Towards the just society

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Labour and access to justice

The title is taken from the Labour Party's constitution which proclaims the party to be a 'democratic socialist' one committed to working for a 'just society'. Those four key words (democracy, socialism, justice, and society) are very problematic for the new Labour project primarily because this administration has yet to decide exactly what it means by each of them. The genius of the ideas behind new Labour is based on its ability to function as a campaigning tool; the weakness of those ideas is that they have never been worked into a cohesive intellectual framework.

To be fair, Blair came to the leadership at least five years before he would have wanted or expected that he could. Given more time in the shadow of John Smith (where the bulk of the Party's members remain in truth), Blair might have tempered his enthusiasm for all things "new" with the possibilities of believing in an ethical socialism maintaining an affection for the welfare state. 'Belief', 'mission' and 'values' are important to Blair (see Blair (1998)). The difficulty is that the government is not allowed to confuse belief with ideology: humanistic ideas (like civil liberties) are problematic for a paternalistic, Christian socialist administration (to whit, the difficulties with freedom of information, national security and immigration policy).

The real test of this division between rhetoric and policy is in the area of human rights and of the protection of those rights through law. The lack of a coherent intellectual framework for those four, difficult ideas (democracy, socialism, justice, and society) is most apparent whenever Derry Irvine, the Labour Lord Chancellor, speaks (see Irvine (1997)). While his press releases speak of 'access to justice' and a 'community legal service' his policies are concerned only with cost-cutting, 'consumers of services' and 'value for money'. What I hope to show is that there are two obvious and irreconcilable streams of thought at work here - and further that, perhaps surprisingly for some, the only prospect for reconciling these positions is by a return to welfare state-ist ideas (Elliot (1995)).

Power, rights and law

The aim of this essay is to discuss the implementation of Labour's human rights policies. There is much to be said about the problems for socialist theory in advancing the liberties of individuals instead of the role of the state: there is no space to consider those questions here. One significant facet of our political organisation is that we exercise constitutional power through law and not

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through observance of other cultural phenomena like magic, religion and so forth (on which see Foucault, ed. Gordon (1980)). Political power is thus located in the ability of citizens to have their rights recognised as being truly 'rights' or 'entitlements' enshrined in law, rather than being merely 'claims' or 'aspirations'. Lawyers are typically cautious to retain the distinction between talk of 'rights' as legally-recognised entitlements and language using the term 'rights' as merely rhetorical claims to entitlement (see perhaps Raz (1986), 183). In that sense, it is particularly important that human rights are genuinely
activated through law.

The nature of this legal structure requires careful consideration. Law is the product of politics (through legislation) and also of discourse (judicial judgments and legal practice). In short, law is created by virtue of things that are said: a judge pronounces the law to be such-and-such and the law is consequently such-and-such. This is a combined process of authority to speak and the things that are said. Access to the system through which law is pronounced and discussed is therefore vital both to ensure rights do exist and to affect their nature. Our discussion of civil liberties in the English and Welsh legal system will question whether we should continue to do things in a particular way simply because we have always done things that way.

And yet the bases of law are anthropological as well as political. Cotterell (1999) and Durkheim (1984) have explored the possible genesis of law in religious observance (for example the development of property rules in the segregation of sacred sites from general use) and of magic (particularly the parallels between using magic rituals to express power or hex over another person just as following legal procedure leads to a judicial expression of power or injunction over another person). Post-colonial theorists like Fitzpatrick (1993) have expressed the need for us, pleased with our own
legal sophistication, not to consider pre-colonial societies with their alternative social structures as being somehow less valid or less developed. By examining these alternative sources of our law, we must recognise the current system as being based on a status quo (the way things happen to be now) and not a sine qua non (the way necessarily have to be).

The central assertion of this essay is that reform to one part of the modern 'justice system' through which law is accessed and shaped cannot achieve its goals in a vacuum from consideration of all other aspects of that system. As Tony Blair has said (Blair, 1998), and as John Smith said before him (Smith, 1994), the purpose behind reform of the justice system is the pursuit of greater social justice. The aim of any programme of reform must be to work towards a "just society". That involves an increase in access to the system. It also involves a programme of public education and a simplification of substantive legal rules. The procedures of court-based litigation must be streamlined - although that will not provide a complete solution in itself.

The British people must be brought closer to the means of dispute resolution as a means of enhancing their own liberties and of unlocking their own potential. Too often we allow law to be thought of as something that is done to us rather than something which we own and control as citizens. Law ought not

to be a sovereign which exerts power over us. Law should react, it should enable us to forge our own relationships (Hudson, 1999).

The political problem: rhetoric and resources

Before considering the detail of 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) was an intractable one for the Major administration and has remained so for the Blair administration.

The focus of the new Labour government's proposals is on 'the consumer of legal services'. 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.

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. The political problem is presented as being one of balancing ideological will with available resources.

The political discourse of law

As asserted earlier, 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. While the political debate is effectively restricted to those legal actors, 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 because they cannot afford it.

