Access to Social Justice (1997)

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> "*It's the characteristic of our Western societies that the language of power is law, not magic, religion, or anything else.*"
> - Michel Foucault[2]

PART I - INTRODUCTION

Law and power

The only two groups of people who are able to access our justice system are the very wealthy or those who live on income support levels of income. The majority of British citizens, typically those who are in work or who have only modest savings, are unable to gain access to legal advice.

As Foucault maintains, the language of law is at the centre of the discourse of power in Western society. For the individual, it is in the arena of law that questions of rights and power are decided. Where there is no access to law, there is no power. Without power there are no effective rights and no real obligations. The issue of access is dominated by the lawyers themselves and by political decisions as to the availability of public resources. As Foucault said "it is as if even the word of the law could no longer be authorised, in our society, except by a discourse of truth."[3]

The legal system does not operate effectively at any theoretical level. The law does not work on the free market model which the Lord Chancellor's Department[4] has long considered that it does, or ought to. There is no such this as a "free market in legal services". A free market requires a broad range of suppliers who are able to offer comparable goods and services at a broad range of prices. Typically that range of prices will include a range of qualities of service, of back-up support, added extras on expensive models and budget features on the inexpensive.

A mature market in products like motor vehicles ensures that there are not only a broad range of vehicles used for a number of purposes (family saloons, long-distance cars for salespeople, executive cars for status, large vans for

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[1] This is a version of the chapter which was published in my contribution to Blackburn, ed., *Constitutional Reform Now* (Longman, 1998). It was written in 1997 before a large number of changes in the detail of the policies discussed although I consider that the policy and intellectual issues remain broadly unchanged.

[2] *Power / Knowledge: Selected Interviews and Other Writings 1972 -1977* (ed. Colin Gordon) Routledge, 1980, at p.201.

[3] *The Order of Discourse* [1971] in R. Young (ed.) *Untying the Text: A Post-Structuralist Reader* London: Routledge, 1981, at p.55.

[4] Under Conservative administrations, in any event.

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deliveries, lorries for road haulage) - such a market also enables a second-hand market so that most people in society are able to acquire some form of vehicle if they really require one. Even if they cannot afford such a vehicle, there is public transport (buses, trains and even taxis and ambulances).[5]

In the legal system there is no such market. There are publicly-funded legal services for those who are either very poor (legal aid) or those rich enough to appear very poor (legal aid for the apparently wealthy[6]). There is then legal service for those individuals rich enough to afford lawyers and for corporate entities wealthy enough to afford lawyers (large businesses, charities and so forth). For the rest of society there is no ability to access any other form of *legal* service.[7] There is no "budget" form of legal advice. Some High Street solicitors are prepared to cut costs to bring in business. Fees are always open to negotiation or are left on a contingency basis. However, those fees are never open to negotiation in the same way that even non-NHS dentists are prepared to charge only £10.00 for a consultation and check-up.

There are a number of reasons why there is no free market in legal services. First, professional restrictive practices.[8] Second, over-complexity in the system's rules and practices.[9] Third, the legal system operating as a closed system where lawyers dictate the substance and form of discourse.[10] Fourth, a lack of alternative mechanisms of dispute resolution.[11]

Beyond law and politics: connexity and social justice

While the legal system remains inaccessible for most people, society is changing profoundly. One impact on the legal system in the changed world is the growth of what Mulgan calls "connexity".[12] In his terms, despite this growing interdependence, institutions like the legal system are failing to connect with individuals by failing to provide them with access to remedies. As the world changes in this way, individuals are less able to protect their rights, to impose obligations on others or to forge new identities and connections.

The growth of inter-connectedness and the increased concentration on human rights raise the following sorts of problems:-

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[5] At the time of writing, in a coincidence of metaphor, the Lord Chancellor was reported (in the Guardian, Times and Telegraph) as referring to sharp increases in court fees bemoaned by many lawyers, as like moaning about an increase in vehicle excise duty when compared to the price of cars. It was interesting to hear the Lord Chancellor, attacking "fat cat lawyers" who earn enormous fees, when he himself was a recent alumnus of that feline club.

[6] See for example Lord Chancellor's Department consultation paper "*Legal Aid for the Apparently Wealthy*".

[7] Typically advice agencies do not have rights of audience before most courts and some tribunals - nor are their workers necessarily qualified to give legal advice.

[8] The nature of the professions is considered in more detail below.

[9] See the discussion of Lord Woolf's report into reform of the civil justice system below.

[10] See, for example, the discussion of Giddens and Teubner above.

[11] As set out below, there is a broad range of available dispute resolution but the discourse of substantive law remains the locus of political power.

[12] "*Connexity*: how to live in a connected world"; Geoff Mulgan, Chatto & Windus (1997).

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> "[T]he clearest sign of all of the heightening tension between freedom and interdependence is that in much of the world today the most pressing problems on the public agenda are not poverty or material shortage (although these remain acute for large minorities), but rather the disorders of freedom: the troubles that result directly from having too many freedoms that are abused rather than constructively used."[13]

Having freedoms, but being unable to protect or advance them, is bound up with the growth of dispossession and disaffection in 1990's Britain. The modern legal system[14] makes little allowance for inequalities of bargaining power and the impossibility for most people of accessing legal advice. This is at root a political question, calling for a need to examine the possibility of social justice and equality without the possibility of recourse to law.

Law is, in theory, the great leveller. Only in the context of law is an individual is equal in power to any other individual.[15] Where the legal system denies access, then that ability to be equal is lost. Therefore, access to justice is not simply about law or about legal procedural rules, it is about rectifying the denial of social justice. It is about the provision or denial of basic civil liberties.

