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In Place of Injustice

Alastair Hudson

> "Not even the apparently enlightened principle of the 'greatest good for the greatest number' can excuse indifference to individual suffering. There is no test for progress other than its impact on the individual. If the policies of statesmen, the enactments of legislatures, the impulses of group activity, do not have for their object the enlargement and cultivation of the individual life, they do not deserve to be called civilized."
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> - Aneurin Bevan, *In Place of Fear* [1]

The English legal system is proof that there is no truly democratic settlement in the United Kingdom. At the root of the British constitution is an understanding in the 'rule of law'. An assertion, in Dicey's terms, that no-one is above the law, that the law will apply equally to everyone, and that the role of law is to regulate the relationship between the individual and the state. I say it is "an assertion" because, in truth, it can be nothing more than that. For the majority of citizens in the UK it is impossible to gain access to justice through law or quasi-legal forums. To maintain that there is a theoretical entitlement to equal treatment before the law is nothing more than a chimera which serves to shore up the legitimacy of an undemocratic system.

These are unpalatable truths for a nation which prides itself on a Parliamentary democracy which it brandishes as a model for the rest of the world. All that despite the decrepit working practices of the House of Commons, inherited from a time before the right to vote was extended to women when Parliament was truly a gentlemen's club, and the House of Lords' embodiment of the legacy of inherited wealth and status through the hereditary voting privilege. These are not the democratic structures of a democracy beginning the 21st century. They are the relics of British history and, in tune with these days of marketing and service industries, a model of heritage theme-park politics.

So what are the truths? In Hutton's analysis of British social class,[2] there are those who are financially insulated and comfortable, those who are in work but not comfortable, and those who are reliant in some part on benefits and not at all comfortable. In terms of access to justice, there are those who are able to access legal advice (corporations and affluent individuals), there are those who are eligible to

[1] *In Place of Fear* (first published 1952; currently Quartet Books, 1990).
[2] *The State We're In* (London, Jonathan Cape, 1995).

receive legal aid (the socially disadvantaged on benefit levels of income), and there are the remainder of working families not eligible for legal aid but unable to afford lawyer's fees for litigation.

As a result the vast majority of the population is disabled from access to the legal system to pursue claims or to defend their rights. The sort of disputes in issue might be a conflict with a neighbour, it might be a complaint against treatment by an employer, it might be contested access to a governmental service, it might be issues arising from family breakdown. It might be any one or more of a million potential, day-to-day problems which cannot be solved by that person on their own.

Necessarily, that person looks to outside agencies for assistance. That is the first step in democratic empowerment. Before the citizen has the ability to act, she has a need for knowledge about what action is possible. The citizen needs information: what action can be taken? Who can advise me on that action? How do I act? What are the implications?

Unless the citizen is able to access that advice, nothing is possible. These issues are fundamentally political. It is a political question whether or not citizens are empowered by making access to justice possible. It is a political question whether or not public resources are made available for advice agencies to assist them. Citizens require this access to information and then to justice, to enable them to change from being merely "subjects" in a monarchical system of political power, to being "citizens" in a mature democracy. For most citizens access to legal advice is an impossibility as a result of cost, delay and complexity. As to advice agencies, the funding of CAB and law centre networks is precarious, with very little core funding coming from central government.

The focus of this article is to consider Bevan's fundamental statement of democratic socialist principle in the light of current proposals for reform of the legal aid scheme in England and Wales. These are issues of access to justice which cut to the heart of the success of failure of the British constitution for our citizens. The heart of the problem is generally considered to be legal aid. Through pressures of space that must be our focus, although there are more systemic issues of justice at large here, as considered in *Towards a Just Society*.[3]

Rethinking legal aid

The English 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 has long considered that it does. 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

[3] Hudson, *Towards a Just Society - Law, Labour and Legal Aid*, (Cassell, 1999).

include a range of qualities of service, of back-up support, added extras on expensive models and budget features on the inexpensive.[4]

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 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).

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[5]). 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.

There is no "budget" form of legal advice. Some High Street solicitors are prepared to cut costs to bring in business but those fees are never open to negotiation so as to make them truly affordable. Even non-NHS dentists are prepared to charge only £10.00 for a consultation and check-up. No lawyer would charge that little.

There are a number of reasons why there is no free market in legal services. First, professional restrictive practices. Second, over-complexity in the system's rules and practices.[6] Third, the legal system operating as a closed system where lawyers dictate the substance and form of discourse.[7] Fourth, a lack of alternative mechanisms of dispute resolution. Unfortunately, there is not time here to examine each of these issues in detail.