What is implicit in the regular trumpeting of the phrase "access to justice" (see Woolf (1996) and Irvine (1997)) is an understanding that law occupies an important symbolic and practical place in the Western, democratic model. It is not true to say that most citizens have regular contact with the legal system - appearance in court for the non-lawyer is a rare occurrence. Many citizens will live long and fruitful lives without ever having to enter a court building. However, citizens will come into daily contact with the effects of government-through-law.

The logic of democracy is that governments are empowered by democratic mandate to rule within the confines of existing law by creating new laws. Law is the exercise of power in that political sense. Therefore, it is essential to the logic of liberal democracies, built around the notion of the rule of law and the function of politics being to create law and thereby govern, that the law is capable of access by all citizens in equal part. Legitimacy for governmental action is achieved by law-making through constitutional means, as well as day-to-day electoral legitimacy through the lens of the media's treatment of politics. Law acquires the mantle of truth and probity precisely because it is law, made through the appropriate democratic mechanisms.

Welfare state approaches

It is my contention that efficient and equitable administration of legal aid can only be achieved if it is considered to be a welfare state benefit for the disadvantaged: that is, a social welfare payment made to those who require access to prescribed parts of the justice system. To achieve greater social inclusion, it is important that citizens are both connected to their legal entitlements and able to join in the legal discourse about their claims. The system would operate for the benefit of the disadvantaged but be restricted only to particular areas of advice and representation such as social security, criminal defence or housing cases (see Hudson (1997)).

There is typically a distinction made between criminal legal aid and civil legal aid in this context. The argument is frequently made that criminal legal aid concerns basic human rights (such as 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 (a civil claim) is of more significance than the ability to defend a road traffic offence (a criminal matter).

Where the conceptual difficulty arises more significantly is not in this horizontal measurement of availability of legal aid into broad income categories, as at present. What appears to be more useful is to divide this issue into vertical differences between types of case (Hudson (1999)). 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 - a welfare statist conception of the context of legal aid would facilitate the primacy of one over the other. What I would envisage therefore is a conceptualisation of the priorities for the justice system being decided by the political system. A left-of-centre administration ought to advance the use of public funds primarily for social welfare disputes (including housing, social security, employment, healthcare, and so forth) in place of white collar crime and similar disputes.

This proposal has two immediate problems on its face. First, it apparently refutes the principle of greater equality by introducing inequality in the form of bars to publicly funded legal services for those whose disputes do not fall

within the selected categories. Second, civil libertarians would be concerned that politics is being brought explicitly into the arena of justice.

The answer to the first concern is that the current barriers to publicly funded legal services are hidden because an applicant will not receive full legal aid even if they are on a very low income. That means the vast 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. Expressing this issue as being purely sociological would be to ignore the naked politics at issue (see the sentiments of Virilio, (2000)). Introducing politics to the situation expressly has the advantage of making legal aid provision more transparent and accountable. Currently, 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 into legal disputes rather than
investing in the health of those families by means of mediation or counselling services.

In this way it is almost too easy for the legal system to focus on its own, internal logic and to miss the broader social context in which the law operates. In this regard, much of the discussion of human rights among lawyers does not seek to redress any of the imbalances in society. As Gearty has expressed the problem (Gearty (1994)):

> "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."

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.

Themes and (con)fusions

There are two fundamental defects in New Labour legal affairs policy: first, it fails to take an integrated approach to justice policy and, second, it fails to match a consistent ideology with targeted policy. It is suggested, in short, that the only way in which it is possible for reform to be effective is if it looks at the problems which citizens face as to dispute resolution and as to education about their legal rights. The principal focus of policy on cost-cutting ignores the democratic aspect to justice reform. More importantly, that failure to understand that there is a complex web of services and social need beyond the limited problem of the legal aid budget means that it will be impossible, in fact, to cut budgets.

What is immediately apparent about the government of the justice system is that it is not the responsibility of one, single department. The Courts Service and legal aid fall within the remit of the Lord Chancellor's Department. Within the purview of the Lord Chancellor personally are issues relating to judicial appointments (including the magistracy) and promotions within the legal profession. The Lord Chancellor retains an advisory body in relation to legal education and training. Of the advice agencies, the law centres are administered from the LCD too.

Peculiarly, the budget for the CAB system is administered (in the main) by the Department of Trade and Industry. Issues to do with criminal justice, sentencing and prisons are administered by the Home Office - outwith the responsibilities of the Courts Services Agency. There is a turf war between the LCD and the Home Office as to responsibility for juvenile justice, which is an even more important political issue given the rise in media interest in juvenile crime and in the family. It is then the Department of the Environment which has responsibility for local authority advice agencies and appeal procedures by means of guidance notes in support of subordinate and primary legislation, as well as direct bureaucratic control of certain aspects of local authority funding.

The immediate answer to these problems is the creation of a Ministry of Justice to bring together all of the agencies and resources (human as well as financial) to advance the democratisation of society through a responsive and accessible system of justice provision. In an era, supposedly, of joined-up government it is imperative that there be a central locus for the co-ordination of policy to do with human rights and social justice.