In Mulgan's terms, a "weakness infuses liberal politics which imagines the individual as a self-sufficient entity, not formed by society, and owing nothing to it, but rather heroic in his or her isolation, and defined by a series of claims that can be made on society".[16] That is true of the legal system. Concentration is poured onto the creation of models for codes of rights and obligations with little attention being paid to the manner in which those rights can possibly to be protected. The individual is not self-sufficient. Access to law or access to justice is necessary to achieve or create self-sufficiency.

The further problem for the legal system is the extent to which it is a closed system. In the power equation quoted from Foucault at the beginning of this essay, the individual who cannot enter the closed system of the law is denied power. Where power is discussed in the language of law, not being able to enter that discussion is a denial of power. In Teubner's terms:

> "'Legal reality' ... is a social, not a psychic construct ... it is the product of communications. And among social constructs, it is a highly selective one, since it has come into existence with an autonomous social system, the hypercyclically constituted legal system.'"[17]

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[13] Mulgan, *op cit.* p.5.
[14] The better appellation is probably a "postmodern legal system". As with Jameson's definition of the term "postmodern", our legal system is constantly self-referential, it pastiches old codes of dress and language constantly and draws for new ideas on old texts and habits of thought (see generally Frederic Jameson, "*Postmodernism, or the Cultural Logic of Late Capitalism*"; Verso, 1989).
[15] See for example the recent Mc Libel litigation where two individuals were able to defend an action brought by the megalithic Mc Donalds corporation, converting it into the longest trial in English legal history.
[16] Mulgan, *op cit.* p.9.
[17] "*Law as an Autopoietic System*", Gunther Teubner; Blackwell, 1993, at p.45.

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The law seals itself from other discourses about politics and constitution. Yet, it is through law that constitutional reform must be put into action.

PART II - LABOUR PARTY POLICY PROPOSALS

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."[18]

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.[19] 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[20] is on "*the consumer of legal services*"[21]. 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.

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[18] Sometime Labour Party spokesperson on legal affairs, speech to the Labour Party Conference, Brighton, October 1995.

[19] 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.

[20] As expressed while in opposition, it should be noted.

[21] As set out in numerous places in "*Access to Justice*"; Labour Party, 1995.

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The Labour Party's chief proposal to achieve this refocusing of resources is to create a Community Legal Service[22] 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.[23] 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.

It is also important to understand the personnel involved. Under John Smith, the Constitution and Democracy Commission was chaired by Tony Blair: this was the body charged with the development of Labour Party policy in this (and other) areas. Under Tony Blair's leadership Jack Straw succeeded to this position. The current Lord Chancellor (at the time of writing) Lord Irvine sat on all manifestations of this commission. At the time of writing, Sir Peter Middleton is carrying out a review of civil justice and legal aid policy at the behest of the Lord Chancellor, Lord Irvine.[24]

What follows will concentrate on published Labour Party policy in advance of the General Election, before considering the likely approach of the 1997/98 policy review.

Policy under John Smith

First, it is important to consider what was left out of the Smith era. Two important strands of policy were altered.

The first was the long-standing commitment to create a Ministry of Justice which would have its own Cabinet Minister and be accountable to a select committee in the House of Commons. It was the aim of that policy that the Lord Chancellor's Department functions be subsumed into the Ministry of

[22] On the C.L.S., see below.
[23] See generally "*Access to Justice*" Labour Party policy document, July 1995.
[24] 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).

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Justice. There were a number of reasons for this, but the core motivation was that, by creating a Ministry of Justice, justice policy would become the responsibility of an elected, Cabinet minister who would be accountable directly to 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 (such as some aspects of juvenile justice in the Home Office and Citizens' Advice Bureaux in the Department of Trade and Industry) and bring them under one roof. A number of savings to central spending budgets could be made by integrating many of the duplication of functions.

While the process of making legal affairs and citizens' rights reviewable in the Commons is important, 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. Binding these bodies together under one Ministry should enable their independence to be enhanced in terms of industrial and social policy while their administration and support functions are improved.

The scope of the Ministry of Justice would be to look broadly at a number of issues concerning access to justice from the point of view of cost, standard of service and the organisation of the justice system.

The new Ministry would be able the increased use of alternative methods of adjudication which are not as traumatic, expensive and prone to delay as courts for the user. A central ministry would ensure that the profession and the judiciary responded to the demands of the users of the system and of the new order of rights protection.

Most importantly, though, the justice function would be brought into the House of Commons for the first time, rather than being left to the Lord Chancellor in the House of Lords. With the creation of a new government ministry in the House of Commons, there would be a select committee which will enable MPs to oversee the running of the justice system.

The second change in Labour Party policy was the movement away from the consideration of bodies like a Law Foundation which would seek to bridge the gap between public and private partnership. A Law Foundation is an organisation which has been used to great effect in other jurisdictions as a non-governmental means of examining the way in which the justice system operates and of creating pilot projects for new techniques in dealing with disputes.

The justice system is currently riddled with examples of inefficiency and waste. Little work has been done to quantify the extent of this problem but on a purely anecdotal level there is a very large amount of time wasted during litigation in preparing documents and waiting for the case to be listed. Court buildings are also under-used in many circumstances. Much of the work could be carried on in court buildings when the courts are not sitting or in areas where there is capacity which is surplus to court requirements. There are clearly efficiency savings to be made in this area. Similarly, the new technology available now

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would require testing in an advice centre environment and integration into the court building infrastructure in many places so that the court buildings and the advice agencies could continue to be brought closer together.

The co-ordination of research work in this area and the pilot schemes that would be necessary for the above proposals to cope with the implementation of the Civil Justice Review, would be the responsibility of the Law Foundation. By having the Law Foundation exist separately from the Ministry of Justice, it is possible for the profession, the advice agencies and consumer organisations to feed into the innovation process their individual concerns, and thus ensure that the justice system does not evolve in a way that is determined solely by civil servants or a central political agenda.

All of what follows under 'New Labour' proposals was in fact part of the proposals under John Smith. Separating the two, when one is really a sub-set of the other, is simply done to make it easier to see how policy developed.

