Regeneration, Legal Aid and the Welfare State (1998)

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> "*I am a big supporter of the Labour Party but I think that what they are doing to legal aid is shocking.*"
>
> - Ben Elton[1]

LEGAL AID IN CONTEXT

This chapter aims to place the legal aid system within the broader context of the discussion about the welfare state and the provision of social goods. The welfare state compromise of the successful post-war socialist governments, while carrying with it greater public affection than the central command economies of communist administrations, has both laboured under an intellectual inconsistency and suffered in the changed world of globalised economies to match supply with ever-increasing demand.

The welfare state's problem is simple to state: too many people need it but too few people are prepared to pay for it. The problems of legal aid provision are caught up in the same malaise. This chapter aims to show how legal aid fits into this debate, to place it in the current intellectual debates about the status of law, and to illustrate how successful re-calibration of the legal aid system must be based on identifying it as an engine of equality, social justice and democratic empowerment.

The Labour Party's attitude to the welfare state has been a contentious part of their programme since Blair became leader of the Party. Even under the late John Smith, the party's attitude to social welfare policy was considered to be susceptible to review by the Commission on Social Justice created by Smith. The correlation between legal aid and the welfare state is even more complex. The role of legal aid, providing access to legal advice and representation for citizens, was created in 1949 at the same time as the establishment of the post-war welfare state. However, rather than mirroring the National Health Service with a form of national legal service, control of legal aid and effective access to legal advice and representation was given to the Law Society. At the time of writing, civil legal aid is available only to those on benefit levels of income, making it appear a form of social security benefit in practice.

Defining the legal aid problem

The problem with the reform of the legal system is a lack of intellectualisation of the issues involved. The availability of legal aid is a case in point. Legal Aid was introduced in 1949 as part of the package of welfare state institutions created by the Attlee government.[2] Strictly, the introduction of legal aid, administered by the Law Society, only approximated loosely to the delivery of other welfare state benefits. It

was not provided on the basis of the universality principle by a state-employed cadre of professionals. Rather, it was administered and provided by lawyers in the private sector on the basis of a means test.

Therefore, the genesis of the legal aid system is somewhat in doubt. While it is regularly trumpeted by the human rights lobby as equating to state-provided access to justice, it is in truth a form of means-tested benefit. Whereas it was available to over 70% of the population at its creation, eligibility levels fell to slightly above 45% of the population in 1993. Its ongoing reform has been similarly problematic. Ever-increasing demand married with lack of resources, has led to a crisis in the provision of the service. There was a 600% increase in the size of the legal aid budget between 1979 and 1997, at the same time as eligibility and access have been progressively reduced.

The pattern has been for a rolling withdrawal of what was only ever a means-tested benefit from the outset. Legal aid only provides for the disbursement of lawyer's fees for advice and court-based litigation but does not include the broad spectrum of dispute resolution and advisory services which fall outside that. Matrimonial and criminal cases account for more than two-thirds of the total legal aid take-up between them.

As legal aid has been effectively withdrawn from the working population, the political analysis of it has changed. The rhetoric surrounding legal aid has altered from "welfare state benefit" to "the market in legal services" and "the needs of the consumer" - language which disguises the lack of anything which could be properly described as a fully functioning market in relation to legal services. The discussion takes this confusion and will examine it through the lens of issues about the notion of socialism and of the welfare state.[3]

The question then is: does access to the means of providing justice (whether a legal system, mediation, etc.) occupy a different place from access to other benefits such as the NHS and social security benefits? Ironically, legal aid is now restricted to those who are in receipt of welfare state benefits, despite its genesis as a system which avoided the welfare state revolution in the 1940's.

