LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

KEYNOTE ADDRESS

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INTRODUCTION

1. We are all committed to access to justice. It is a subject on which a great deal has been said, by many people, over many years. Giving an address on the subject now feels a bit like a philosopher adding yet another footnote to Plato. I cannot do better than beginning by referring to what Franz Kafka famously had to say about access to justice in a parable entitled *Before the Law* towards the end of his book *The Trial*:

   "*BEFORE THE LAW stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected: the Law, he thinks, should surely be accessible at all times and to everyone, but as he now*

takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin black Tartar beard, he decides that it is better to wait until he gets permission to enter. . ."[1]

2. The law, the man from the country thinks, should surely be accessible at all times and to everyone. And so it most definitely should. But, like the man from the country, we live in a world where many doorkeepers block the way to justice in many countries. The door to justice in this country stands open, but the cost of entry serves as a formidable doorkeeper.

3. At the request of Lord Clarke, then Master of the Rolls, Lord Justice Jackson is looking at ways we can reduce litigation costs in our courts. His final report is due to be delivered to me at the end of the year, although copies will be probably only available in January. In the light of his numinous and panoptic interim report, I am confident that Rupert Jackson's Final Report will contain many beneficial recommendations.

4. The level of costs is a very major part of the access problem with which all justice systems have grappled in recent years – and the results have been of questionable success, certainly in this jurisdiction. And it will be a very major aspect of the problem in the coming years. Reducing litigation costs can however only be part of the answer, not least because there is only a limit to which any reduction can be reasonably achieved. At least in a capitalist system, costs will always have a potentially emasculating effect on access to justice. However proportionate litigation costs may be, they will always remain too great for large numbers of people. Hence the question today: how do we ensure that there is effective access to justice for those who cannot afford to pay even reasonable and proportionate litigation costs?

5. It is ironic that one has to pose this question in the year which marks the sixtieth anniversary of the enactment of the Legal Aid and Advice Act 1949, which represented our first serious attempt to provide a comprehensive solution to the access question. In 1950, the Act provided 80% of the population with a means-tested entitlement to legal aid, by 1973 this had dropped to 40% and by 2008 it only covered 29% of the population.[2] The world has changed since 1949, but, with the increasing emphasis on human rights, which of course include Article 6 of the Human Rights Convention, the need to ensure effective access to justice is at least as pressing as it ever has been.

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[1] Kafka, *Before the Law* in *The Complete Short Stories of Franz Kafka*, (Penguin Twentieth Century Classics) (1988) at 3; *The Trial* (Penguin Modern Classics) (1953) at 235.
[2] Hynes & Robins, *The Justice Gap*, (2009) (LAG) at 21.

6. I do not, of course, pretend to have all the answers; indeed, I do not propose to put forward any specific proposals today. I have not even started in the awesome job, which goes with being Master of the Rolls - head of civil justice in England and Wales: that begins tomorrow. Further, it would be neither wise nor fair to try and pre-empt what the Jackson Report will say. Anyway, the real meat of the matter is to be the subject matter of the debate that follows. However, although rather general in nature, I have some thoughts to offer.

7. As it is the 1949 Act's sixtieth anniversary, it is appropriate, as well as helpful, to take it as my starting point. The Act was the product of the deliberations of the Rushcliffe Committee, whose report to Parliament was published in May 1945.[3] Its remit, as one contemporary commentator put it, was to assess whether we should '*go on as we have in the past or [should] . . . grapple realistically with the problem in an attempt to solve it on a comprehensive and ambitious basis?*"[4] The problem was how best to provide legal aid and assistance to those who could not afford it. Rushcliffe's answer was to make proposals which were comprehensive and radical, in both senses in which that word is used – namely fundamental and revolutionary. This immediately identifies our first question. Do we go on making piecemeal reform in this area as we have been doing over the recent past, or do we attempt a comprehensive and ambitious solution? There is merit in both approaches. But what does the experience gained in many different jurisdictions teach us? And what can we learn from history?