New Labour proposals

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

The New Labour proposals, adopted by Labour Party Conference in October 1995 as official party policy under Tony Blair's leadership, constituted the most detailed party political proposals available at that time. While the document that contained them ('*Access to Justice*') was shorter than the document prepared under John Smith, the spread of proposals was still broad. There is only space here to consider the more important proposals relating to legal aid and the introduction of a community legal service, although something is said about attitudes towards the judiciary and the reform of the legal profession. The strength of the proposals lay primarily, in their scope and the recognition that reform of the legal system was a complicated undertaking.

The Community Legal Service ("CLS")

The CLS is the Labour administration's proposal for the reform of legal aid provision.[25] The problem with legal aid is simply stated. There was an increase in spending between 1979 and 1996 of 600% in the Lord Chancellor's Department budget on legal aid with a corresponding reduction in the level of the population able to claim legal aid falling from 77% to 47% over the same period.

[25] The term "community" is clearly a fashionable one. The Commission for Social Justice, set up by the late John Smith MP, indicated the need for an 'Investor's Britain' in which our institutions and citizens work together to enhance the growth of our communities: see "*Strategies for National Renewal*"; Vintage, 1994. The term community has been used more broadly under the influence of Amitai Etzioni by the New Labour administration.

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The CLS would not be an entirely new system in itself; instead it would be part of a restructuring of the legal aid system. Rather than set nationally applicable levels of income below which a person is entitled to receive legal aid, the aim is to give greater local control over the manner in which legal aid money is to be used. By creating distinct CLS boards, based on existing Legal Aid Boards, local budgets can be set to achieve locally-prioritised objectives for legal services. Some areas have a need for representation in employment disputes, other see housing and social welfare as their most pressing needs. The CLS in conjunction with the Legal Aid Board and the Lord Chancellor's Department would set priorities for the expenditure of legal aid in those areas within budget constraints.

The extreme cultural shift this represents is the movement towards a system of *vertical* eligibility for legal aid, rather than *horizontal* eligibility on the basis of income.[26]

The question of a community legal service is very much in the air. At one level it operates as no more than a renamed version of Conservative proposals for block contracting and NHS-style trust reforms. A community legal service will only work where there is flexibility in funding and a freedom to be bloody-minded in the choice of priorities for which money will be applied. The most important point to note is that the creation of a community legal service will create differences between the nature and composition of legal services delivery in different areas. The notion of equal rights for all citizens will therefore be made impossible. Some will be made more equal than others.

Ideologically this may be problematical and may create political problems of presentation. For example, the current system gives preferential treatment to those with matrimonial disputes. Where a particular community takes money away from matrimonial disputes and puts it towards those bringing industrial disputes, there is no longer horizontal equality.

The real difficulty will come with the body that makes the choices. Where bureaucrats make the choices bureaucratically, there will be talk of hidden agendas. It is only if the selection is seen to be the result of choice made by some body representative of local people, that this problem can be circumvented. There could be responsibility put onto local councillors, although local government might be loathe to assume this responsibility. Local magistrates' committees and local legal aid boards carry the problem of being apolitical appointees who could not command any seeming of representation. Perhaps local committees made up of people selected on a focus group basis would be a closer approximation - although educating them as to the complexities of legal aid budgeting would not be an easy task.

The strength of community-level selection of requisite spending priorities is that there can be a political discussion as to the needs and priorities that affect ordinary people. The presumption that this is a matter for expert decision-making (in the way that NHS trusts leave decisions about healthcare treatment to be 'clinical' decisions) masks the fact that it is a discussion about

[26] The vertical / horizontal distinction has been considered above.

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the entitlement to public resources. As in any other context, this is a straightforwardly political matter. Therefore, the solution to the operation of a community legal service must be a political matter too.

The alternative is therefore to have centrally-controlled delivery of legal services. All that the community legal service will do at that stage is to channel funds. On that basis a community legal service will not be responsive to local needs for justice provision.

Policy on the lawyers

The Labour Party's policy commitment in *Access to Justice* with reference to the judiciary was to create a Judicial Appointments and Training Commission, to carry out the functions of the Judicial Studies Board. The intention was that the Commission would be independent of the Lord Chancellor's Department and would have a strong lay presence. The primary role of this body would be to advise the Lord Chancellor on all aspects of judicial selection and the appointment of judges and magistrates. The requirement of such a body should, in this writer's opinion, be to make the selection of judges and QC's while publishing criteria for their choices - rather than referring the matter back to the Lord Chancellor for a final decision.

The often stressed pro-active role of this Commission would be to develop a strong equal opportunities policy and make every effort to encourage members of groups currently under-represented on the bench to apply for judicial and magisterial posts. What remains lacking is a thorough, formal procedure for both monitoring the performance of judges and for handling complaints from members of the public about judicial conduct. Judicial monitoring on this model was recommended by the Runciman Royal Commission on Criminal Justice.[27]

Boateng was particularly damning of the legal professions. In his speech to Party Conference in 1995, introducing the *Access to Justice* document he said: 'the gravy train must stop ... there can be no more money for lawyers ... to the lawyer's the message is that the party is over - for the consumer, the message is that the party has only just begun'. This clear message was laid out as part of the reforms of legal aid and, later, in considering plans for compulsory pro bono work to be undertaken by lawyers as a condition of retaining their practising certificates.[28]

Reform of procedural rules: the Woolf Report

The archetypal lawyer's discourse about the reform of the system is set out in Lord Woolf's investigation into the Civil Justice System, culminating in

[27] Cmnd 2263 (HMSO 1993).

[28] This initiative had the public backing of Tony Blair but has receded into the background under Lord Irvine's chancellorship. For more detail on these issues see 'Towards a Just Society' by Alastair Hudson to be published by Cassell in 1998.

