Times Law Awards 2011 - Stephen Donnelly

Justice under the axe: can the Government's cuts be fair?

In the throes of crisis politicians, and sometimes judges too, are least inclined to uphold the rights of the vulnerable or unpopular. Lord Atkin's dissenting speech in Liversidge v Anderson, that laws speak the same language in war as in peace, is emblematic of the courts' place as the keystone of justice's edifice when others would quarry it for other ends. This essay proposes to answer the present question in line with that speech: the government's cuts can be fair, so long as our laws speak the same language in poverty as in plenty. Consequently, although the cuts will have wide-ranging effects, it focuses firstly on the central role of the courts in ensuring fair treatment, and secondly on guaranteeing the fairness of the courts themselves.

One might simply argue the courts should escape the cuts altogether: an effective justice system is a precondition of substantive fairness in the national balloon debate attending the cuts. Hence, though some may consider health or education services more important, the mechanisms for deciding their fair allocation must remain robust.

That would be a superficial response. There is force in Fuller's analysis that courts are ill equipped to determine wide-ranging political issues such as the allocation of funding. One must not therefore suppose that justice and fairness are the sole preserve of the courts. Moreover, as Lord Neuberger argued in his speech to the Bar Conference in November, the interests of litigants are not necessarily conterminous with the public interest.

On the other hand, experience suggests that legal protections such as those guaranteed by the common law and bolstered by Human Rights Act are much more effective at safeguarding unpopular minorities than political mechanisms such as ministerial accountability to

Parliament and, less focused still, elections. Thus in these economic straits the public is hostile to those it sees as a burden – asylum seekers, prisoners, and those on benefits – just as in earlier days it was to nationals of enemy states. Nourished by public and press antipathy to such groups, the government has left it to the courts to ensure that prisoners may vote, or that the proper oversight of judicial review is available in at least some circumstances to those dragooned through the new, cheaper, administrative tribunals. Therefore, although the courts may not be the only guarantors of fairness, they are vital ones.

But how can we ensure that the courts themselves remain fair on a reduced budget? In other words, what is really meant by the slogan, increasingly often and unthinkingly invoked, 'access to justice'? Justice is a finite resource. Everyone has a right to it, but it must be rationed. One might think that inconsistent with the characteristic image of blindfolded Justice. But when public funds are so restricted, failure to direct funding where it is needed would shut out an unthinkably large portion of the public. Some mechanism of means testing must therefore remain, and perhaps even be expanded.

Moreover, though legal aid is also a product of the post-war welfare reforms, we are very far from an N.H.S. for law. Market solutions will therefore have to complement a re-calibration of direct funding.

The Law Society has suggested a 'polluter pays' system: for example, a levy on alcohol to reflect its contribution to the crimes legal aid has to be paid for. However, that would operate arbitrarily. Many 'polluters' such as drug dealers operate outside the law to begin with. And other untaxable contributors such as poor education or parenting may be at least as significant

as more proximate causes like alcohol, as vouched by the criminologist Lacassagne's admonition that, 'Society has the criminals it deserves.'

What about private charity? Many lawyers generously act *pro bono publico*. But reliance on that would be a retrograde solution, taking us back to before it was appreciated that recourse to the courts is a touchstone of a democracy. Such recourse deserves proper funding if we are to merit the name. Moreover, the advantage of legal aid over charity is the former's quality assurance scheme for advocates receiving it. Establishing a similar scheme for *pro bono* advocates would simply cost money that would be better spent funding existing cases.

Indeed, any eventual savings through large-scale structural reform are probably precluded for the time being by the truth of the 'Yes, Minister' adage that it is more expensive to do things cheaply – at least initially. An effective solution therefore cannot require heavy capital investment.

One solution, immediately realizable and consistent with means testing, would be to charge progressively higher court fees to non-legally aided civil litigants. Fees would rise with the sum sued for, on the premiss that the benefit of litigation is *prima facie* linked to the amount at stake. Each very high-value action might thus fund several legal aid cases. Furthermore, potential litigants would have more reason to consider whether proceedings, with the consequent allocation of the court's administrative resources, were really necessary or whether alternative dispute resolution might be preferable – particularly beneficial in sensitive family law cases.

Meanwhile, if Jackson L.J's recommendations on civil litigation costs were implemented, savings in costs could offset the rising fees. For example, contingency fee arrangements would allow those pursuing high-value negligence claims to afford the increased court fees.

Compromise is inevitable in this. If, for instance, one accepts that damages are no more or less than compensation, no win, no fee litigants' losses will never be fully addressed. Moreover, if litigation is diverted to arbitration or mediation, the public and consistent source of law that springs from the courts will be diminished for everyone.

This will be painful. It may be worth it. If such compromise means that those who can pay more do so, while those who cannot need not; that public and private funding can be co-ordinated to ensure that at least one is available in each case; and that, crucially, this can be done without victimizing unpopular minorities, then our laws will speak at least a dialect of the language they spoke in plenty.