Beyond 2015: Shaping the future of equality, human rights and social justice (12 and 13 February 2015)

Session 3: Access to justice

Presentation by Lord Low of Dalston

I strongly identify with Prof. McDermont 's starting-point of the gap between rights on paper and in reality. I always used to react adversely to disabled colleagues who would bang on about rights to this and that - inclusive education for example - without doing the hard graft of the policy work necessary to design the services or institutions which were the only way that such rights would ever become a reality. If not anchored in what one might call the "facts on the ground" there are effectively no rights. We all know the old tag about the law being open to all like the Ritz hotel. We also need the institutions, services, policies, practices and procedures which are necessary to found the rights of disadvantaged groups generally and not just our own particular reference group. I remember once saying to disabled colleagues that the steps up to the front door are not the only reason it's not possible to get into the Ritz hotel.

In the report of the Low Commission on access to advice and legal support on social welfare law, published just over a year ago, we looked at why people needed advice and assistance when they were taken to court or needed to go to court to enforce their rights. The adversarial nature of court proceedings means that litigants have to do all the work in order to present their case before the judge. They need to know the law that applies to their case. They need to understand and comply with court rules and procedures. They need to identify what evidence they should put forward to support their case and how they might challenge their opponent's case. And they need to know the "rules of the game", otherwise they find, as one litigant in person said on the radio recently, it is like playing football without knowing the offside rule.

A lot of work has been undertaken by the judiciary in recent years to identify ways in which the system can be made less alienating for litigants,

particularly litigants in person, and how it can address some of the problems highlighted by Prof. McDermont. Initially the emphasis was on "getting people lawyers" either at state expense or by reform of the legal services market to increase competition and drive down prices for privately paying clients. But increasingly people have begun to question whether the old approach of "getting people lawyers" is really enough.

The Judicial Working Group chaired by Mr Justice Hickinbottom set out the importance of a positive approach to litigants in person in its report of July 2013. It said: "Litigants in person are not in themselves "a problem" - the problem lies with the system which is not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa".

The Chancery Modernisation Review conducted by Lord Justice Briggs identified three common misconceptions which need to be put to one side at the outset: "The first is that a shared concern about the unfairness of current practice and procedure vis-a-vis litigants in person can be properly addressed merely by taking steps on the periphery to ameliorate them. Access to justice is not provided by making practice and procedure only moderately unfair to litigants in person, rather than (as at present) seriously unfair to them. The second misconception is to think that the unfairness to litigants in person inherent in practice and procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the vast majority, it will by then be too late, because the cumulative hurdles which litigants in person will by then have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing. Furthermore, the judge will be constrained when seeking to redress those disadvantages at a hearing by the need to give fair treatment also to the represented party and to ensure that the expensive professional assistance in which that party has invested is put to economic good use, rather than wasted. The third is that written descriptions of practice and procedure truly intelligible to

the average litigant in person can be satisfactorily formulated by lawyers. This was, with the benefit of hindsight, perhaps a misconception which undermined the Civil Procedure Rules. Complex practice and procedure is not made intelligible to the average lay person merely by the removal of latin and legal jargon and the use of short sentences".

Deputy Chief Justice Faulks of the Family Court of Australia, in a paper entitled "Self-Represented Litigants: Tackling the Challenge" in February 2013 said: "It has been said there are three things that can be done in relation to self-representation by litigants: one is to "get them lawyers", the second is to "make them lawyers" and the third is to "change the system". The focus on legal services reform, or indeed on pro bono, as the potential answer to "getting people lawyers", or on websites and self-help services as a way of "making people lawyers" ducks the central issue: that complex law, complicated procedures and the arcane lingua franca of the adversarial approach of courts and some tribunals all drive lawyers and the "passive judge" in an adversarial direction which means that the litigant in person presents as much of a challenge to the court as the court does to the litigant in person".

We welcomed the Judicial Working Group chaired by Mr Justice Hickinbottom and the Chancery Modernisation Review conducted by Lord Justice Briggs. Both of these had called for a change in approach to litigants in person which recognised them as valid users of the courts and adapted the way that the courts operated to suit them rather than expecting them to conform to rules designed for lawyers. Both reports suggested a more inquisitorial approach with the judge taking more responsibility for extracting the necessary evidence that will be needed to decide the case.

But this is a very expensive way of conducting cases, and often the first time the judge sees the case is at what is intended to be the final hearing. This leads to adjournments and a waste of valuable court time. We drew attention to the way in which some tribunal jurisdictions were using registrars to do essential case management. We suggested that this provided a possible approach for the future, especially for those issues

where litigants were invariably in person. A registrar would know the law, know the procedure and be able to look at the case and decide what evidence would be needed. The registrar could contact the litigants by telephone or email to explain what was required and to make sure it was provided. And they could also identify if the case would be suitable for mediation. They could make the best possible use of resources by reserving the use of expensive senior quasi-judicial figures for the most difficult, complex or ground-breaking issues, and for the task of oversight, using lower paid, yet expert, trained and managed caseworkers or registrars to undertake the preliminary identification of issues, communicate with claimants, seek additional evidence and reach a preliminary view. They could do all this in a much more cost-effective way than a judge at a final hearing and it is to be hoped that we will get some pilots soon.