled to provide these services and make claims on the legal aid fund where they can demonstrate the necessary competence. It

will be argued that the deconstruction of these restrictive practices are necessary to improve the democratic rights of ordinary people. The acid test must be the quality of the justice that is made available to every citizen and not the commercial viability of the legal industry.

The reform of civil litigation procedures

The thrust of the reforms and alterations proffered by the lawyers themselves is for a tinkering with the detailed rules of their procedures. The irony of technocratic restructuring as a sop to the political need for fundamental change, is that the lawyers will insist on retaining their Regency codes of dress and Edwardian modes of address so that the practice of law remains as rarefied as ever it was. Subtle changes to the Rules of the Supreme Court will only have an impact at the margins for some of those who are currently able to litigate in any event. It will do little to increase access or secure broader social justice.

The example considered in some detail in Part IV *Components of Delivery* is the report prepared by Lord Woolf into civil litigation procedures. The easy criticism of the Woolf Report into the reform of civil litigation is that his strictly procedural reforms alone are unlikely to make any more litigants come to law. The problem for litigants is often not the concern about the delay involved in litigation, but rather the cost of paying for the first consultation with a lawyer at all. One particularly regrettable feature of the Woolf Report, however, is that the importance of a case is not necessarily to be measured by reference to its significance to the parties but rather by reference to its cash value. The very fact that a litigant will be required to rebut a presumption of lack of importance merely underlines the fact that those of restricted means are being relegated in the juridical scheme of things, at the expense of high-cash worth commercial litigation. The game is exposed in that foundation stone of Lord Woolf's recommendations. The instinct for the lawyer in coming to the reform of the law is to measure the profit involved in different types of case and to work backwards from there.

Lord Woolf's fundamental aim was "to improve access to justice by reducing inequalities, cost, delay, and complexity of civil litigation and to introduce greater certainty as to timescales and costs".[iv] There are also a tranche of specific objectives within that broader remit. Lord Woolf has expressed his opinion to be that the system of civil justice ought to be: "accessible, efficient and just".[v] He described the current system as being "expensive, slow, uncertain and unequal".[vi] The last identified problem is interesting. It has hints of the statement of aims of the Legal Action Group: that there be "equal access to justice for all". In Lord Woolf's opinion, people are not afforded an equal opportunity of justice if the system operates to deter them from seeking or obtaining access to justice.

One central issue explored in *Components of Delivery* is between judicial control of litigation and party control of litigation. Is it an interference by the judges to set down

timetables for the conduct of litigation? The answer to this question might depend on a more fundamental view of the role of the civil legal system in this regard. There are two competing views. Woolf considers that involving judges at an earlier stage will increase the likelihood of the issues being defined sooner and the parties reaching settlement. Zander's view is that involving judges at an earlier stage will increase the cost of litigation by requiring parties and lawyers to attend court sooner in cases which would probably settle in any event. He argues that at present more than 50% of cases settle without court order.[vii] Therefore, the introduction of judges into the decision of these cases is more likely to impede settlement than to hasten it. The social role of law is the key question here. While there is no denying the extent of the crisis of feasibility facing the English legal process at present, there is a great danger of ignoring the purpose of that same system.

Civil law is generally treated as being an homogenous entity. The Woolf Report treats in this way for the most part. For a lawyer, it is easier to think of one case as being the same as any other. It has the happy side-effect, at least superficially, of removing any hint of bias. Unfortunately, as set out earlier, the current organisation of the legal system means that there is a power imbalance in the system at the moment. What is necessary is the disaggregation of types of case. Rather than seeing all litigation as being the same, it is only possible to remove imbalance by recognising the differences between cases.

One good example is the need to treat personal injury cases differently from other types of litigation. The problem with personal injury litigation is that most cases will settle. By requiring parties to go before a judge at an early stage in the proceedings will lead to a front-loading of costs and prevent early settlement in many cases. The way in which this form of litigation is necessarily conducted (relying on the production of expert evidence which frequently removes the need to go to court) marks personal injury cases out as needing separate treatment. This is another example of the need to look at cases vertically and not horizontally.

Alternative dispute resolution

The over-concentration in legal affairs policy on court-based remedies, which are overly expensive and inaccessible for most citizens, has created the need to introduce alternative methods of more *appropriate* dispute resolution. Where law prevents access to viable solutions and remedies, it denies the litigants access not only to their rights but also access to their own potential. The argument that is classically put is that alternative dispute resolution offers some capacity to think more constructively about the resolution of disputes.