Defects in the legal aid system

The core political issue remains the cost of providing legal and other representation to the public. The problem has tended to be dealt with as a crudely political one concerning the size of the legal aid budget. On the 1st April 1993 the then Lord Chancellor, Lord Mackay, removed the entitlement to civil legal aid for about 14 million people by altering the income threshold appropriate for such entitlement. Yet, at the same time, the cost of the legal aid budget to the Lord Chancellor's Department was £1.1 billion in 1993, a rise of over 21% on 1992, and 600% higher than in 1979. Legal aid expenditure was increasing amid the Major government's attempts to control public expenditure.

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[4] For an extended discussion of this idea see Hudson, "Citizens' Access to Law", in *Constitutional Reform Now*, ed. Blackburn, (Longman, 1998), and Hudson, *Towards a Just Society*, *op cit.*.

[5] See for example Lord Chancellor's Department consultation paper *Legal Aid for the Apparently Wealthy*, (HMSO, 1995).

[6] See Lord Woolf, *Access to Justice - Final Report* (HMSO, 1996).

[7] See, for example, Giddens, *Beyond Left and Right* (London, Polity Press, 1994) and Teubner, *Law as an Autopoietic System*, (Oxford, Blackwell, 1993).

However, the spiralling legal aid budget was causing more systemic problems than that. It had risen from £570m in 1989/90 to £1,100m in 1992/93. Criminal legal aid had decreased as a proportion of the total legal aid budget, falling from 58% of the total budget in 1989/90 to 46% of the total budget in 1992/93. The cause of the realignment in proportions of the legal aid budget was the growth of civil legal aid applied to family law matters. Legal aid for matrimonial work is rising and accounted for 30% of the total budget in 1992/93.

What is intended by this assessment of the performance of successive Conservative administrations is the demonstration of two simple points. The first is that the Conservatives had failed to realise their own ideological goal of controlling public spending from 1979 to their eventual loss of power in 1997. The second is that, when in 1993 the Major administration sought to advance its policy on legal aid spending, it did so by crude cost cutting. This is indicative of the myopia which characterised Conservative policy on justice affairs during this period. While matrimonial legal aid was proving to be the engine for much of the increase in legal aid spending, the Conservatives decided simply to change the threshold for eligibility rather than seek to restructure the system in a way which would have satisfied their other ideological goal of empowering people by granting them greater liberty.

At no point was there evidence of a serious, systematic attempt to address these issues in policy terms. Rather, the legal system over which the Labour government inherited control in May 1997 was in very great difficulty indeed. Behind the rhetoric of the Conservatives, who relied on their "Courts Charter" to represent a convincing justice affairs policy, lay a very different reality.

Indicators of the severity of the problem included long waiting times for criminal trials, particularly for those held in custody; repeated failures to meet targets and timescales set by the "Courts Charter", whilst at the same time mothballing courts in order to save money; stringent eligibility criteria (consistent with income support thresholds) for legal aid, severely restricting access to justice; a massive court closure programme, reducing still further access to justice; and the introduction of a policy of bringing of lesser charges by the Crown Prosecution Service in order to reduce unit costs by keeping cases in the lower courts.

New Labour's legal aid reform proposals

Lord Irvine, Labour Lord Chancellor, has clung to his mission statement of providing effective justice at low cost by removing a large number of cases from the legal aid net. The proposals are fourfold: the introduction of conditional fees to replace civil legal aid in damages claims; the introduction of legal insurance as part of conditional fee arrangements; the introduction of block contracting through a community legal service; and a tougher merits test. Conditional fees, legal insurance and the block contracting proposals are considered here.

Conditional fees - not legal aid

The conditional fee idea was launched in *Access to Justice with Conditional Fees.*[8] The aim is to enable people to get to court, having reached a conditional fee arrangement with their lawyer, in situations where legal aid would or would not have been available. Conditional fees are the "no-win, no-fee" arrangements practised by American lawyers under the title "contingency fees". In short, the client negotiates a fee with the solicitor which constitutes a percentage of any winnings which the litigant might receive. If there are no winnings, the lawyer receives no fee.

One thorny aspect of this policy is the insurance policies required to act as a safety net where there is no public money provided to do so. It is important to examine what this means. As a prerequisite to entering into a lawful conditional fee arrangement, the litigant or the solicitor will be required to pay (an estimated) £3,000 to an insurance company by way of a premium to insure against the risk of losing the case.[9] A premium of £3,000 will operate as a very effective barrier to entry for most ordinary litigants if they cannot be advised that they have a very good chance of winning. A solicitor paying for such insurance on a one-off or on an ongoing basis will be similarly discouraged from pursuing a small claim.