The context of "regeneration"

"Blairism" has not really emerged as an identifiable political credo, at the time of writing. That is hardly surprising given that Blair inherited the leadership of the Labour Party at least a decade too soon, on the death of John Smith. The reason for the European and American enthusiasm for the energetic young leader is that he personifies the zeitgeist of the new politics which has captured the imaginations of the intellectual vanguard of the centre Left. As the Left has come to power in Europe and America in the late 1990's, the Right has been forced to seek a more centrist, populist context for their policies as the electoral appetite for strictly applied monetarist economics has waned. This project has adopted a number of guises: "the Third Way" is the most popular term, "beyond left and right",[4] and "renewal",[5] are all monikers

for the same process. The term "regeneration" has been chosen for the title of this essay as typical of the Blair rhetoric.[6]

THEMES IN SOCIAL JUSTICE

The key underpinning theme of this essay is that reform of the legal system, and its satellite institutions, should be orientated around a principle of achieving social justice. The justice system, a composite of those various social systems and agencies, must be conceived of as a part of the constitutional settlement in the United Kingdom. Alongside the Blair administration's programme of constitutional reform (including the commitment to reform of the House of Lords, the introduction of a Freedom of Information Act, the implementation of the Human Rights Act, and electoral reform) is a need for those citizens who have been newly empowered in theory to be given the practical wherewithal to put their rights into action. The practical application and development of social rights and obligations is the business of law and of advice agencies. That is true whether those rights are "macro" constitutional freedoms from discrimination or rights at a "micro" level between neighbours.

The erosion of the welfare state model

> "*Socialists want power so they can share power with the people.*"
>
> -Aneurin Bevan

Many of the problems of social exclusion in the 1990's are the result of society outgrowing the strictures and certainties of mass provision of public services to citizens who had broadly similar needs and expectations. The problem has grown out of liberal democracies' acceptance of the validity of diversity among its citizens. Rather than being recipients of homogenous public services, citizens now conceive of themselves as having personal rights. The free market ethos has entrenched itself deeply. In terms of public services, this has led to a movement away from blithe acceptance of the quality of service provided, towards a demand that the individual be considered as a consumer with rights. However, this collapse in common identity has accompanied a splintering of social relations. In line with the ongoing breakdown of the family and rising levels of divorce, former social certainties have become arenas for personal insecurity.[7]

In this changing context, the ideal of the welfare state is under challenge. The free marketeers advance the presumed benefits of privately funded pensions schemes, healthcare, education, and transportation. Deregulation and de-segregation of public services have been the agenda left over from the 1980's. The Blair administration contentedly adopts much of the logic of competition, not only in economic markets but also in the context of public services in many contexts.[8] The reforms of the National Health Service which promised to reverse the privatisation introduced by the

Thatcher and Major administrations have been slow to emerge. The place of the individual in this movement is left open to question.

In theoretical terms, the drive for deconstruction has begun to strip out not only the possibility of politicians and popular movement ever asserting truth, but also the possibility of conceiving of the self-reflecting subject. The disintegration of pre-War social structures has resulted from increased globalisation - in terms both of communication between nations and, more importantly, the acceptance of common social norms by disparate cultures around the world. As belief has become unfashionable, the most successful export from the industrialised West has been democracy. Its cultural impact has penetrated the constitutions of most nations (whether in substance or in terms of written documents parading theoretical rights), and those which remain outside the loop find that democracy is the banner waved most fervently by opposition groups.

For the left of centre in Western politics, the role of the individual has been the core of the issue. The rise of the feminist and human rights movements in the 1960's disturbed the logic of the welfare state ideal. For a welfare state to operate properly, it must provide identical rights to identical services for all citizens. The universality principle is at its heart. In a society in which needs and expectations were roughly homogenous, this principle had a utilitarian beauty about it. However, the rise of a political movement which asserted the diversity of rights, needs and expectations of citizens began to eat away at the very notion of the welfare state.

The Left has been in difficulty ever since it became the intellectual home for this dissentient drive for individual liberties. The reason for the suspicion of state power came in the wake of the failure of the central command economies of central and Eastern Europe, as well as civil liberties abuses in democratic states. The content of democracy became an issue in itself. The other reason for this suspicion was the increasing amount of private power held by corporations which reacted to a logic of profit and not political ideology.

