

EQUALITY

The idea of equality is central to socialism – although it is something which has been forgotten by the Blair government. It is generally thought by those on the Right that equality is not a part of a political programme. However, it is a common part of all societies that there are things in relation to which all people are equal: in democratic societies, equality relates to the right to access legal rights. In the UK it relates to the right to access the National Health Service, etc.. Thus the debate between Right and Left is actually a debate as to those social goods over which equal access is contested: but it is a debate in the middle about a narrow ground. There are two debates here: first, to what extent is equality a desirable goal and, secondly, how can equality be put into practice and increased?

In this document, the bulk of the discussion is culled and adapted from my 1999 book *Towards a Just Society* – the argument which is was seeking to address in that book was that one can move beyond the traditional arguments about *equality of outcome* (that, like communist or anarchist models, all alike on an equal basis) and *equality of opportunity* (that, like social democratic models, administrations seek to give everyone the same start but thereafter encourage meritocratic differentiation in the outcomes of those individuals) into a more fruitful arena of *equality of access* (whereby we recognise that one of the most significant aspects of equality is to ensure that there are no obstacles to the ability of individuals to gain access to the rights which have been politically prioritised).

Equality of access to the justice system

From “Towards a Just Society”

Equality is at the heart of most of this discussion. It will be argued below that equality is at the very centre of social justice on any model of the left, and in particular in the creation of a viable justice system. Although there are those who would analyse the operation of law predominantly in terms of freedom,¹ the logic of those liberty-orientated approaches is that there is no inequality inherent in the legal system. As considered in *Publicly-funded Legal Services* below, there is exactly such an inequality in the legal system. For all to be free in a democratic society, all must be equal under the rule of law. The question is not really “should we be equal?” but rather “in what ways should we be equal?”. In the context of the rule of law, the logic of democracy requires that we be equal without compromise. The argument advanced in this book is that we should

¹ As derived perhaps from Nozick, ...

therefore be similarly equal without compromise in relation to access to law and legal remedies. The inter-action between community and individual autonomy is considered below.

However, the notion of equality is a particularly problematic one. There are many different ways and times in which equality can be measured. The Blair administration is not focused on equality of outcome as one of its core aims, rather it is focused on the creation of a social market, a just society and on prosperity. Its social democracy is libertarian and aspirational, rather than egalitarian. For the first time the rhetoric of equality has been dropped by a Labour government as part of moving away from the slogans of redistribution and universal benefits towards, what has been dubbed in this book, “the radical centre”. In moving beyond the structures of left and right the main ideological casualty in discourse has been equality.

The content of the term “equality” has become ever more difficult to pin down. Gordon Brown is heard to speak of “equality of opportunity”² and even more generally of “fairness”, as being among the key socialist goals. Echoing John Prescott’s words, the New Labour project is applying “traditional values in a modern setting” by leaving equality of outcome behind. To some that means effectively jettisoning those values and being “value-less”. In fact, the Blair administration sees itself as working towards the development of different values - although it is still necessarily jettisoning some values as it goes. The primary casualty has been equality. The notion of equality has transformed into a concept of “inclusion” in Giddens,³ and to a notion of “equal worth” in Blair’s conception.⁴ For Giddens, inclusion relates to an ability for all citizens to participate socially by virtue of a social investment state which will educate them so that they have opportunity, but which will also nurture them through the rest of their lives where that initial injection fails. Blair is concerned to provide opportunity and prosperity by ensuring policy which gives equal democratic worth to citizens. While both these conceptions have an impact on the economic context in which citizens live, it is apparent that equality is given a more spiritual (and a less economic) spin.

Ironically, it is in relation to access to justice that the notion of equality has the greatest claim to truth. The notion of the rule of law, underpinning the constitutional democracy revered by the Blair administration, is that there is equality before the law. To translate that aim into practice, it is essential that individuals have equal access to that law and are equally subject to it. As considered in the introductory essay, the current structure of the legal system means that there is no such equality. What remains at issue is the type of equality that is meant and the manner in which it ought to be applied in policy-making in the context of the justice system.