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another report called *Access to Justice.*[29] It is unfortunate that there appears to be little current political will to implement many or any of those proposals. "Unfortunate" not in the sense that Lord Woolf's proposals offer a utopia (they simply do not) but rather that they move towards a form of legal system which is concerned with equality and fairness between citizens.

The three giants: cost, delay and complexity

Woolf's fundamental aim is "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".[30] 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".[31] He described the current system as being "expensive, slow, uncertain and unequal".[32] 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.

The easy criticism of Woolf 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.

The underpinnings of the Woolf Report

There are two key goals underpinning the Woolf reforms:-

1. Getting cases out of the system;
2. Ensuring cases coming within the system are conducted in a "proportionate" way.[33]

The draft Rules of the Supreme Court, prepared by Lord Woolf, will require that a case be dealt with "*justly*". The aim of case management is to achieve a just result where the rules do not otherwise provide for it. For example, if the rules do not provide for a set timescale or a set cost for the litigation, then the court will be given the discretion to impose such directions to ensure that the case is dealt with "justly". The rules should also have the effect that litigation is a last resort.

[29] "*Access to Justice, Final Report*"; HMSO July 1996.
[30] *ibid.*
[31] Speaking at the LSE on 30th January 1997.
[32] *ibid.*
[33] The proportion referred to is the ratio between size of damages sought, and size of legal costs.

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There will be three streams to the new Lord Woolf proposed to raise the limit (from £1,000 to £3,000) for claims to be taken into the "lawyer-free zone" of the Small Claims Court. The proposed fast-track procedure will introduce a fixed fee for cases worth between £3,000 and £10,000. The aim is that the litigant will know: the upside and downside of the cost, the timescale for the litigation; the exact procedural requirements which the litigant must satisfy. It aims to introduce "no frills litigation".[34] The third limb of the new system, "caseflow management", constitutes, in the terms that Woolf proposes, a radical alteration in civil procedure.

Lord Woolf identified the following as the core of his proposed reforms: "... a fundamental transfer in the responsibility for the management if civil litigation from the litigants and their legal advisors to the courts"[35]. Caseflow management in the civil courts is the lynch pin of Lord Woolf's proposals.

The case against Woolf: is size important?

One regrettable feature of the Woolf Report[36] 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. Only cases with high cash value will qualify for the Rolls Royce system of caseflow management. A claim for payment of social security benefit will generally be small compared to a breach of contract claim between commercial parties. The potential impact of Lord Woolf's proposals would be that social welfare law claims would be de-prioritised at the expense of the interests of commercial parties. The notion of equal access to justice for all is an impossible goal to achieve if the system is ranking claims on the basis of cash sums.

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. Broadening the scope of access to justice will not be served by erecting barriers to entry in this way. It is the regulation of the mundane cases which are the measure of a legal system's egalitarianism, despite Lord Woolf's nod to the need to remove inequality.

Too much judicial control - justice or process?

The issue 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

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[34] His lordship's own expression.
[35] Access to Justice: Interim Report (June 1995), p.52.
[36] It should be stressed that this is not one of Prof. Zander's objections, but rather the author's own.

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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.[37] 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.

Personal injury claims: the case for dis-aggregation

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.

Policy under Lord Irvine

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[38], 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.

[37] *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.
[38] *The Observer*, 27th July 1997.

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Indeed the position of the Lord Chancellor has become an interesting one since May 1997. His most famous public words, rather than 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.[39]

The remit for the Middleton review bears indications of things to come.[40] The requirement to control the Lord Chancellor's Departmental budget, as well as the need to consider reform in itself, would seem to lie behind the appointment. As this essay seeks to argue, reform of either civil justice or legal aid must be carried out in the broader context of reform of the entire system of dispute resolution and advice throughout the UK.

The terms of reference of the Middleton review are important. In line with the intention to think the unthinkable, the task is one of getting back to basics but only in the context of cost-cutting. To quote from the terms of reference:[41] '*(3) In particular, the review is to consider: (a) whether the civil justice reforms can be implemented without imposing costs which outweigh savings both for potential litigants and the courts ..*'.

The review seeks change without increased cost - the issue is whether that can be achieved without a more fundamental restructuring of the system. For example, will the de-coupling of matrimonial legal aid be considered, given the fact that one third of the total legal aid budget is spent on private matrimonial proceedings? The larger questions about use of rights and imposition of social responsibilities must be taken as part of policy-making in this context.

The terms of reference continued by setting down a second point for consideration - '*(b) the means by which the cost of legal aid can be kept within limits which society can afford and is willing to pay in the context of the overall public expenditure ceilings to which the Government is committed, while giving the fullest possible weight to the important values of legal aid as a rights-based entitlement equally available throughout the country*'.

The expression '*limits which society can afford*' raises the old question: what price justice? It is unfortunate the challenge needs to be couched in such starkly financial terms. However, simply to tinker with the system as it is currently organised would be to miss the opportunity to re-structure the elements of the legal system which has caused so much of the rapid growth in the size of the legal aid bill.

It is this writer's opinion that change can be achieved within existing spending limits only if there is a radical overhaul of the means of providing access to justice. Simply concentrating on the figures for legal aid, in a vacuum from

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[39] 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.

[40] That Sir Peter is a former Treasury official is an interesting development in itself.

[41] Society of Labour Lawyers' newsletter, August 1997.

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dealing with the greater question of restructuring the system for providing access to social justice in the UK, will fail to cut costs while also failing to tackle the greater problems of breakdown in the social fabric and loss of communal identity. In the terms of what follows, it is possible to achieve the 'first political objective', cost-cutting, while also going some way to achieving the 'real objective' - movement towards a just society.[42]

Importantly, the New Labour proposal for a Community Legal Service 'built on the existing plans for Regional Legal Services Committees' is supported by Middleton.[43] Further conditional fee arrangements were accepted by the Middleton review[44] and warmly embraced by Lord Irvine as a means of widening access to justice. The proposals have produced broad condemnation from civil liberties groups and the professions alike.