The legal system operates as the only means by which the individual can combat this growth in private and state power, whether alone or as part of a pressure group. Electoral politics tends to be too blunt an instrument to reflect the broad range of pressure group issues. Lobbying politicians is a similarly complex activity for all but those powerful corporations. Law remains as the means by which constitutionally-permissible conflict can take place.

The creation of the welfare state in 1948 failed to deal with the legal system. The legal aid scheme created by the Legal Aid Act 1949 did not create the national legal service which had been proposed by the Rushcliffe commission, along the lines of the National Health Service. Instead it gave power to the Law Society to distribute public funds among its membership to defray their fees. Legal aid has never been a part of the universally-available welfare state, it has never been an engine for equality as much as a stop-gap to ensure that the poorest in society were able to access legal services. Rather than the legal system being the servant of citizens in a democratic state, and therefore considered part of the range of public services available to the

individual, it has remained a relic of its history - a form of power exercised by the monarchy over subjects to regulate their inter-actions.

Law and the equality debate

> *"Democracy, thus, entails a commitment to a set of empowering rights and duties. To deny entitlement capacities in any significant domain of action is to deny human beings the ability to flourish as human beings and it is to deny the identity of the political system as a potentially democratic system. A democratic legal state, a state which entrenched and enforced democratic public law, would set down an axial principle of public policy - a principle which stipulated the basis of self-determination and equal justice for all and, accordingly, created a guiding framework to shape and delimit public policy."*
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> - David Held[9]

Given this mismatch between the logic of the welfare state and the creation of a legal aid scheme which oils the wheels of a self-contained legal system, what has not yet been achieved is a restructuring of the legal system along welfare state lines. The legal system is the one context in which the logic of democratic societies requires that there be universality. It is necessary that all are subject to the rule of law in equal part. This aspect of the debate about equality is one which has escaped the agenda for reform of the legal system.

The pathway of the political debate about equality is well-trodden.[10] On the one hand, it is argued that it is the responsibility of government to ensure that there is equality of opportunity between citizens. This is the standard that is flown by Labour Chancellor Gordon Brown in his approach to management of the economy.[11] For example, it is said that the reform of education ought not to be directed at ensuring that all children are educated in identical fashion but rather that diversity of forms of education should not disadvantage some children (typically those in comprehensive education when compared to those in private education). Instead, all children are required to be enabled to reach the same level. In short, their education must give them equality of opportunity.

In the light of the change in work patterns which has seen the "jobs for life" culture be replaced with mass unemployment, Brown has long argued for "life-long learning" which enables adults to re-train and thus be able to retain the opportunity to participate in the job market despite periods of unemployment or the obsolescence of their skills. The shortcoming with equality of opportunity is that it permits for inequality after the initial injection of equal preparation. In truth, its focus on the virtues of competition means that inequality is an economic necessity.[12]

The flipside to this initial equality is equality of outcome. This measures the traditional socialist concern that it is visible poverty and inequality which ought to be the object of political reform. Therefore, policies such as the minimum wage work towards the removal of inequalities, rather than the equality of opportunity approach which leaves citizens to their own devices once they have received the initial service. Brown's complaint is that equality of outcome has no sensitivity to effort or desert,

tending instead towards bureaucratic inertia by means of centralised regulation. Ensuring equality of outcome in legal terms creates difficulties. In terms of litigation it is impossible to ensure that the parties are equal in any meaningful sense without displacing the authority of the court to reach an unfettered decision.[13]

A third context of equality is equality of provision. This aspect focuses on the rights of citizens to receive public services. As an echo of the universality principle, it argues for the all citizens to have equal rights to use public services as a result of their citizenship. The National Health Service is a good example of this. Regardless of income, a citizen is entitled to treatment regardless of the cost of that treatment. Where the principle has broken down in practice is by the introduction prescription charges and flat rate charges by dentists for services.

