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

'Hard cases make bad law.' When a judgment opens with those ominous words, it usually signifies that something very unfair is about to happen. Behind the maxim there is an important point: in law, the right decision is not always the fairest one. Indeed, lawyers are not, on the whole, concerned with fairness. Certainly they seek to achieve justice: to see that disputes are determined coherently, predictably, consistently and openly. Fairness, on the other hand – too nebulous to be measured, too subjective to be regulated – they leave to the politicians.

What, then, makes cuts unfair? Fundamentally, distributive fairness is about relative value: which social institutions are most important? Such judgments are best made democratically. However, opinion polls are not reliable guides for economic policymakers. Asking voters how they want essential services to be cut is like asking turkeys how they want to be served for Christmas: unlikely to elicit a helpful answer. Rather than gauging short-term interests, it would be more productive to look to the values that society chooses to enshrine in the constitution.

The basic function of the legal system is set out conspicuously in Article 6 of the ECHR. Everyone has the right to a proper trial in the determination of rights and charges, which encompasses the right of access to a court (*Golder v UK*). This is the minimum standard; to the extent that cuts imperil these elementary entitlements, they will be unfair.

If Article 6 requires access to justice, how do we resist the conclusion that further cuts to the legal system will be unfair? The past few years have seen such swingeing cuts that it is not clear there are any more inefficiencies to be pared. The popular conception of fat-cat lawyers misrepresents the relatively svelte majority of publicly-funded practitioners. Anecdotally, there is already a sense amongst students that a decision to practise criminal, family or immigration law is 'courageous'. It cannot seriously be doubted that another squeeze on legal aid and the courts will impede access to justice, particularly for disadvantaged and vulnerable litigants. If a significant budget reduction is to be achieved fairly, it will require something more imaginative than simple salami-slicing.

The solution that the Government seems to have in mind is suitably radical: privatisation. The recurring theme of recent proposals is that costs can be saved and fairness maintained by privatising the resolution of disputes. The effect of the mooted reforms will be to shift the burden of delivering justice to the private sector in three ways. First, civil disputes will primarily be determined out of court. Alternative dispute resolution (ADR) will be promoted directly, by granting legal aid only to parties who have attempted mediation,[1] and indirectly, by closing courts and rendering the legal system less accessible. Second, legal aid will largely be replaced by private insurance. By withholding public funding for certain cases and raising the threshold for eligibility generally, the Government will discourage reliance on legal aid, whilst encouraging wider take-up of before-the-event insurance.[2] Third, the legal profession will be expected to bear a greater proportion of the costs of litigation. As the Government renounces much of its own responsibility for funding cases, lawyers

[1] Jonathan Djanogly MP, *Interview with Tom Bateman*, BBC Radio 4 (6 October 2010)

[2] Kenneth Clarke MP, *Evidence taken before the Justice Committee* HC (2010-11) 378-i

will be left to pick up the slack *pro bono* or under conditional fee arrangements (CFAs).[3]

The determination of rights is one of the essential functions of a state, and the move towards privatisation may seem peculiar. However, it is not necessarily unfair. Indeed, in light of the severity of the cuts required, redirecting litigants to the private sector is arguably the only way to preserve access to justice. In theory, ADR should act as a filter, reducing the number of cases brought to court; and as ADR becomes more popular the market should respond with cheaper and better procedures. Provided that participants retain the right to a trial, or forego it willingly, Article 6 survives. Substituting private insurance for legal aid is consistent with this 'filter' idea, because insurance policies can and will commit purchasers to ADR before litigation. Greater assumption of risk by the legal profession through the broader use of CFAs and an increased willingness to work *pro bono* will secure a contribution from lawyers in private practice towards the cost of representing litigants who would otherwise go unrepresented. In so doing it will protect access to justice; and if it also goes some way to rehabilitating lawyers' public image, then perhaps it will not be quite so politically expedient to target the profession in the next round of cuts.

If it is committed to privatisation, the Government could fairly do more. It could compel, rather than merely encourage, the purchase of legal event insurance, along the lines of the U.S. health insurance mandate. It could require a binding commitment to a minimum level of *pro bono* work from firms and chambers. It could recoup more of the costs of administering justice from litigants with deep pockets. The privatisation

[3] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* CP 12/10 (November 2010) at pp. 72, 80

project cannot be pursued too far – there are functions for which the state ought never to abdicate its responsibility, such as where liberty is at stake – but it can go a little further without endangering Article 6.

By focusing on fairness, however, we risk losing sight of justice. Privatisation envisages a much narrower role for law. ADR assumes that the purpose of litigation is to resolve disputes; it ignores the broader context in which decisions set precedents guiding future conduct. If litigation is treated as a business, susceptible to outsourcing like any other, the law loses much of its prescriptive force – and with it its consistency, openness and predictability.

Privatisation has a more esoteric disadvantage. There is something particular to the English legal tradition – something about its quality and pedigree, its laws and procedures, its judges and lawyers – that continues to attract foreign litigants and influence developing legal systems. The structural changes that the Government seeks to impose may preserve fairness; but they will forfeit – to put it in language the Government will understand – the unique selling point of English justice.

Andrew McIntyre