Common non-partisan reform proposals

There are a number of other proposals for reform to the system which have been made by other politicians or which have been considered, often informally, by the policy-making bodies. Due to lack of space, they are set up to be knocked down here. The common objection is a lack of focus on *producing* social justice.

Legal insurance

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. The result would be that successful litigants would recover their costs from the insurance companies of those whom they have sued. One example of this would be potential polluters of water systems and air, as required in some jurisdictions in the USA.

This alternative would be of limited impact on the legal aid budget because it cannot be guaranteed that the bulk of litigants would fall within legal aid eligibility guidelines but it would have the effect of increasing the ability of citizens to seek equal access to remedies against corporations.

Lord Irvine has supported the availability of insurance for use by practitioners entering into conditional fee arrangements in claims for money damages. The proposals suggest that litigants should pay the cost of the premium to acquire insurance to cover the legal adviser for the risk of losing the litigation. However, no pilot schemes have been set up, at the time of writing, and insurers have

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[42] The principles identified in this submission, form the backbone of the forthcoming book by this writer '*Towards a Just Society*'; Cassell, 1998 forthcoming. The aim of that book is to reconcile three problems which are identified as the greatest problems currently facing our nation, with the question of how we provide something called "justice" to our citizens. Those themes are the breakdown of the social fabric, loss of communal and individual identity, and the weakening of democratic empowerment for our citizens.

[43] '*Review of Civil Justice and Legal Aid*, a report to the Lord Chancellor by Sir Peter Middleton GCB'; Lord Chancellor's Department, September 1997, p.5.

[44] *Ibid.*

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shown reluctance to support the scheme in public. Aside from this practical problem is the further issue of litigants finding the lump sum to pay for the premium when they are too straitened to afford legal fees in any event.

One alternative, insurance-based system would be similar to the Japanese system of compulsory insurance for healthcare, or the German system of legal insurance. Common to all such systems is the notion that the citizen pays for private insurance through taxation. That insurance will then pay for the whole of, or most of, the cost of any litigation undertaken by that citizen. The state is required to provide the funds for those citizens who are unable to afford the increased tax burden, or do not pay tax at all. Issues then arise whether the insurance should entitle the citizen to choose a lawyer themselves, or whether they are required to use a lawyer appointed for them by the state. This raises some of the arguments raised by a National Legal System, which is considered immediately below.

It is submitted that this proposal would constitute a reversal of the core policy of the 1949 Legal Aid Act and the welfare state motivation that lay behind it:

> '.. to make legal aid and advice more readily available for persons of small or moderate means, to enable the cost of legal aid or advice for such persons to be defrayed wholly or partly out of moneys provided by Parliament.'

Obtaining suitable insurance in the market would not guarantee that suitable advice could be obtained or paid for. It would rob the state of the ability to select priorities for state funding through the current legal aid system. The final objection is that legal aid is already paid for through central taxation, and therefore there is no need to increase the tax burden to pay for a new system. It would be better to make the current welfare state model (albeit a means-tested one) operate more effectively for the achievement of greater social justice.

A National Legal Service

A regular proposal is that for a National Legal Service (NLS). There are a number of different approaches to this suggestion. At one level, it is little more than a Citizens' Advice Bureau system where the advice workers are also empowered to appear in court. This model is extended in some cases to include a Public Defender function.

The CAB model would require the provision of representation as well as advice by the NLS for it to be more than simply a CAB or a Law Centre. At this level it is difficult to see what is achieved beyond the mass employment of lawyers by the state.

Once the NLS is expanded to mean the necessary availability of trained and qualified advocates on demand for any citizen for any type of case, then different arguments obtain. That all citizens are able to defend litigation without fear of cost would enfranchise many more citizens. It would remove many of the pressures to settle litigation. At that level the civil liberties aspects are

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compelling. However, where the NLS is extended to provide advice for anyone wanting to bring a claim (i.e. to act as plaintiff) without any concern as to the cost, the context changes slightly. Clearly, there is a public service available to all citizens which has great impact for the quality of citizenship.

The objections to an NLS are primarily twofold. First, there would a great increase in cost to the state of handling the increase in claims and paying salaries to all the lawyers involved and managing the system. Given the current strictures on legal aid spending, this would appear to dismiss this proposal in practical terms. Second, there is no guarantee of the quality of advice. The experience of some NLS-style programmes in the USA, for example, has been a haphazard ability to advise citizens effectively as to their rights because of a lack of time, because of a lack of expertise and because of bureaucratic inertia to bring the sort of seemingly speculative arguments which a privately-paid lawyer would advance to protect a client. The 'dead hand' of the bureaucrats has been a great obstacle to such schemes in practice.

Contingency and conditional fees

The matter of contingency fees is often discussed in this area as a means of cutting the costs of legal aid. Contingency fees enable the litigant to meet the cost of legal fees entirely (in most cases) by paying a percentage of a damages award to the lawyers if successful, and paying nothing if unsuccessful. In personal injury cases, this enables many litigants to bring actions without worries as to meeting the legal bill. Alternatively, the 'conditional fee arrangement' has been proposed by the Middleton review under which parties would obtain insurance to cover the cost of fees if litigation is unsuccessful.

There are a number of objections, however. First, a court awards damages to a plaintiff on the basis of her loss. Therefore, if the damages are to compensate the wrong suffered by measuring the size of the loss, there is no calculation to take into account legal expenses - that is the purpose of the costs award. Therefore, to give away a part of the damages is to rob the plaintiff of a necessary part of the compensation for her loss. The result would be the alteration of the tone or manner in which litigation is conducted with out a corresponding increase in the quality of justice received by the citizen, with the danger of it worsening.