The legal aid system is a very bad example of a social construct when measured against the principle of equality of provision. Public funds are only provided for citizens to pay the fees of their lawyers if they are very poor. In effect, unless an applicant is on social security benefit, there will be no legal aid available. There are millions of citizens who are unable to access legal services because of prohibitive cost. However, their need is not sufficient to generate entitlement. There is no equality of provision.

Yet it is a type of equality which must be the fundamental principle in the provision of justice. Equality of access is central to a properly functioning legal system. Equality of outcome is not a useful concept in this context. The outcome of an application to court will be dependent on the merits of the case, the availability of credible witnesses, and the opinion of the judge on the proper interpretation of the law. The only meaningful outcome is in the context of a dispute being heard by a court, or otherwise processed by the justice system, in accordance with principles of fairness and procedural propriety.

Equality of access is closer to equality of opportunity. Each citizen is to be entitled to access legal services, regardless of wealth or other factors. The opportunity in this case is the access to advice and possibly representation in the resolution of a dispute or in the development of a legal right. In the context of law it is easier to achieve equal opportunity from the outset, and then leave it to the court to reach a decision on principles of fairness. The only weakness is in respect of cases which do not reach a court or tribunal and which are settled by the parties either on the basis of a realistic assessment of their chances of success or after bargaining.

To compare the legal context with Brown's example of equality of opportunity in education, some public schools will typically provide avenues to highly paid employment which state schools will not, even if the standard of teaching and facilities are effectively identical. However, apart from some difference in quality between lawyers, legal aid enables access to any lawyer which the citizen chooses and therefore equalises the very poor with the very rich in court in terms of their representation. The shortcoming of legal aid is that it is not uniformly available, such that some people are advantaged by it and others disadvantaged by it. Legal aid operates as a mechanism for social justice for the worst off in society but as an engine of inequality at the same time.

It is suggested that satisfaction of the principle of equality of access is the only one that is possible without conflicting with the total responsibility of the courts for the substantive distribution of remedies to legal disputes. Equality of access is not provided by the English legal system as currently organised. These issues, and the Blair administration's proposals to meet them, are considered below.

Procedural justice and communication

The reason why access to justice is important is fundamentally political. The regenerative project for the justice system is to enable empowered individuals to shape their own rights and to impose obligations on others. Given the withdrawal of the state from total competence in the content of individual's rights, progressively on the wane since the acceptance of restrictions on the divine rights of kings at the time of Magna Carta, the justice system comes to occupy a part of that important role.

Dispute resolution between citizens, corporations and the state is an important part of the practical process of creating and destroying rights. The more visible form is by political debate in the media culminating in verbal jousting on the hustings and in Parliament. The end-goal is legislation. However, for many campaigns it will be impossible to generate sufficient public interest or political momentum. Alternatively, legislative change may be considered to be too slow. For individual citizens it will often be a simply inappropriate means of defending themselves.

The alternative is dispute resolution between parties contesting the content of particular rights, or contesting access to particular social goods. Thus, appropriate dispute resolution aimed at the definition of the limits of social and legal rights comes to form an important part of the communicative process in developing those principles. This is particularly true in a common law system where the doctrine of precedent entrenches legal rights without the need for Parliamentary approval of them.

The practice of law is, at one level, about communication. In the context of the great Habermas / Luhmann debate, it could be seen as an open continuum of debate about communicative action between social actors to establish the ideal structuring of rights or systemic action by which closed social agencies communicate between themselves to shape social structures. From a procedural stand-point, law operates hear to arbitrate between claims to rights. It becomes an endgame for political protest in some circumstances, or simply for the resolution of a very localised conflict. Law is flexible in that sense - it responds in similar vein to the great and to the small. In Habermas's terms, litigation can be a step on the road towards the ideal speech situation, as a form of stylised conversation about the content of a social contract.[14] For Luhmann, law is a place where that conversation happens in closed language.[15]

Constitutional power

> *"I do not accept that there is a constitutional right of access to a free court system, anymore than I could accept that before the National Health Service was set up in 1948 … a "constitutional" right to free medical services was being denied, although we all recognise that the health of the nation makes a high call on scarce public resources."*
>
> - Lord Irvine[16]

The other aspect of law discussed above in outline, is it constitutional role. Through law, the individual becomes as powerful as the state. Both are subject to law and both are theoretically capable of calling on it to affirm their rights. The practice is more complicated. As considered throughout the discussion thus far, the practice of the law is about the content of rights. In the constitutional sense, access to legal and quasi-legal services is about the implementation of constitutional norms. Lord Irvine's words quoted above, show a limited acceptance of the constitutional role of *access*.