The policy grew out of the Middleton Report[10] commissioned by Lord Irvine with a remit to find ways of cutting the cost of legal aid. Lord Irvine is sensitive to the criticism that the policy pursues Middleton's cost-cutting zeal at the expense of other issues. In a speech to the House of Lords he said:-[11]

> "Let me refute the assertion that our proposals for reform are Treasury-driven to cut the legal aid budget. This is wrong. We do not intend either to increase or reduce the cost of legal aid in real terms. We plan to spend not one penny less than the last Government planned to do. But we also plan to take control of the legal aid budget."

The difficulty with this assertion is that, at the time of the publication of the proposals, there were no exceptions from the principle that all claims for money damages would be subject to conditional fee arrangements in place of civil legal aid. Those claims for money damages were to be treated the same because that would be cheaper. It was only after the event that concerns about injustice in some cases were listened to. Some concessions have been wrung from the Lord Chancellor subsequently. For example, housing cases are now to be excluded from the conditional fee scheme.

Block contracting

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[8] Lord Chancellor's Department, *Access to Justice with Conditional Fees* (March 1998); www.open.gov.uk/lcd/consult/leg-aid/lacon.htm

[9] As estimated by Lord Irvine himself, speech to the House of Lords, 9th December 1997; www.open.gov/lcd/speeches/1997/adjn-deb.htm

[10] *Review of Civil Justice and Legal Aid*, report to the Lord Chancellor by Sir Peter Middleton (September 1997).

[11] Lord Irvine, speech to the House of Lords, 9th December 1997; www.open.gov/lcd/speeches/1997/adjn-deb.htm

Beyond the conditional fee idea is a new system for licensing lawyers to claim legal aid. The core of the argument in favour of a fixed fee, block contract system is that lawyers are simply paid too much at present from the legal aid fund and therefore block contracting will introduce a discipline which bolts them to fixed income for particular forms of work. The administration of the block contracting scheme will be as follows:

> "Regional Legal Services Committees will involve local people in drawing up plans which will match services to the needs of a particular area and determine how they can best be delivered. This chimes with the Government's wider objective of returning power to the community."

The principle of community control of budgets, as practised in Ontario and New South Wales, still leaves a number of issues as to the manner in which local boards will be required to comply with national standards, the manner of the selection of the people who will make-up those boards, and what form of appeal (if any) local people will have against the decisions of that body. At the time of writing, no specific model created for this development.

Block contracts restrict the number of firms who can then take on specific forms of work, thus decreasing the choice open to litigants in each area. Furthermore, block contracting requires operating on fixed budgets so that it is possible for there to be no money left in a given geographic area for legal advice to be given on a particular type of work until the following financial year. There could be no clearer example of a contravention of Bevan's core principle that individual suffering cannot be permitted in the name of the greater good.

Community legal service

The community legal service is the Labour administration's proposal for putting block contracts to work. It is not a new system in itself; instead it is part of a restructuring of the legal aid system. The theory is this - rather than set nationally applicable levels of income below which a person is entitled to receive legal aid, there should be greater local control over the manner in which legal aid money is to be used.

By creating distinct community legal service 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 community legal service, 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 political slant on the community legal service is clear. It is aimed at the free market's favourite demons of inefficiency and ever-increasing public expenditure, while reflecting the lawyers' concerns of excessive cost and delay. While one of the perennial criticisms of the Blair administration is a reluctance to increase taxation to pay for public services, there remains the need to examine what is being paid for with

public money. Legal aid is a particularly bad thing on which to spend public money. Expenditure on legal aid does not correlate to greater access to justice, rather it correlates to more money for lawyers.

Since the election, Lord Irvine has set out some skeletal tasks which the community legal service would undertake:-[12]

> "The Service could provide telephone helplines, education in rights and obligations; legal advice on the internet; referrals to alternative dispute resolution; legal representation in tribunals; even interactive kiosks in every high street or supermarket dispensing information about the law and the legal system."

There are two disappointing words in this thumb-nail glimpse of the community legal service. The first is "could" which indicates that, despite the example of successful services in Ontario and New South Wales there has been no model thought out for the English service. The second disappointment is the word "referrals" indicating that there is no plan to integrate such advisory services into the community legal service structure or under another umbrella to share cost and expertise.

Unless local community legal service boards are given the authority to make choices as to the precise allocation of resources in this way, they will have little effective power to shape the manner in which justice is administered in their region. To empower them to examine the way in which alternative services could be used is pointless unless they are then enabled to put those powers into effect.