Second, contingency fees open the client to bartering with lawyers from a position of weakness. Third, contingency fees do not guarantee the increased representation of those whom the Labour Party would wish to see represented more. Indeed it is likely that only the high profile defamation cases would attract the interest of the lawyers, rather than the benefits of representing those who have suffered small industrial injuries which may yet affect their ability to work.

Fourth, contingency fees only work in the case of claims for amounts of money. A claim to be housed on grounds of homelessness does not carry with it any award of money ordinarily. Therefore, there would be no possibility of contingency fees. Similarly, injunctive relief carries little likelihood of damages. Defending actions rarely carries any likelihood of damages awards, other than costs orders.

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Contingency fees, therefore, cannot offer an entire answer. In many commercial cases, however, it is only the lawyers and the commercial litigants who stand to lose by the arrangement. In that context they should be permitted to enter into whatever arrangements they can negotiate between themselves.

As considered above, Lord Irvine has accepted the case for conditional fee arrangements to cut the legal aid budget. It remains to see how Lord Irvine intends, in the detail of his proposals, to replace the welfare state benefit, legal aid, with a partial system based on insurance-based conditional fees for money damages claims. It would appear that the up-front cost required from the litigant to enter into conditional fee arrangements will exclude those who are too poor to afford that cost. The solution would appear to be a concessionary, means-tested system as suggested by his lordship before the Home Affairs Select Committee.[45] It is difficult to see how this proposal differs from the provision of legal aid.

PART III - THE IDEOLOGY BEHIND THE PRINCIPLES

The development of policies to deal with the reform or restructuring of the legal profession have suffered from under-theorisation. The legal system is only addressed as a political question usually when it has become too expensive. What is lacking is a way of looking at the legal system in a political context that links it to other problems of public policy. To increase access to law it is necessary to think differently about the the larger system that gives us law, solves disputes and gives advice to citizens.

The following three conceptualisations are this author's own but draw on archetypes of three separate, established points of view: (1) the New Right, (2) the legal establishment, and (3) the social democratic left.

As discussed above, Labour's position has shifted since 1992 on the detail of this policy. There does appear to be some shift too in its intellectual underpinnings. At one level the party has moved from John Smith's humanist, ethical socialism to a 'democratic socialism' based on neo-Gramscian ideas of a new nation and the generation of community. There was a production of something new in that shift from old style labourism which was inclusive of all churches on the electable left from trade unionists, welfare state social democrats and centre-left modernisers, to an ethos created out of American liberal ideals of a state which sought to create a context in which individuals were given the freedom to make their own lifechoices.

The following categorisations, then, see New Labour present in all of them in some context. The old Labour affection for a Ministry of Justice and the generation of more human rights sits more clearly with the social democratic model.

[45] October 1997.

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1. Economic System Management Approach

The Economic System Management Approach is precisely that: the legal system is treated as a system which should be managed in the same way as any other system which makes demands on public funds. Its ideology is most clearly identified in the policies of the Major administration and could be rendered thus:-

> "[To] introduce a system of block contracts covering the type, quality, volume and price of services to be provided ... improve the targeting of funds towards areas of need, particularly where suppliers can provide high quality advice at less cost than the present court based approach ..."[46]

The language used is the language of markets and of consumers. Rather than centralised, state provision of services, publicly funded legal services should be provided by providers holding block contracts. The traditional legal aid system operates in this way in any event. Private sector lawyers invoice central government or one of its agencies, and are paid for providing a service to the population.

The goal of this first approach is to seek effective and economical solutions to problems in the interests of the litigant and the taxpayer. It requires centralised control to the extent necessary to create a discipline for setting priorities. Therefore, there would be regulation and controlled cost made possible by a system of block contracts operating within an overall predetermined budget. The role of the government agency would be that of an overseer concerned with targeting need and priorities.

The buzzwords are: 'effective', 'economical', 'discipline', 'block contract', and 'budgeting'. In line with the emphasis on the consumer is the need for these goals to be achieved for the benefit of the purchaser of the services. The emphasis is not primarily on civil liberties or a discourse of rights and obligations. Behind the economic system approach would typically be an idea of individual freedom on the Thatcherite model.

One of the great concerns about this means of providing the service is that it will develop monopoly providers in particular regions where some firms have block contracts and other firms do not. Large contract holders will tend to swallow the personnel, clients and business of smaller firms who do not hold contracts, and the availability of a market will shrink.[47]

However, the discussion of this model cannot be confined to the purely Thatcherite. The Community Legal Service proposal under New Labour, for all

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[46] Lord Chancellor's Department consultation paper "Legal Aid - Targeting Need"; Cmnd 2854 (HMSO 1995) at p.21.

[47] This approach grew out of the Conservative government's need to control spending on legal aid. The proposals made as to block contracting grew out of the reforms of the National Health Service and Compulsory Competitive Tendering in local government.

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the protestations that it will seek to do something other than create compulsory competitive tendering, sits very close to a supply-led attitude to public funding of legal services. Rather than provide a budget which meets demand for legal aid and the other services that come out of that one budget, the Community Legal Service would attempt to control the availability of funds, thus cutting supply and rationing the availability of service.

As discussed above, the political problem necessitates this new approach. Funds are limited in the politics of the 1990's and therefore service is limited. However, at least half of the problem is the reluctance to look at entirely new ways of providing the service. A legal system which focuses on the old-fashioned demands of the legal profession will fail to operate within the new strictures.