8. In England and Wales we have in recent years been in a state which might be described, not entirely inaccurately, as one of permanent revolution – as one of my judicial colleagues has said, it has been like Chairman Mao's China, but without the fun. We have seen the abolition of the Legal Aid Board, and its replacement by the Legal Services Commission. We have seen civil legal aid coming under the umbrella of the Community Legal Service, and criminal legal aid becoming the province of the Criminal Defence Service. We have seen the removal of civil legal aid for personal injury work - a '*huge gamble*' in the words of Hynes and Robins in their excellent book on legal aid, *The Justice Gap*. It was a gamble which left, as they put it, '*the fate of accident victims to the mercy of market forces and enhanced* '*no win, no fee*'

[3] Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd. 6641) (HMSO).
[4] Elson, *The Rushcliffe Report*, (1946) U Chi Law Rev (13) (2) 131 at 142.

deals'.[5] Many commentators think that the CFA gamble, especially where the claimant (due to after-the-event insurance) has no interest in the cost of litigation, has been one where society has lost. They may be right. I do not know. I prefer to await the conclusions and recommendations in the Jackson Report rather than rush to judgment.

9. These haven't been the only changes. We have seen almost constant pressure on the legal aid budget, and attempts to deal with them. David Lammy MP's *Fundamental Legal Aid Review* in 2004 never formally reported because it was said by Lord Falconer LC, not to have come up with reforms that were fundamental enough.[6] Fundamental reform was under consideration then. Lord Carter's Review, which did report in 2006, recommended, amongst other things, fixed or graduated fees, and it proposed Best Value Tendering, which now, for the moment at least, seems to be in the long grass. We have had talk of contingency fees, of a contingency legal aid fund, of Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANS). We have had the Legal Services Act 2007 and its introduction of legal disciplinary partnerships, multi-disciplinary partnerships, alternative business structures and outside investment in legal practices.

10. I question whether this perpetual motion since the Access to Justice Act 1999 has improved things, and whether access to justice for all is now within our grasp. Is it in fact slipping further from our grasp? Would it not be better to adopt the Rushcliffe approach and attempt a fundamental comprehensive review; a fundamental review of the character Lord Falconer, some might say, rightly desired in 2004? Might it be better to commission a group charged with making proposals aimed at reforming in the round by reference to first principles and specific aims, involving an assessment of the expected impact, and consequences of those proposals, and based on reliable evidence? A Royal Commission perhaps?

11. If we were to embark on a comprehensive exercise, rather than constant tinkering – in modern parlance, fire-fighting –, what would we take as its guiding principles? We could usefully again look back to Rushcliffe, which looked at reform through the prism of four principles.

[5] Hynes & Robins (2009) at 33
[6] Falconer LC cited in Hynes & Robins at 53.

12. The first principle was that legal aid was a right; a right which the state had a duty to protect.[7] It accepted that, to quote Hynes and Robins again, '*Access to justice is the constitutional right of each citizen.*'[8] This is a principle recognised in England at least since Magna Carta, and more recently affirmed by the House of Lords in *Attorney-General v Times Newspapers Ltd*, when Lord Diplock noted how:

"*in any civilised society, it is a function of government to maintain Courts of Law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the State as representing society as a whole.*"[9]

13. It is, also, of course a right expressed in Article 6 of the European Convention, and, as the US Supreme Court's decision in *Caldwell v Texas* tells us, in the Fourteenth Amendment to the US Constitution. Chief Justice Fuller, in that decision, noted how according to the US Constitution '*no state can deprive particular persons or classes of persons of equal and impartial justice under the law*'[10]

14. I doubt anyone would disagree either with this proposition being the first principle guiding any review or reform in this field. But it is helpful to remind ourselves why it is so important. For that reminder I think we can usefully remain across the Atlantic, and focus on an individual who is well known over there, in fact so well known that there is an annual award given out in his honour to the legal aid lawyer of the year by the National Legal Aid and Defender Association. In America it is known as 'the Reggie.'[11]

15. The Reggie in question was not Reginald Perrin of blessed memory, but Reginald Heber Smith, the founder of the American legal aid movement in the early years of the 20th Century. He was also, perhaps surprisingly, at least according to the US Supreme Court Judge, Ruth Bader Ginsberg, the inventor of hourly billing as a means to calculate lawyers' fees.

