

SIR HENRY HODGE MEMORIAL LECTURE 2011
EQUAL ACCESS TO JUSTICE IN THE BIG SOCIETY

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We are all here to honour the memory of Henry Hodge and the very special contribution he made to the practice of law in this country. He was a pioneer in so many ways. He was one of that enthusiastic group of young lawyers in the 1970s who really believed that the law should be for everyone. He worked hard, at the Child Poverty Action Group and at Hodge Jones and Allen, to make that dream a reality. He was one of those who put social welfare law on the map. He helped to turn Legal Action Group thinking into mainstream thinking. It may be hard to remember it now, but so mainstream did it become that young radicals like Henry (and even like Brenda) became quite respectable, even establishment, figures, who in due course might be appointed judges. But as a judge he was a pioneer too, only the third solicitor to become a High Court judge (I sometimes think a greater achievement than being the third woman). And of course the fact that he could actually run things made him so well qualified to be President of the Asylum and Immigration Tribunal.

I wonder what he would have thought of the current furore about privacy injunctions. The media often argue that it is unfair that only the rich can afford to protect their private lives in this way. They draw the conclusion that therefore no-one should be able to do so. But when Henry and I were young the conclusion which we would have drawn was that, if the rich had access to a remedy to protect their rights, then the poor should have one too. We believed in levelling up rather than levelling down. We

believed in equal access to justice. Many now believe that simple aspiration is under threat as never before. Last year, Elizabeth Butler-Sloss spoke about ‘A Child’s Place in the Big Society’, so this year I would like to talk about ‘Equal Access to Justice in the Big Society’. It is, I think, a slightly more complicated subject than ‘equal access to lawyers’, although of course that comes into it.

Access to a system of law

The first requirement for access to justice is obvious but needs to be said – and that is for a system of just laws. We can argue forever about what makes a particular law just or unjust, but we cannot deny that we need to have laws, and laws which we can explain by reference to some defensible concept of justice. We have to have laws which treat people equally – like cases alike and unlike cases differently. To my mind we also have to have laws which promote equal treatment – and so ban treating people less favourably because their race, sex, and a number of other factors which ought to be irrelevant to the decision.

The law also needs to be foreseeable. At the centre of the beautiful building which now houses the Supreme Court lies its library – the collection of statutes, decided cases and legal writings going back many centuries from which we discover the law which we pronounce in our judgments. Our library shows the world that we are not making it up as we go along – that the judges, just like the Government and everyone else, are subject to the rule of law, that legal decision making must be principled,

consistent and foreseeable, that as Aristotle put it, ‘even the guardians of the law are obeying the laws’.¹

And the law – the content of it – needs to be accessible. To be accessible it ought to be clear and simple. This seems to be a vain hope in today’s complicated society. I spent more than nine years of my life trying to promote the simplification, modernisation and codification of the law. This was the statutory mission of the Law Commission. Sometimes, as with the Children Act 1989, we achieved it. Mostly we did not. The European Network of Council for the Judiciary recently adopted a declaration at Vilnius which, among other things, called upon legislators to make the law clear and unambiguous. A great deal of time, trouble and money is wasted when the law is complex and unclear. It is a mistake to think that most lawyers want the law to be complex and unclear. There may be some top advocates in the higher courts who relish the wriggle room that unclear law gives them. But surely most want to be able to give their clients clear advice. Their clients’ lives are messy enough. The law should not also be a mess.

But it is not enough simply to have a system of law. You have to have access to it when you need it. Engraved on the glass doors leading into our library is an even more symbolic document – a facsimile of the Magna Carta – the Great Charter which King John granted to his barons to stave off revolution and which has been seen as the foundation of our constitutional monarchy ever since. Only three of its provisions

¹ *Aristotle’s Politics and Athenian Constitution*, ed and trans by John Warrington (Dent, 1959), Book III, s 1287, p 97; quoted by (Lord) Tom Bingham in *The Rule of Law* (Allen Lane, 2010), p 3. Lord Bingham’s wonderful book is the source of many of the thoughts and quotations in this paper.

survive in our modern law, of which the most important includes this,² which is picked out in English on the library doors:

‘To no-one will we sell, to no one deny or delay right or justice.’

In other words, everything should be done according to law and everyone should have access to the means of achieving it. Although I doubt whether the medieval barons gave any thought to the poor and vulnerable in their society, still less to the women, the principle has been firmly established since their time. It found further expression in the well-known case of *Ashby v White*,³ where Lord Chief Justice Holt said:

“If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy for want of a right and want of remedy are reciprocal.”

There is no point in having the right to vote if the returning officer can prevent your exercising it.

And it is hugely important that people believe that if they have a right they will have a remedy, that if they are done wrong, they will be able to get recompense; or conversely that if they have an obligation, they should honour it, or if they do wrong, they will have to pay for it. Businesses, large and small, cannot do without an effective system of debt enforcement. But neither can individuals, rich or poor, do without an effective system of protecting their rights. The fact that there is such a system benefits everyone, and not just those who have to use it, because it is part of

² Translation taken from the website of the British Library, which houses two of the surviving four original copies: www.bl.uk/treasures/magnacarta/translation/mc_trans.html

³ (1702) 2 Ld Raymond 938.

what makes people respect one another's rights without having to go to court. As the Bar Council has recently said:⁴

'Individuals' belief that they live in a society in which harm done falls to be recompensed, or that obligations made will be honoured, is important.'