It is in the sphere of legal affairs that equality is an easy concept to apply. It is an uncontentious statement in democratic societies that everyone should be equal before the law. It also follows that the standard of equality is something which can be different in

² Brown, *Fairness* , John Smith Memorial Lecture .

³ Giddens, *The Third Way* (Cambridge, Polity Press, 1998).

⁴ Blair, *The Third Way* Fabian Pamphlet 588 ().

different contexts. Rather than constituting resiling from principle, it is important to measure the appropriate social good and to conceive of the appropriate level of equality for the purpose. Thus in relation to welfare state benefits, employment-related benefits replace income in a way that makes the recipient unequal in terms of receipt of social goods but more equal in terms of income than unemployment would otherwise mean. However, access to the National Health Service is equal to all in that there are no eligibility criteria. Therefore, it is necessarily the case that there is no such thing as total equality in society in any event - it is not suggested that those in employment ought to be entitled to unemployment benefits as well as the unemployed. Therefore, in relation to access to justice it is important to understand the appropriate context of equality.

In opposition to the egalitarian socialist and social democratic viewpoint, is one based on the autonomy of the individual which emphasizes liberty rather than social structure. The libertarian position emerges from Nozick, who has referred to the autonomous subject as:-

“a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract principles or considerations it formulates to itself and hence not merely the plaything of immediate stimuli, a being that limits its own behaviour in accordance with some principles or picture it has of what an appropriate life is for itself and others.”⁵

This individualist subject makes decisions and choices in a way that is unfettered. The measure of that freedom is therefore in its equal application. None should be more free than others to make these choices. The question arises then as to whether or not this is a useful way of considering equality. To be equally free to make mistakes or to succeed, necessarily means that equality is a transitory value which will apply to selected groups of people only for a short period of time until their lifechoices make them either unequal or simply different. The antithesis to Nozick’s libertarian position is that of the social contract championed by Rawls. In *A Theory of Justice* Rawls extended a conception of equality and social justice combined:-

“Justice is the first virtue of social institutions ... in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.”⁶

In the calculus of providing social justice through law, it is contended that only social institutions will create an environment in which individual citizens will be empowered to shape their own rights and responsibilities. As considered below, there is a trade-off between individual autonomy and the systemic pressures which come to play an important part in the discourse about rights in particular contexts. However, to ensure that individuals’ liberties are protected, it is this writer’s opinion that equality of power within the justice system is the fundamental criterion in the generation of social justice. To be free under the law is to be equally free to access that law. Beyond the question of access,

⁵ Robert Nozick: *Anarchy, State and Utopia*, 49

⁶ Rawls, *A Theory of Justice*, p.4.

which is the remit of this book, it is a question of politics as to the reform of common law if judges do not reflect social requirements in their judgements and as to the reform of statute through Parliament.

Equality of Opportunity

Opportunity stems from the concept of personal autonomy. It is by giving power back to individuals that they are able to realise their opportunities. By investing in the citizen, the state enables the citizen. Central dictation of the pattern of an individual's life chances does give them the ability to meet their own needs or to realise their own potential. A similar approach is taken by Held in the context of his principle of individual autonomy, predicated on a notion of some pre-existing equality:-

“... persons should enjoy equal rights (and, accordingly, equal obligations) in the framework which generates and limits the opportunities available to them; that is, they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others”.⁷

The theory suggests that there are justifiable inequalities in our society. Rather than a reliance upon compulsory equality for all, there are circumstances in which an unequal distribution of social goods is permissible. An example of this might occur where an individual has a particular talent which is deemed to be of social benefit. An inequality of social goods to assist this individual to hone that talent would be a justifiable use of resources even where the individual is not per se in an economically unequal situation.

Opportunity, diversity ... and injustice?