This ignorance of that context is all the more surprising given that the skeletal reforms[17] outlined below refer constantly to the talisman of "access to justice" as an apologia for dangerous abrogation of the individual's right to approach a lawyer for advice without consideration of the size or nature of that claim. Irvine talks in the language of 1960's human rights activism without concern for the possibility of putting those rights to work. His happy elision of the constitutional right to free healthcare, long a part of the political consensus in the UK, with the language of cost-cutting and public resources, is indicative of his blithe acceptance of broader cost management at the expense of core civil and political rights. Legal aid will not grow into the welfare state mould at a time of such confused ideological focus.

DISPARATE PROVISION

> "*It is social justice which requires that there must be access to the law for all*"
>
> - Tony Blair[18]

The fundamental shortcoming in the English legal system is not simply its proclivity for delay, cost and complexity, but rather its limited utility for the citizen. The legal system soaks up an enormous amount of public money in terms of legal aid, bureaucratic overheads and judicial salaries, but provides only a part of the service required by citizens to resolve their disputes. This is the point which Lord Irvine ought to make. Not that too much money is spent but that money is spent in ignorance of the need for resources to be targeted on structures which provide universally available justice.

Much of the fuller justice service for citizens is provided by the Citizens Advice Bureaux network, law centres, voluntary agencies and local authority advisory services, aside from the limited role of legal aid, lawyers and courts. Similarly, courts provide only a part of the dispute resolution service required by citizens. People are more likely to appear in front of a tribunal, or a small claims courts with a lay assessor, than a court with a judge.

Therefore, the focus of the legal community and of many policy-makers on the legal system is to ignore the real impact of the dispute resolution system on the ordinary citizen. Lord Irvine's policy focus on legal aid and procedure in civil courts therefore fails to acknowledge the core importance of this broader context.

Legal aid - the leveller

Legal aid relates only to proceedings in court or to advice given by a lawyer accredited by the Legal Aid Board. Legal aid is not available for representation before most tribunals, thus ensuring a form of justice which is free of lawyers. At one level, being free of lawyers is expected to produce a more efficient, less formal approach to resolving disputes. However, in an unfair dismissal claim before an industrial tribunal, the single complainant is therefore unable to pay for professional representation in circumstances in which the respondent employer may well be able to afford lawyers. The risk is a system of justice which favours the wealthy over the poor.

Therefore, legal aid is only a leveller in circumstances in which both parties are similarly represented and advised as a result of legal aid equalising the balance. However, the provision of legal aid to those on social security benefits creates an inequality between legally aided citizens and privately paying citizens where the former can call on the whole of the resources of the legal aid fund and thus intimidate private payers into settling litigation. This militates against satisfaction of the principle of equality of provision.

Legal aid is available in a number of circumstances. The Green Form Scheme permits two hours initial advice if the client satisfies a means test. This permits some access to legal aid advice. The ABWOR scheme for advice by way of representation enables some representation in court for the client, typically on an emergency basis in circumstances where full legal aid application would not have been possible. These developments to the full legal aid scheme permitted for greater flexibility.

Civil legal aid is available on satisfaction of a merits test, that the lawyer believes there to be a reasonable claim, and a means test, requiring the client to be on benefits levels of income in effect. In many circumstances, the litigant will be required to make a contribution to the cost of legal aid, depending on income. Criminal legal aid is more broadly available on a single means test. There is no requirement to satisfy a merits test for a defence to a criminal offence which falls within the prescribed categories.