Two main concerns arise. First, some institutions and groups of economic actors use alternative means of dispute resolution to keep their disputes apart from the courts and thus privatise their own fields of endeavour. One prolific example of this is a large amount of work done by arbitrators and disciplinary panels in financial markets in disciplining traders who have transgressed exchange rule-books. The danger is that the law's control is

abrogated if disputes are not taken to law but rather to some insider who interprets the market's own rules as the market sees fit. The second concern is that some tribunals are created to deal typically with disputes concerning the poor or disadvantaged, such as Social Security Tribunals, where lawyers are discouraged from appearing. In these contexts, the dispute resolution procedures appear to be de-skilled and the concerns of the poor to be subjected to a "second class" form of justice. Alternative dispute resolution therefore raises concerns at both ends of the spectrum as well as offering a much-vaunted means of enabling citizens to access justice inexpensively and rapidly.

As considered below, there are a number of senses in which the re-organisation of advice agencies and the broader use of computer-based technology also offer a means of opening up access to justice to citizens in alternative ways. The introduction of ground-breaking, new technology will undoubtedly revolutionise the conduct of litigation and facilitate a reduction in the pressure on central taxation. The re-organisation of Law Centres, Citizens Advice Bureaux and the other private charitable organisations which offer similar services, is necessary to co-ordinate the scarce resources which exist in terms of equipment, reference materials and human expertise. The use of this technology will enable the advice agencies to offer a unique new service that will be in great demand from ordinary people.

A ministry of justice

Amid this maelstrom of calls for change, and potential avenues for change, there is a need to co-ordinate justice policy more efficiently and accountably. The democratic problem surrounds the role of the Lord Chancellor as speaker of the House of Lords, senior judge, Cabinet minister and political apparatchik, rolled into one body. There is therefore a fusion of constitutional roles in one place. Developments under Lord Irvine in relation to the powers of the Lord Chancellor personally to approve rights of audience in court indicate an ever more disturbing accumulation of power in one place.

For a socialist, the creation of a central Ministry of Justice offers a suitably state-ist response to the problem. Matters of justice should be the responsibility of an elected, Cabinet minister who is accountable directly in the House of Commons. The creation of a central ministry would also recover the scraps of the justice system which are administered in other departments. The new Ministry of Justice proposed in Part V *Models for Reform* would organise the sharing of premises to reduce cost, and the extension of the support functions to ensure efficiencies that are translated to the citizen in a palpable improvement in the quality of justice received.

Policy concerning all the Industrial, Social Security and other tribunals must be centred in one place so that efficient working practices, costs savings and better administration can be concentrated together. Much of the cost saving in costs will come from "hidden" reforms to the legal system. A Law Foundation be created to examine the legal system, modelled on that in New South Wales. Its role would be to examine methods of improving access to justice and the reform of technical procedures which hamper access to justice or increase

cost unnecessarily. Similarly, a National Advisory Service is necessary to bring together the diverse functions carried out by local government, the CAB network, and law centres. In tandem with a form of National Legal Service, the ability of the citizen to receive advice and support can be greatly increased without great cost.

The political problem: rhetoric and resources

Before considering the detail of proposals to reform the legal system, it is worth considering the exigencies of day-to-day politics and the need to manage a public sector budget. The problem of control of the costs of the legal system (let alone the need for radical alteration of that system) had been an intractable one for the Major administration and promises to be equally challenging for the new Labour administration. The issue of budgets and system management are the bane of modern government. A statement made by Paul Boateng MP, when shadow spokesperson for legal affairs is illuminating:

> "The Labour Party's central aims and values focus on the need for strong communities which are able to sustain themselves as part of a successful society."[viii]

This attitude underlines the way in which politicians still want to *speak* about the aspects of government which they seek to *manage*: that is, they wish to conceptualise the problems rhetorically.[ix] The political problem is one of balancing ideological will with available resources. As will be considered later, the solution to balancing that equation may be to pursue bloody-mindedly the logic of that political rhetoric.

The focus of the new Labour government's proposals[x] is on "*the consumer of legal services*"[xi]. This highlights another potential problem with the future of the legal system in political terms. As the problem is seen as one of consumption of legal services, the civil liberties aspect of access to the most mundane forms of legal advice and assistance is constantly down-played. The legal system remains a system isolated within its own terms of reference - fenced off from the broader discussion of constitutional, political and national renewal.

The Labour Party's chief proposal to achieve this refocusing of resources is to create a Community Legal Service[xii] incorporating a radically reformed legal aid scheme and far greater provision for alternative dispute resolution. Coupled with this will be the reform of the franchising scheme, extended to control the cost of access to justice and to set high standards for the quality of services provided by franchise-holders. The renewed focus on the *consumer* of legal services must mean changes for the legal profession.[xiii] What it fails to hit upon is the need to focus on the end-goal of a just society and not on the trendy rhetoric of consumerism.