2. Legalistic Approach

Within the legal system the lawyers will, of course, insist on having their say: despite the facts that it is the citizens' rights and not the lawyers' convenience that count. The study commissioned from Lord Woolf by Lord Mackay the Conservative Lord Chancellor produced the following analysis of the relevant goals:-

> "A civil justice system should: be just; be fair; at reasonable cost; at reasonable speed; be understandable; be responsive; provide certainty; be effective."[48]

This approach is termed the Legalistic Approach because it does not seek to address any political or sociological considerations beyond the courtroom.[49] Typically the legalistic approach will look to timetables for litigation and the business of procedural justice. In assessing the merit of different cases, regard is given to the financial weight of the case and the complexity of the legal arguments. At the level of procedural justice, the solution is sought in combined sets of court rules rather than the restructuring of the profession or the opening up of alternative avenues of representation, advice and assistance. The salvation of the system is identified in the reform of court procedures in the same way that the problems are identified as being in those same procedures.

The use of the Woolf Report to cut costs is, as considered above, a potentially poison chalice. Woolf is unlikely to make the legal system cost less. The fear is that it will actually cost more. More to the point, Woolf is unable to address head-on his own particular agenda of removing inequality. That is the business of a system which places movement towards social justice at its centre.

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[48] Lord Woolf's Interim Report "*Access to Justice*".

[49] That is not to say that Woolf was content to operate with the remit assigned to him. The discussion below as to the detail of Woolf's Final Report indicate some of the desire to look beyond these legalistic confines.

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3. Social Democratic Approach

It is perhaps a little self-consciously that the third approach offers no more radical opposition to the technocratic precision of the New Right approach than "social democracy". There are two reasons why there is no "socialist" alternative properly so-called. The first reason is that there is no political movement or party in the United Kingdom which approaches the question of law or, arguably, of human rights in a way which purports to do more than produce some "fairness".[50]

The Labour Party has never sought anything more radical than social democracy on a European model.[51] A truly Marxist organisation would seek to ignore law on the basis that it would wither away, or would at least be used as a part of the engine of revolutionary change in property relations. It is an unfortunate part of the internecine strife on the Left in Britain that the term "socialist" is necessarily taken to be synonymous with "Marxist", by both modernisers and traditionalists. The term 'social democratic' is advanced as meaning an approach concerned with 'social justice' and 'realising the potential of ordinary people'[52]

The second reason is that much of the discussion of human rights among lawyers does not seek to redress any of these imbalances. As Prof. Conor Gearty has explained:

> "The [European Convention on Human Rights] contains no guarantee of equality. It accords the same "human rights" to corporations as to the rest of us. It largely accepts and protects the pre-ordained allocation of property in society by presuming that '[e]very natural or legal person' should be 'entitled to the peaceful enjoyment of his [or her] legal possessions."[53]

The concern of this social democratic model is to address the pre-Marxian socialist notions of social justice and equality of opportunity to achieve greater democratic empowerment. To that extent, the approach taken is a development of the "social democratic approach". However, its claim for socialism (properly so-called), is that a system of dispute resolution that removes power imbalances between litigants is, straightforwardly, an engine of equality. The law, and the systems that surround it, should seek *in their practice* to be transparent as between litigants. Once there are disaggregations of power between individuals at the level of *access* to justice, that is, in the context of procedural rules, the operation of substantive legal rules will necessarily be biased.

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[50] See for example Gordon Brown's tract 'Fair is Efficient - a socialist agenda for fairness' which isolates 'fairness' as a suitable left-of-centre goal; Fabian Pamphlet 563.
[51] See on this Gregory Elliott "*Labourism and the English Genius*"; Verso, 1995.
[52] John Smith, Preface to '*Strategies for Renewal*'; Vintage, 1994.
[53] "*The Cost of Human Rights: English Judges and the Northern Ireland Troubles*"; (1994) 47 Current Legal Problems 19, at p.21.

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The social democratic approach is personified by policies such as the creation of a Community Legal Service which employs vertical eligibility criteria for access to resources; expansion of Alternative Dispute Resolution; use of the information superhighway for advice and education; and the reform of the legal profession and the judiciary. The strength of the social democratic approach in this context is its unspoken determination to weaken the stark dividing line between the legal system and other social systems.[54]

The Labour Party's proposals should not be represented solely as a social democratic approach, any more than Lord Mackay's proposals should be considered to be solely based on the economic management approach. Rather, each takes some of the other.[55]

PART IV - FROM PRINCIPLES TO PRACTICE

The real problem with legal aid: and a proposal

What is rarely acknowledged by lawyers in considering the legal aid bill is that legal aid is a payment of money from central taxation directly into lawyers' pockets. The matter is as simple as that. 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 point was made earlier that there is no market in legal services. Restrictive practices in the legal system, 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.

The question therefore arises: why is legal aid to be provided in this way? Should legal aid seek to provide the whole of the fee to the lawyer as it does currently? An alternative system would be one which identifies the standard amount of money which would be required by a litigant to defray the cost of litigation. The legal aid fund would provide payment for a standard amount of money which the Legal Aid Board considers appropriate for that type of case. By capping the amount of money available for particular types of case, lawyers would have to make the decision whether to offer their services for this amount or whether to price themselves out of the market for legal aid amounts. The litigant would then have greater scope to acquire representation in the legal marketplace. The litigant would be able to seek further amounts of legal aid where it could be demonstrated that the case contained complications which took it out of the ordinary run of cases. [56]

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[54] See above the discussion of law as a closed social system.
[55] The Labour Party's proposals contain intentions to develop franchising of contracts and of community-based legal aid provisions which some have difficulty in distinguishing from the Conservative proposals.
[56] This system has more in common with the German "legal insurance" system. As discussed, it might be that control of fees through quality-assured franchising would reach the goals of increased access at lower cost.

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There is no reason why all of the cases which are currently paid for by legal aid and which are undertaken solely by barristers and solicitors should be able to continue. Voluntary agencies and advice agencies should be able to provide these services and make claims on the legal aid fund where they can demonstrate the necessary competence.[57]

There is typically a distinction made between criminal legal aid and civil legal aid in this context. The constitutional argument is made that criminal legal aid concerns basic human rights, the right to freedom of person and the right to a trial, whereas civil litigation concerns less precious subjects. That there is a possible conceptual distinction is beyond question. Whether the distinction is always real is another matter. The ability to defend yourself against an action to repossess your home is of more significance than the ability to defend a road traffic offence.