What is lost in this discussion of the detail of the legal aid system is the real nature of legal aid: it is a payment of public funds directly to lawyers to satisfy their fees. It is no more complex than that. The taxpayer is paying a lawyer directly on behalf of a particular citizen. The policy pronouncements from the Lord Chancellor's Department talk of consumer rights and value for money as though there were a market in legal services. Much of the political rhetoric of the Major administration made this same mistake. It is simply not true that there is a market in legal services.

A market requires sensitivity from suppliers to the demand for their services and a fixing of price accordingly. Possibly in commercial contexts, there is some necessity for solicitors to fix their prices to keep clients. For law firms earning legal aid, they receive roughly the amount of money which they claim subject to the Legal Aid Board's control of excess, or in cases in which there are standard fees. Given that most citizens cannot afford access to law for anything other than conveyancing services, there is no broadly accessible market. A market requires that there be a range of products at a range of prices. In terms of legal services, there are rich clients or there are poor clients bringing money from the state. No-one in between is able to participate in the process in any meaningful way.

Advice agencies

The filling in the legal services edifice is provided by advice agencies. Citizens who cannot afford legal advice and who have no access to information about their rights, seek help from advice agencies. Advice agencies occupy a broad spread of territory. The best known advice agencies are the CAB network which were created in the late 1930's by a combination of government departments anxious to provide advice to citizens in the event of national emergency. This system was not wedded to the legal system in 1949 because of the Law Society's effective lobbying to ensure that the competence for giving advice to citizens remained primarily with the legal profession.

The CAB movement is plagued by lack of resources, relying on a mixture of central government, local government, and charitable money to fund each centre. There is no core funding from central government to enable the system to develop systematically over time. Lack of funds from year to year, and the risk of arbitrary withdrawal of funding, has meant that CABx are unable to plan sufficiently in advance the nature and scope of their work. Some funding is given by the Department of Trade and Industry to NACAB, the CABx national representative body.

The detail of the advisory work is undertaken by a mixture of voluntary workers and full-time caseworkers, with very little legal input. Rather, the CAB will often act as a referral system for local solicitors. In tune with this local networking, some local solicitors will run community advice clinics to provide free advice on an occasional basis. This offers some initial guidance for the citizen for ongoing problems but does not provide a systematic means of receiving information.

The law centre movement grew in the 1970's by providing a full-time, legally qualified advice mechanism to local communities. Typically, law centres do not make themselves accountable to their local communities but clearly inter-act closely with the local population. Part of the settlement between law centres and the Law Society, is that law centres do not advise the public in areas of work which conflict with private solicitors' practice. The result is an advisory service focusing on social welfare, tribunal and housing work, rather than the staple diet of solicitors.

Most public services are provided through local authorities. This requires a complex system of obligations under statute to create appeals procedures against the award of entitlement to services, and systems for giving advice on access to local government services. Frequently, CABx are linked to this broader context of advisory services. However, there is a crossover in subject matter between these offices and the advice agencies considered already. In short there is a non-legal substratum of advusory and tribunal networks which service the majority of British citizens to make up for the ignorance of the legal system for their concerns.

Control by the legal profession

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

As has been set out above, the legal aid scheme was given into the hands of the Law Society from the outset, only being put into the hands of a public body outside the profession under the Legal Aid Act 1988. Similarly, the legal professions have blocked the development of advice agencies which could advise those who cannot afford lawyers' fees. The Law Society and the Bar Council have operated for the most part since the Second World War against the public interest to protect the incomes of their members as though a *de facto* trade union.

The political generation of a justice system, capable of delivering a mature constitutional settlement to the UK, requires the eradication of lawyers' restrictive practices in relation to legal aid, the courts system and the development of alternative structures of justice provision. Social justice requires that public money is applied to enabling citizens to realise their own potential, not that it flows to the tune of £1.7 billion annually into lawyers' bank accounts with restricted entitlement for the majority of those citizens who are subsidising this system through central taxation.