The heart of the political problem is that there is no new money to spend on publicly-funded legal services and the maintenance of the court system. To manage the increase in demand and spiralling cost, there is therefore a need for a more fundamental refocusing of the structure of publicly funded legal services. Labour party policy in this context has

undergone great change since 1992. It can be segregated into three distinct phases. The first phase is policy under John Smith, the second under the leadership of Tony Blair in opposition, and the third manifestation is policy under Lord Irvine as Lord Chancellor in the new Labour administration. It would be easy to over-emphasise the differences in these drifts in policy. There are some differences in detail. At the time of writing, Sir Peter Middleton has completed a review of civil justice and legal aid policy at the behest of the Lord Chancellor, Lord Irvine.[xiv]

New directions under Labour

There has been some rapid development of policy under Lord Irvine. The first notable factor is the determination of the new Lord Chancellor not to be bound by official party policy. The election manifesto was, necessarily, less detailed than *Access to Justice*, but an interview with the *Observer* newspaper soon after the election[xv], he set out some policy stances which appeared to be in conflict with published party policy. Foremost amongst them was the abolition of plans to reform judicial appointments. Proposals to introduce a lay voice into appointments to the bench and to the creation of new Queen's counsel, providing accountability in the selection process, are thus laid aside.

In *Theories of Social Need*, we shall examine some of the main underpinnings of the Third Way suggested for Anglo-American politics by politicians like Blair and non-politicians like Giddens. Giddens principal intervention in this debate[xvi] has reclaimed a number of important themes of the Left, such as equality, which had previously been thought lost in the sea of change. In examining the development of Labour government policy in this area, it will be important to ask why there is so little ideological linkage between the reform of law and of the constitution, with the progressive rhetoric of Blair and thinkers like Giddens, when there is so much obvious overlap in the subjects which they are discussion. In part this resolves itself in a lack of imagination among lawyers and policy-makers when considering the ways in which constitutional change will be *put into action* through law and quasi-legal structures. Indeed the position of the Lord Chancellor has become an interesting one since May 1997. His most famous public words, rather than being an express commentary on constitutional or legal reforms, has been his announcement that he considers himself to be in similar mould to Wolsey - the chancellor at the time of Henry VIII who ran the Kafka-esque Star Chamber and was ultimately beheaded.[xvii]

It would be of some great concern if the reluctance to embrace progressive policy-making in the area of legal affairs were the result of an all-powerful Lord Chancellor blindly staking out a programme of politically convenient cost-cutting, rather than surveying the orchard root and branch prior to cutting out dead wood and planting anew. The irony may prove to be, as developed below, that only radical and citizen-friendly policies of the left are capable of delivering greater access at proportionately lower cost.

[i] No wonder Beatrix Campbell plumped for 'Goliath - Britain's dangerous places' as the title for her excellent account of disorder and breakdown in our inner cities. Give a book a real name and let the reader discover the rest of the title.
[ii] The expression "a just society" is that used in the new Clause 4 of the Labour Party Constitution.
[iii] Labour Party, *Access to Justice* (London, Labour Party, 1995).
[iv] *ibid*.
[v] Speaking at the London School of Economics, on 30th January 1997.
[vi] *ibid*.
[vii] *Judicial Statistics*, 1994, p.30, Table 3.4. See, for example the *Report of the Personal Injuries Litigation Procedure Working Party*, (the "Cantley Committee"), Cmnd. 7476, 1979 para.9.
[viii] Sometime Labour Party spokesperson on legal affairs, speech to the Labour Party Conference, Brighton, October 1995.
[ix] As Robin Cook said: in opposition you wake up in the morning thinking about what you are going to say today; in government you wake in the morning thinking about what you are going to do.
[x] As expressed while in opposition, it should be noted.
[xi] As set out in numerous places in "*Access to Justice*"; Labour Party, 1995: see Appendix.
[xii] On the Community Legal Service, see *Models for Reform* below.
[xiii] See generally *Access to Justice* Labour Party policy document, *op cit.*, July 1995.
[xiv] A report published by completion as *Review of Civil Justice and Legal Aid. Report to the Lord Chancellor by Sir Peter Middleton* (Lord Chancellor's Department, September 1997).
[xv] *The Observer*, 27th July 1997.
[xvi] Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge, Polity Press, 1998).
[xvii] Lord Irvine's most infamous public spending decision is likely to prove to have been the decision to spend £59,211 on wallpaper for his official apartments; see inter alia *The Guardian* 2nd December 1997.