Where the conceptual difficulty arises more significantly is not in this *horizontal* measurement of availability of legal aid into broad income categories. What appears to be more useful is to divide this issue into *vertical* differences between types of case. Where public resources are being used, there ought to be some public recognition that some types of case are of greater utility than others. Group actions for medical negligence are of greater social utility than the failure of City fraud trials.

The argument runs: why should a Centre-Left administration allow millions of pounds to be used by the apparently wealthy when other taxpaying individuals are not able to bring actions against their employers using legal aid? The solution would be to take the politically courageous decision to deny legal aid to the apparently wealthy (who receive it simply on the grounds that their lawyers and accountants can demonstrate that they have ostensibly no assets) and decide instead that other types of litigation are politically more important.

This approach has two immediate problems on its face. First, it cuts against the principle of greater equality by introducing inequality in the form of bars to publicly funded legal services. Second, civil libertarians would be concerned that politics is being brought explicitly into the arena of justice. The answer to the first concern is the simple assertion that the current barriers to publicly funded legal services are hidden because they rely on the bulk of the population having income or capital above very parsimonious eligibility levels. That means the bulk of the population cannot afford to go to law. Making the law more equal means taking advantage away from those who are currently "more equal" than the ordinary individual.

The response to the second concern is that the system currently advantages the well-off to the detriment of the less well-off: that is already a question of political power. Introducing politics to the situation expressly has the advantage of making legal aid provision more transparent and accountable. A political decision to focus resources in South Wales on housing disputes and social welfare claims would be unpopular with those who would seek to use

[57] The competence referred to is considered below in connection with franchising and the quality of service provision.

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the system to fund the whole of their defence in white-collar fraud trials - but that is in the nature of politics.

For example, one third of the total legal aid budget (civil and criminal legal aid) is spent on matrimonial disputes. That is an annual amount of about £500 million paid to lawyers to conduct private divorce proceedings. This expenditure of legal aid on matrimonial disputes fails to recognise that in many situations the courts are not the best place to decide family disputes and that lawyers are not the best people to give advice or to reach these decisions. It also avoids the difficult question whether or not we wish to use large amounts of public money to fund private matrimonial disputes. Therefore, enormous sums of public money are being paid on translating ordinary family problems to legal disputes rather than investing in families by means of mediation or counselling services. Putting concern for social justice at the centre of policy is the only way on ensuring that public money in the legal system is applied primarily to ends which are socially just.

Dealing with the lawyers

> "*Reform of the English legal system has failed up to now because of the entrenched power of the lawyers' guilds.*"
> *- Max Weber*

The lawyer often stands as gatekeeper to the acquisition of rights and obligations. Where the profession itself is distorted, there is a problem of acquiring entry to the availability of suitable legal remedies. There is as much a need for the lawyer to take up the cudgels as there is a need for a litigant prepared to fight it. The nature of the legal system is therefore an equally important part of the notion of access to law.

In 1995, of all QC's, women accounted for 6.6% of the total, while in the population at large women accounted for 52% of the total. As for members of ethnic minorities[58], in 1989 less than 50% of barristers' chambers had any ethnic minority members. While at the same time, more than 50% of all black barristers practised from the same 16 chambers, indicating a concentration of the non-white Bar in particular chambers. By 1995 there were only six non-white QC's.

As the Bar continues to be so unrepresentative of the population, while retaining actual monopoly of advocacy in the higher courts and many of the courts of first instance, the issue for the operation of the British constitution must be: How can you *represent* the community if you are *not representative of* the community?

The nature of the professions is at the heart of the debate about the ability to access law. And yet, as Weber indicates, a great part of political problem with reforming this system is the entrenched power of the lawyers' representative bodies. The Law Society and the Bar Council are vocal and significant players

[58] As defined by the Bar Council and identified in returns to Bar Council surveys.

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in the arguments about the reform of the system. Under their patronage, reform is generally piecemeal and technical - primarily because the lawyers abstract to themselves the authority to talk about the workings of the legal system. Again this becomes a discourse about power in which the lawyers are the only one who are able to speak because they control the means of expression.[59]

PART V - CONCLUSION: THE CONTEXT OF CONSTITUTIONAL REFORM

The reader will be able to isolate some themes running through this discussion. First, the area of reform of the legal system has been considered to be a problem of practice rather than theory for too long. Second, the principle of social justice is one which should lead this debate. Third, the solutions which may be required by the principle of social justice need not be jettisoned as part of a realpolitik assessment of available administrative resources. Fourth, the voguish and one-dimensional imperative of controlling of public expenditure (which has become an article of faith in the administrative organs of the legal system) has ignored, for ill, the social need for complete access to justice in a society in which social relations are transforming rapidly.

The core objective of a restructuring of this system must be that access to justice is made as broad as possible. To work towards this end, it is necessary to make decisions about the allocation of resources. The difficulty is that the legal system *in toto* is not capable of sustaining this core objective of wider access to justice in the way that it is currently organised. The solution therefore requires a programme of policies which address the systemic problem and do not simply chip away at parts of it.

Unless you focus on the justice system as a means of generating a more just society, you will not get the priorities right. The call for reform is a call for justice; the call for access is a call for equality. To deny people the access to law is to deny them access to their rights. It is to deny them the access to the whole of their potential. In the words of the late John Smith, "it is simply unacceptable to continue to waste our most precious resource - the extraordinary skills and talents of ordinary people".[60]

[59] See Michel Foucault, "*The Archaeology of Knowledge*"; Routledge, 1989.
[60] Preface to "*Strategies for Renewal*" (Vintage 1994).

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