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[7] For a summary of all four principles, see Elson (1946) at 134 – 135.
[8] Hynes & Robins (2009) at 134.
[9] [1974] AC 273 at 307.
[10] 137 US 692 (1891) at 699.
[11] http://www.nlada.org/Training/Train_Annual/Annual_Home_thirdcol_Awards

16. Heber Smith's explanation, why the state must give proper access to justice was this:

> "*There can be no argument against the proposition that the state is bound to see that its citizens receive justice. That, and defense against foreign aggression, are the two primary reasons why government exists. The state insists that its people use the courts and gives them no alternative. If a man defrauds you of $100 you cannot break into his house and steal it back. You must bring an action in the courts. If the state, having so ordained, then tolerates a situation where in fact a large group of its citizens cannot avail themselves of court procedure because it is costly and they are poor, trouble is bound to ensue.*"[12]
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> "Trouble is bound to ensue." And that trouble is of course, the breakdown of law and order, the collapse of the rule of law. Put simply, any state, particularly one ostensibly based on, and committed to, the rule of law, cannot long flourish while it countenances the effective exclusion of a large proportion of its citizens from its courts. It is a truism that the price of liberty is eternal vigilance just as it is a truism that all that is necessary for the triumph of evil is that good men and women do nothing. Eternal vigilance demands that we cannot countenance the exclusion of citizens from the courts. If we do, our inactivity will undermine our democracy and our commitment to the rule of law.

17. For Heber Smith, as for Rushcliffe, the answer to the question how to give proper effect to the access to justice right was legal aid. It is the answer currently advanced by Hynes and Robins in *The Justice Gap*. But it may not be only answer. Access to justice is our first principle, and one which extends to all members of society irrespective of their means or circumstances. It is a principle that can, as has been recognised by the Strasbourg court in *Frydlender v France*, be implemented in different ways.[13]

18. So the question for any comprehensive review would not so much be whether legal aid is the answer, but how it might be the answer and to what extent, perhaps in combination with other methods, it is the answer. Today, not least because of the effects of the credit crunch, many countries are finding it difficult to fund legal aid. Economic reality must, of course, play a part. It must play a part in any future reform. But we should still ask how we manage

[12] Heber Smith, *Economics of the Legal Profession*, 119 – 120 (ABA, 1938), cited in Elson, *ibid*, at 143 – 144.
[13] (Application no. 30979/96) (27 June 2000), [2000] ECHR 353 at [45].

to find ourselves in the situation that the total (criminal and civil) legal aid budget for 2008 came to no more than the total NHS budget for two weeks.[14] Reverting to Heber Smith, the rule of law and the defence of the realm are the most fundamental and well-established duties of government: if either fails, the more recently developed, high-profile and expensive government services, such as the provision of health, education and social security, become impossible or of little value. Why some might ask, as a society, are we willing to invest so little on legal aid, when both the unacceptably unfair effects on individuals and the fundamental risks to society of the denial of justice to many citizens are so profound?

19. So much for Rushcliffe's first principle. The second principle was that the right to legal aid encompassed the need to establish a state-funded coherent, national system through which legal advice and representation could be provided. At any rate at first sight, it might appear unthinkable today to ask for a significant extension to our present system. However, a system of funding, available to all who cannot afford litigation or advice, is not merely a noble ideal: it was one which was largely achieved for over forty years from 1949.

20. The third Rushcliffe principle was that the lawyer-client relationship should be maintained. Lawyers were to owe their professional obligations to the citizen also instructed them, and not the state as litigation funder. I doubt that that principle would find many objectors, provided it was accepted, as it should be, that the state should be entitled to know, and act on, the legal advice such as the prospect and likely extent of success. The final principle was that legal aid was not simply to be available to the poorest members of society, another proposition, at least in relation to civil litigation and advice, which might not be immediately attractive to those in charge of the national exchequer. It seems to me that each of these four worthy principles might, at least to a large extent, be adopted and endorsed today by any future reformers.

21. We might also want to consider the proper approach to take to pro bono legal advice and assistance. While it cannot be a panacea, it surely must be an important part of a coherent, multi-faceted, solution. We could perhaps see a commitment, even a professional duty, to do pro bono work, which very many lawyers carry out now in any event, as a fifth principle. A yearly post-qualification commitment should perhaps be part of all legal training – putting practical clothes on the civic duty owed by lawyers to society; a duty already acknowledged

[14] Hynes & Robins (2009) at 34

by Parliament and given expression by the commitment set out in section 1 of the Legal Services Act to promote the constitutional principle of the rule of law and access to justice.