The retention of practices such as the elevation of barristers to the rank of QC is both a charming foible of the history of the Bar and an unacceptable drain on public funds when those same lawyers will seek to double their fees the day after their investiture. The distinction between the rights of barristers and solicitors to appear in different courts is an unacceptable doubling of efforts at public cost. No society can afford this waste. It is regrettable that the Labour Lord Chancellor Irvine has refused to countenance reform of the judiciary by means of a judicial appointments commission (formerly Labour Party policy[19]) and to challenge the restrictive practices of the professions in relation to legal aid funding and representative services.

Labour government policy on legal affairs

The approach of Lord Irvine to reform of legal affairs has demonstrated itself to be worryingly short-sighted: particularly given the reach of Labour Party policy in this

area before the General Election of 1997. The integrated approach to reform canvassed in *Access to Justice*[20] and other policy documents, has been jettisoned in favour of a two-step approach. The first step is the introduction of the Woolf recommendations from his report *Access to Justice*[21] which are restricted to the re-drafting of procedural rules in civil courts. The second step requires the reduction of the legal aid budget through the introduction of block contracting of legal aid and conditional fees.

There are two problems with Irvine's approach. First, it is hidebound to law as the only means by which reform can be effected. There is no strategy in relation to advice agencies or other, non-legal elements of the justice system. Second, his speeches and consultation papers fuse the rhetoric of cost-cutting, consumerism, and human rights activism in a way that is intellectually unsatisfying and practically unlikely to deliver any broadening of access to the justice system for those currently outside the scope of provision. Under Irvine, the socialist goals of equality are unmentioned and unattainable.

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 for legal aid. Conditional fees, legal insurance and the block contracting proposals are considered here.

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.

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.

The Conservatives failed to realise their own ideological goal of controlling public spending from 1979 to their eventual loss of power in 1997. When in 1993 the Major administration sought to advance its policy on legal aid spending, it did so by crude cost cutting. 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. 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.

The 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, it is anticipated that 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:-[22]

> "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."

This is a laudable series of aims which do not knit into a unified strategy for ensuring a broader access to justice across the range of services and conflicts that make up the lives of ordinary citizens. The increased politicisation of the community legal service offers both dangers and opportunities. 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.

Block contracting

Block contracting is a new system for licensing lawyers to claim legal aid. All of the work carried out in respect of a given area of law in a given area will be delegated to a fixed list of solicitors' firms by giving them the exclusive block contract to provide that service in that area. 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."[23]

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.

Conditional fees

The conditional fee idea was launched in *Access to Justice with Conditional Fees*.[24] 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.[25] 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[26] 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:- [27]

> "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.

This section has been written in advance of the mooted White Paper and legislation which promises to set out more clearly the structure of this scheme and the issues considered above. A fuller account is provided in *Towards a Just Society*.[28]

THE REGENERATION OF JUSTICE

Rethinking the social context

> "*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.*"
>
> - Aneurin Bevan, *In Place of Fear*[29]

Bevan was the political architect of the welfare state and the godfather to the sentimental wing of the British Labour Party. That sentiment remains an important part of the Labour Party's drive for greater social justice. It also illuminates a thread in the construction of the welfare state that is commonly forgotten. In the talk of "structure" there is less concentration on the plight of those who are disadvantaged. Bevan requires us to provide for that individual. There is no social system so well placed to assist in that process as the justice system. It is a means of access for the citizen to combat disadvantage.

This emancipatory role for legal services, mirrors the proposals for a third way in public services, which encompasses the expectations of citizens to have their views heard. Within this context, it is important that the reform of the justice system acquires a political outlook. For too long it has been left to the lawyers to control legal aid and the running of the courts. The strength of the lawyers' guilds has ensured that the tribunal and mediation systems have acquired the trappings of second class justice.