However, there are a number of difficulties with this level of power. The primary difficulty would be that different priorities would mean justice being provided unevenly in different parts of the country. If South Wales required more money for employment disputes and therefore allowed legal aid only for divorce mediation and not court proceedings, there would be a profound difference from a scheme in Surrey which funded the whole of divorce proceedings but not employment disputes. Justice would cease to be equal, in effect, even though the substantive law would remain the same.

The community legal service would require a means of measuring, researching and evaluating those local requirements. In effect, something akin to the disbanded policy unit of the Legal Aid Board, able to run pilot schemes, perform statistical analysis and develop new ideas. Replicating that level of intensive work across the country in different regions would be inefficient and a strain on regional budgets otherwise used for legal aid spending. If there were no local policy unit, then the regional board would be required to make its decisions based on approximations derived from national statistics and from representations made to it by pressure groups.

The risk of using pressure group politics in relation to the community legal service is that the people who need the favours of the community legal service to enfranchise

[12] Lord Irvine, *ibid.*

them are typically the people who are not able to represent themselves and are not represented by pressure groups.

Some general drawbacks in the proposals

The policy papers issued by the LCD since the 1997 General Election have confused styles of rhetoric. In *Access to Justice through Conditional Fees* there is no mention of providing a higher quality of service through the use of block contracts, rather the only discussion is of lower price. The presentation of this policy as a single thread of cost-cutting does rather give the lie to the occasional bluster that there are more wholesome concerns behind the reform proposals.

The real concern with conditional fee arrangements is that they distort the parties' analysis of the merits of the case by introducing a new dimension, that is the commercial agreement as to fees which the parties have reached with their lawyers. For the legal profession this will necessarily develop ambulance chasing as law firms seek out those cases which seem likely to generate sufficient damages awards and thereby suitable fees as a proportion of those damages awards.

One regular complaint about the nature of conditional fees is that they give a lawyer too large a stake in the conduct of the litigation, such that the lawyer is likely to press for victory at a higher amount than settlement for a lesser amount. Lord Irvine's view is that this has not been borne out by the experience of conditional fees since their introduction in 1995. Unfortunately, no systematic research has been done, so it is impossible to know.

Individual and social

At the heart of the debate about access to justice is the relationship between the individual and the social. The kernel of the "third way" debate, which currently occupies the collegiate mind of the centre-left in Western politics, is the nature of the relationship between the individual and the state. This debate has crystallised in a new understanding of the way in which public services and the state must be responsive to citizens. What the debate has yet to embrace wholeheartedly is the need for an honest discussion of the political dimension to setting priorities. It is important that politics is the arena in which social priorities are debated and public resources allocated. Access to effective justice offers citizens one important means of challenging iniquities in the administration of those priorities or in resolving disputes with other people as to those or other social goods.

In the passage from Bevan quoted above, an important facet of his redistributive socialism was an emphasis on the impact of policy on ordinary people. The focus of policy on the legal system should be directed to ensuring that Bevan's concern for social justice is addressed by citizens empowered to act in their own best interests within the context of a socially responsible state.

Towards a just society - a map

In this short article there has not been space or time to consider the broader range of issues confronting the English legal system. It has not been possible to unpick the way in which law operates as an autopoietically closed huddle of vested interests shared by legal practitioners and the judiciary. Nor the way in which they distort our social communication about the content of our rights.

On a more forward-looking note it would have been more uplifting to consider the possibilities offered by a co-ordinated National Advisory Service to bring together the work done by local authority advice services, the CAB network, law centres and other charitable institutions; the introduction of a National Legal Service to deal with the more critical arrears of legal services for the disadvantaged; the creation of a Law Foundation to run pilot projects and to share best practice between the many advice agencies. In short, to talk of the possibilities of generating an integrated Justice System, rather than a legal system with satellite agencies, administered by a politically accountable Ministry of Justice.

What is key is that, in developing the policies of the democratic socialist Blair government, Bevan's imprecation is borne in mind. In the search for cost-cutting and models which provide more efficient government, we must not overlook the democratic deficit which already exists in our nation as a result of a legal system which underpins our constitution but which is out of the reach of most of our citizens. For many millions of people, this means an abrogation of their rights as citizens. Those individuals are prevented from claiming their stake in our society through lack of education about law, lack of information about the means of protecting their rights, and a lack of access to justice. Our apparently enlightened principles about responsive and efficient government are allowing us to remain indifferent to the individual suffering of many.

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* Much of the material in this article is culled from a forthcoming book "*Towards a Just Society - Law Labour and Legal Aid*", (Cassell, 1999).

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