22. Based on its four principles Rushcliffe made a number of proposals, intended to cure the problem of lack of effective access to legal advice and the courts. The most significant were that legal aid was to be available in all courts; that it was to be such as to enable citizens in need of assistance to have access to legal professionals; that it was to be widely available, subject to a means test; and that those who could not afford to pay could receive legal aid at no cost to them, whereas others who could pay something would be required to pay according to a scale of contributions towards the litigation costs.[15]

23. The Rushcliffe principles and proposals were perhaps a more coherent and effective a strategy for ensuring genuine access to justice for all than any other which we have yet come up with in England and Wales. They provided an impressive blueprint for reform in the 1940s. We should not slavishly consider them to be the answer now. But the fact that the consequent legal aid and advice system applied in this country for nearly fifty years, suggests that, if we once more take the time and effort to examine these issues on a principled basis as the former Lord Chancellor's response to the Lammy Review suggests, we might reasonably be expected to arrive at a coherent and effective solution: or, to put it in the terms of Lammy Review, a *Fundamental Legal Aid* solution. The task would then be to implement that solution, to fund it appropriately, and let it work. Such an approach requires will, courage and vision from politicians and civil servants, and commitment from the lawyers. It is something our societies need to consider, if we are to escape the clutches of Kafka's doorkeepers and the trouble Heber Smith saw, no doubt, just on the horizon.

CONCLUSION

24. It is worth quoting what Reginald Heber Smith said in his seminal tract on legal aid, *Justice and the Poor*:

"*For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgment of the fundamental rights which the State is directly forbidden to infringe, To deny law or justice*

[15] For a summary see, Elson (1946) at 133; Hynes & Robins, *The Justice Gap*, (2009) (LAG) at 20.

to any person is, in actual effect, to outlaw them by stripping them of their only protection . . .

In that direction we have imperceptibly, unconsciously, and unintentionally drifted. The end of such a course is disclosed by history. Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes in the law itself. And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end."[16]

25. One of the few basic standards to which lawyers, and judges, indeed all members of society, must aspire is democracy and the rule of law, which means that we do not tolerate individuals losing the protection of the Law because they cannot afford it.

26. In other words, we must be committed to giving genuine effect to the rule of law, to ensuring that no one is outside Law's protection or assistance owing to lack of means. If we fail in this, so that justice is not truly available to all, we acquiesce in the provision of a justice system, which like the one faced by Kafka's man from the country, is one that for many people is a cruel trick. The question for us all is how best to ensure that our justice systems are such that anyone with a meritorious case can walk through the door and seek the law's protection or assistance.

27. With that question in mind I would like to conclude by making the following points:
    1. We must all take care to ensure that we do not *imperceptibly, unconsciously, and unintentionally drift* towards a position where our justice systems fail to meet the minimum acceptable standards to satisfy the rule of law in a modern democratic society. We do not want to find ourselves in the position where we have to acknowledge, as a melancholy truth, that we do not have proper access to justice;
    2. There is therefore a heavy duty on all members of society to ensure that such a situation does not arise, and where it does arise, to remedy the situation. Despite the current economic problems, we are a developed and rich country, the money involved would not be enormous, while the benefits to society as a whole would, it could well be said, are enormous;

[16] Heber Smith, *Justice and the Poor*, (1919) (Carnegie Foundation), cited in Luban, *Lawyers and Justice: An ethical study*, (Princeton) (1988) at 256.

3. There is also, and in particular, a heavy duty on the legal profession: lawyers are perfectly entitled to seek to make money, but, unlike most other people, even other professionals, they also have a duty to the public;
4. Any reforms must be founded on the principles I have mentioned, but they must also be practical, in the sense of being realistic and carefully thought out and costed; they must also be evidence-based, as anyone who listened to Hazel Genn's excellent Hamlyn lectures on civil justice will appreciate;
5. The Jackson report can be expected to provide many constructive ideas for change, which I am sure will also provide a good basis for positive developments in this very important and imperfectly resourced area.

28. We have much to do to ensure that the door to justice is and is able to remain "*accessible at all times and to everyone.*"