There are shortcomings with this focus on opportunity, in that it permits of huge social injustice by encouraging unequal outcomes. Giddens has identified the shortcomings of equality of opportunity as the sole plank of egalitarian thought in the radical centrist position.⁸ In his view, if the focus is simply on opportunity, without thought to a just level of equality of outcome, the desire of the radical centrist for social justice will not be satisfied.

The fundamental issue is then: to what extent are specific inequalities to be justified? And further, beyond choosing the grounds for inequality of treatment, opportunity to do what? These are normative claims which themselves need to be grounded in an intelligent base of concepts. There are inter-generational inequalities; these inequalities will emerge even on Rawls' "year zero" approach to justice generation.⁹ How do we manage the growth of the

⁷ Held, “...”, *Reinventing the Left*, ed. Miliband (London, Polity Press,), p. 48.

⁸ Giddens, *The Third Way* (Cambridge, Polity Press, 1998), p.161.

⁹ Rawls, *A Theory of Justice*.

aged population and the need to alleviate the poverty of the elderly? Sen¹⁰ talks of a need to assess capability of individuals to act: a dynamic conception of equality of opportunity. James¹¹ concentrates on the injection of equality of opportunity at infancy: providing universal nursery education, healthcare at birth and so forth so that at least the start in life is equal. Opportunity, it is argued, will follow from this.

How does one conceive of inequality? What is the inequality displacement which we are trying to manage? Should a system of equality of opportunity favour diversity? The "one-size-fits-all" approach to benefits does not sufficient account of the needs of individuals. To work towards an socially-inclusive system of benefits provision, individuals must find that their needs are met by the system. The emphasis must instead be on the provision of services to individuals in communities. The development of a public service ethos which is committed to responding to individuals, rather than simply to carrying ideology into practice, is the necessary focus of all social services including the legal system.

The aim of equality of opportunity in the modern context is better described as equality of access to lifechances than a redistributive provision of an exact mean average of social goods. There are some individuals, communities or groups at whom benefits and social goods should be targetted, while retaining the emphasis on diversity.

How useful is equality of opportunity anyway?

There are matters of degree in this view of equality of opportunity. While equality of opportunity is often considered to be a less radical idea that policy to ensure equality of outcome, the notion of making all citizens' opportunities equal is in fact a very radical idea when taken to its possible conclusions. It is in staking out the parameters of this notion together with management of perception of ideas like stigmatised means testing that will determine the success or failure of the project.

This issue resolves itself in part into a discussion of what the state can enable people to do for themselves? In this radical centrist vision, the role of the state ought to be centred on isolating those who are not served by the system and therefore require assistance to ensure that their opportunities are equal to those of everyone else. To borrow the Labour jargon, to be "tough on need, and tough on the causes of need". This approach sits less controversially with a discussion of law, perhaps, than with a discussion of the economy. With reference to economic goals, the classical socialist position would argue for equality of outcome, such that there is no demonstrable inequality or economic injustice.

With reference to the justice system, a notion of law which is capable of being used by the citizen to defend rights and to advance aspirations, is a legal system based on some equality of opportunity. It is not an issue of outcome because the ultimate outcome is a question for the judiciary and the legal system. The only meaningful outcome is the ability to take an

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issue before a lawyer and before a court without the barrier of cost. But that is really a question of access, rather than a question of outcome. Whether access is the same as opportunity in this context is a narrower question.

Equality of access

The context of equality which is most apposite in a society where citizenship is predicated on a balance of rights and responsibilities conceived of and enforced by law, is equality of access. As Held imagines the operation of this principle:-

“Democracy ... 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.”¹²

The pathway of the political debate about equality is well-trodden.ⁱ On the one hand, it is argued that it is the responsibility of government to ensure that there is equality of opportunity between citizens, as considered above. In the light of the change in work patterns which has seen the “jobs for life” culture be replaced with mass unemployment, Labour has begun to argue for “life-long learning” which would enable 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.ⁱⁱ

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.ⁱⁱⁱ

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.

¹² Held, “...”, *Reinventing the Left*, ed. Miliband (London, Polity Press,), p. 58.