The constitutional settlement

The English legal system is proof that there is no truly democratic settlement in England and by extension, I would suggest, 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 or the ennoblement of sycophants. 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? Legal advice is available only to those with the wherewithal to pay for it. Legal aid for civil claims is available to those on income support levels of income only. It is proposed that that scheme will be removed and replaced with conditional fee arrangements, requiring the citizen to negotiate a fee with the lawyer to be deducted from her winnings, if any. Therefore, only those with large enough claims will be able to acquire such agreements. (Legal aid for criminal claims is still broadly available.)

Citizens require equal access to the legal system to evolve from being 'subjects' under 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. Without the possibility of universality of access, let alone uniformity of outcome, the British constitution cannot be said to be the foundation of a functioning democracy.

What is needed is a different understanding of the term 'democracy'. Democratic rights must be seen as extending beyond the ballot paper to an ongoing right to challenge and to shape the legal context in which the British polity sets out rights and responsibilities. Every time a citizen takes a case to court the law develops, every judgment that is challenged sees the law develop, every advance in the law signals a material change in the quality of the rights of citizens. Access to that system is therefore of vital, democratic importance.

Law is culturally hugely significant. 'The law' exists in symbolic presentations of its power - in the modern age usually photographs of elderly men in wigs or newspaper reports of judicial sentences. It occupies an ideological place which is bound up with a veneration for law as something necessarily correct because it has the legitimacy to speak. This is despite the effort which is expended in satirising it. Stories of judges who do not know the household names of pop stars and footballers are a tabloid newspaper staple. A good example would be

the Not the Nine O'Clock News sketch which played up the supposed hidden life of public school educated judges, in the person of a Crown Court judge who had never heard of video recorders or personal stereos but who could identify with great precision a particular brand of sex toy. The law is also represented in a plethora of TV serials about criminal barristers or police officers - whether presented as staid and traditional (Rumpole of the Bailey, Kavanagh QC) or young and sexy (This Life, Blues and Twos).

Modelling the future

Equality must become the core goal of the left-of-centre political project once again. In the Blair rhetoric it is a goal which has lost its status. Blair talks of individuals having "equal worth", whereas Giddens seeks a more prominent position for notions of equality within a reflexive, modern society (Beck, Giddens, & Lash (1992)). In coming to the notion of equality in relation to law, it is comparatively easy to decide that all citizens ought to be equal in terms of their access to the legal system, to legal advice, and to tribunals. It is a fundamental aspect of social justice that there be equality of access to the legal system and its satellite institutions, tribunals and officers.

The government has identified the problem of social exclusion as being one of the core social concerns in the UK: something well-established in the literature (Byrne, 1998);). Part of the programme of increasing inclusion involves policy to tackle crime, to improve education, and to reduce poverty pay and unemployment. It is tempting to see law as an ephemeral add-on to these viscerally important social goals. However, part of the exclusion of much of our society is the inability both of the disadvantaged and even the poorly-paid to participate in the legal system which both creates and allocates legal rights.

Law provides a public service: including dispute resolution, protection of rights, recovery of compensation. It must be conceived of as a part of a supportive welfare state investing in its citizens. Legal aid must be made available not to lawyers on the basis that they have claimed fees but rather to citizens involved in socially-significant litigation to defray the expense of a number of agencies (not simply lawyers). By "socially-significant litigation" I envisage forms of litigation which are politically identified as being important: the vertical integration considered above which prioritises housing disputes and employment tribunal representation over white collar crime.

A reduction in the Lear-like "trappings and additions" of the legal system (such as the grandeur of Circuit judges' lodgings and the Bar mess; ornate and under-used court buildings; antiquated modes of dress and address) will form a significant remodelling of the justice system as a de facto public service. No-one would think to pay out of public money for such architectural trappings for NHS trusts' offices, nor for housing officers to hear applications in wig and gown.

Law is a part of the social and cultural fabric of our polity: it is both equitable and efficient that it be made equally accessible to all. Much of its financial cost can be attributed to its pomp and ceremony and to its slow procedures and its

impenetrable jargon. A reduction in these attributes can increase the democratic capital of our citizens while also cutting the cost to the exchequer. Put CABx in unused space in court buildings, marry local authority advice workers with the mainstream legal aid system in a national advisory service, and the regeneration of the justice system can
begin (Hudson (1999), Part 5).

Towards the just society

A responsive justice system can be one of the most important, flexible ways of permitting individuals and groups to communicate about their mutual rights and responsibilities. Such a system makes that communication possible. Closed social systems (like the autopoietic legal system) would tend to disturb the free flow of such ideas and activities, requiring them to be channelled through a pre-determined, narrow form of legal discourse (Luhmann (1982) and Teubner (1994), as addressed by Habermas (1987)). Thus a legal system hidebound by tradition and inflexible ways of thinking seals itself off from other social systems. More significantly, however, it allows individuals to be relegated in a game of social systems working out their
respective modes of communication. Ours is a society of increasing chaos and complexity in which the justice system must respond equally to all, welcoming all into its portals to work out their respective interests, obsessions and needs. Social justice can only be promoted through this humane activation of discourse where each one is truly equal with each other in bringing their concerns to law.

For many millions of people, denial of access to the legal system 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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