Justice reform must be moulded by political objectives and subject to political accountability through a ministry of justice, shadowed by a select committee and led by a Cabinet minister drawn from the House of Commons. The patronage of the ancient office of Lord Chancellor constitutes too great an affront to the logic of the constitution and too great an anchor to the possibility of integrated reform of the means by which individual citizens access justice.

Failure of the project?

Does the unsatisfactory scope of Labour attitudes to justice policy mean that the Blair project is likely to fail in this area? It need not. The approach of the community legal service is laudable, provided the issues of appropriate local accountability and nationally even distribution are met. The notion of "community" in this proposal

chimes in with a number of New Labour's core messages. It is surprising that legal affairs policy has not been given a make-over to bring it into line with these goals.

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.[30]

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.

Social justice - the real project

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.

A number of issues arise from 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.

Unless policy focuses on the justice system as a means of generating a more just society, no government will succeed in getting 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".[31]

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[11] Stand-up comedian, interviewed on *Clive Anderson Talks Back*, BBC 1, 15th November 1997.
[2] Legal Aid Act 1949.
[3] Habermas, *The Philosophical Discourse of Modernity* ( ).
[4] See Giddens, *Beyond Left and Right* (London, Polity Press, 1993).
[5] *Renewal* is the New Labour political journal; also Blair speaking on accepting the Labour Party leadership on 24th July 1994: "it is a mission of national renewal: a mission of hope, change and opportunity", reproduced in Blair, *New Britain* (London, Fourth Estate, 1996), 29.
[6] See Blair, *New Britain* (London, Fourth Estate, 1996), esp. 141 *et seq*..
[7] Giddens, *Modernity and Self-Identity* (London, Polity Press, 1991), 35 *et seq*..
[8] Blair, *New Britain* (London, Fourth Estate, 1996), esp. 100 *et seq*..
[9] Held, *Reinventing the Left*, ed. Miliband (London, Polity Press, 1994), 58.
[10] For a very good account, see Daniel, "Socialists and Equality", in *Equality*, ed. Franklin (London, IPPR, 1997), 11-28.
[11] Brown, *New Labour and Equality*, The Second John Smith Memorial Lecture, Edinburgh University, 19th April 1996.
[12] Blair, *New Britain* (London, Fourth Estate, 1996), esp. 100 *et seq*..
[13] See Parekh, "Equality in a Multicultural Society", in *Equality*, ed. Franklin (London, IPPR, 1997), 123-155.
[14] Habermas, *Theories of Communicative Action* (Beacon Press,).
[15] Luhmann, *The Differentiation of Society* ( ).
[16] In a speech to the Lord Mayor's dinner for Her Majesty's judges on 23rd July 1997.
[17] "Skeletal" at the time of writing.
[18] Speaking in Sedgefield, 28th January 1995.
[19] Labour Party, *Access to Justice* (1995).
[20] Labour Party, *Access to Justice* (1995).
[21] Lord Woolf, *Access to Justice: Final Report* (HMSO, 1996).
[22] Lord Irvine, *ibid.*
[23]
[24] Lord Chancellor's Department, *Access to Justice with Conditional Fees* (March 1998); www.open.gov.uk/lcd/consult/leg-aid/lacon.htm
[25] As estimated by Lord Irvine himself, speech to the House of Lords, 9th December 1997; www.open.gov/lcd/speeches/1997/adjn-deb.htm
[26] *Review of Civil Justice and Legal Aid*, report to the Lord Chancellor by Sir Peter Middleton (September 1997).
[27] Lord Irvine, speech to the House of Lords, 9th December 1997; www.open.gov/lcd/speeches/1997/adjn-deb.htm
[28] Hudson, *Towards a Just Society - Law, Labour and Legal Aid* (London, Cassell, 1999).
[29] *In Place of Fear* (first published 1952; currently Quartet Books, 1990).
[30] These issues are considered in detail in Hudson, *Towards a Just Society - Law, Labour and Legal Aid* (London, Cassell, 1999).
[31] Preface to "*Strategies for Renewal*" (Vintage 1994).