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, as explored below, 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 through legal aid 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.

Access to social goods is all important if the theory is to be reflected in the experience of individuals. In the same way that, just because all are free to go to court, few can afford to without legal aid, not everyone can make a return on their equal lifechances. In working towards equality of opportunity, we must address the power structures that prevent equality of opportunity. This links back to the need to establish methods towards social justice provision generally and an enlargement of individual citizen's access to democracy. The understanding of power relations and the hypercomplexity of social power, is pre-requisite of enabling the citizen to access social goods. Simply winning electoral power will not, of itself, be enough to communicate opportunity to those who have been dispossessed in the UK.

To compare the legal context with the notion of equality of opportunity in the secondary education sphere, 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

equals 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.

Stakeholder democracy (from Towards a Just Society)

Defining "stakeholding"

The principle behind stakeholding is that it enables individual citizens to have a stake in society. By analogy with shareholders in companies, if you feel you own part of something, you are able to contribute to it more purposively. The act of giving a stake to individuals is an act of devolving political power to individuals. In Hutton's analysis¹³ this stakeholding concept is applicable to constitutional reform rather than simply to economic structures. Indeed Hutton's core point is that the obsolescence of the British constitution is itself a drain on the efficiency of the economy.

The law we're in

The legal system distances many people from access to their rights through delay, cost and over-complexity of rules and procedures. This much is developed in *Components of Delivery* below.

Stakeholding and individual autonomy

There is no longer a clear class demarcation. Security has become one of the more important benchmarks of class. The middle class is now a broad band of people who are not poor enough to be on benefit but not rich enough to be free of worry.

¹³ Hutton, *The State We're In* ().

Equality of access, and individualisation (from a work-in-progress on equity and individualisation)

“Equality” is term used by Beck and Beck-Gernsheim in constructing their notion of individualisation. The content of the term “equality” has always been a vexed one, whether choosing between “equality of opportunity”, in relation to people having equivalent opportunities in life after which they are left to their own devices as to how they exploit them, or “equality of outcome”, which seeks to ensure that all people are equal throughout their lifetimes although with difficult questions as to how one achieves equality logically between adults and children, physically able and physically disadvantaged, lazy and resourceful.

The notion of equality has transformed into a concept of “inclusion” in Giddens,¹⁴ and to a notion of “equal worth” in Blairite public policy.¹⁵ For Giddens, inclusion relates to an ability for all citizens to participate socially by virtue of a social investment state which will educate them so that they have opportunity, but which will also nurture them through the rest of their lives where that initial injection fails. Blair is concerned to provide opportunity and prosperity by ensuring policy which gives equal democratic worth to citizens. While both these conceptions have an impact on the economic context in which citizens live, it is apparent that equality is given a more spiritual (and a less economic) spin.

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This third context of equality is equality of provision 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.²⁰ Equality of access is central to a properly functioning legal system. Equality of outcome

¹⁷ Robert Nozick: *Anarchy, State and Utopia*, Blackwell, 1974, 49

¹⁸ Rawls, *A Theory of Justice*, Oxford, 1972, 4.

¹⁹ Held, “Inequalities of Power, Problems of Democracy”, *Reinventing the Left*, ed. Miliband, Polity, 1994, 58.

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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.

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Access to social goods is all important if the theory is to be reflected in the experience of individuals. In the same way that, just because all are free to go to court, few can afford to without legal aid, not everyone can make a return on their equal lifechances. In working towards equality of opportunity, we must address the power structures that prevent equality of opportunity.

ⁱ For a very good account, see Daniel, “Socialists and Equality”, in *Equality*, ed. Franklin (London, IPPR, 1997), 11-28.

ⁱⁱ Blair, *New Britain* (London, Fourth Estate, 1996), esp. 100 *et seq.*

ⁱⁱⁱ See Parekh, “Equality in a Multicultural Society”, in *Equality*, ed. Franklin (London, IPPR, 1997), 123-155.