The idea, recently floated, that some claims recognised by the law should become non-justiciable in our courts is truly alarming. This would turn debts and other legal duties into voluntary obligations, binding in honour only. And we know what risks of truly alternative enforcement mechanisms those can bring.

Access to the courts

So we need the laws and we need the remedies. The next thing we need is access to the courts to enforce them. Fortunately we now have the European Convention on Human Rights to guarantee this. Article 6(1) begins:

'In the determination of his civil rights and liabilities or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an impartial tribunal established by law.'

On the face of it, this is about the right to a trial which is fair, rather than a right to submit a dispute to the courts. But the European Court of Human Rights very soon found that access to the courts was 'inherent' in article 6. In *Golder v United Kingdom*,⁵ a prisoner wanted to sue a prison officer for libel. The prison officer had

⁴ Bar Council, 'The Merits of a Contingent Legal Aid Fund', April 2009, p 2.

⁵ (1979-80) 1 EHRR 524, decided 21 February 1975.

accused him of assault while taking part in a riot at the prison; the accusation had entailed ‘unpleasant consequences’ for the prisoner, who wished to clear his name. But the Governor had refused him permission to consult a solicitor who could start the proceedings for him. The Court found a violation:

‘It would be inconceivable, in the opinion of the Court, that Article 6 para 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.’

Even so, our courts have had to defend the right of access to the courts in the face of the Government’s insistence that the civil justice system should pay for itself – in other words, that the court buildings, staff, judges and everything they do should be financed by the fees paid by the court users. How much money is raised, of course, depends upon how many people want to use the courts to collect their debts, get compensation for their injuries, or whatever, while many of the costs are fixed. So the Government are often trying to change or raise the fees, to the detriment of would-be litigants. Sometimes the courts can do something about it and sometimes they cannot.

In *R (Witham) v Lord Chancellor*⁶ in 1998, Mr Witham wanted to bring proceedings for malicious falsehood and libel (we do not know why), but he was unemployed and living on means-tested welfare benefits. Previously, people living on means-tested benefits had been exempt from having to pay the court’s fee for issuing the proceedings. But the Lord Chancellor had, by delegated legislation, repealed this.⁷

⁶ [1998] QB 575.

⁷ Supreme Court Fees (Amendment) Order 1996, article 3.

The High Court held that he had no power to do so: the Act of Parliament which gave him the power to set the court fees⁸ did not give him the power to set them at a level which denied this poor claimant access to the courts. It could only do so by the clearest possible words which were not there (pp 585 – 586). Lord Justice Laws declared:

‘...the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg. ... Indeed, the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage.’

So even though we do not have a written constitution, we do have some constitutional rights and access to the courts is one of the most precious. But many would say that access to a court is not much use without access to lawyers.

Access to lawyers

Mr Witham did not qualify for legal aid and was planning to bring his action as a litigant in person. There are no restrictions on acting for yourself in our system. So the High Court drew a clear distinction between the constitutional right of access to the courts and the payment of legal aid, which it said was generally within the power of the state to regulate. However, there is a well-known ironic saying, usually attributed to Lord Justice Mathew, that ‘in England, justice is open to all – like the Ritz’.⁹ The problem was recognised in the middle ages.¹⁰ A statute of Henry VII in 1494 provided for actions to be brought ‘in forma pauperis’ – relieved from court fees and

⁸ Supreme Court Act 1981, s 130.

⁹ See RE Megarry, *Miscellany- at-Law* (Stevens, 1955), p 254.

¹⁰ EJ Cohn, ‘Legal Aid for the Poor: A Study in Comparative Law and Legal Reform’ (1943) 59 *Law Quarterly Review* 250; R Egerton, ‘Historical Aspects of Legal Aid’ (1945) 61 *Law Quarterly Review* 87, both cited in Bingham, *op cit*, p 87.

provided with lawyers acting pro bono. A statute of Henry VIII in 1531 even provided that they should be relieved of having to pay the other side's costs if they lost – but they had to suffer some other punishment instead, such as being whipped or pilloried.

There were further efforts by philanthropic organisations to provide 'poor man's lawyers' during the 19th century but these left large areas of unmet need. During the 20th century refugee scholars from Europe, began to make a compelling case for a comprehensive system of legal aid. EJ Cohn wrote in 1943:¹¹

'Legal aid is a service which the modern state owes to its citizens as a matter of principle. . . . Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law.'

So when the welfare state was established in the United Kingdom after the Second World War, a legal aid and advice scheme was an important part of it.¹² For fifty years it enabled people of limited means to sue and defend themselves in our courts. But of course it cost a great deal of money. So over the last decade it has been cut back and back: the means test has been tightened; different ways have been found to fund certain kinds of case, from which legal aid has then been withdrawn; and it is now planned to remove legal aid altogether from most civil and family law cases. This is being done by providing that certain sorts of case will remain within, and certain others will be removed from, the scope of legal aid, by which is meant all 'civil legal services', that is, all kinds of legal advice, assistance, mediation and

¹¹ *Loc cit*, at p 253.

¹² Legal Aid and Advice Act 1949.

representation. Cases which can have outcomes which the Government defines as serious, such as homelessness, domestic violence, loss of liberty, discrimination, human rights issues and abuse of power by the state, will remain in scope; while other kinds of housing case, debts, welfare benefits, employment, immigration, education, and most family breakdown will come out. But mediation in family disputes stays in.

As Tribunal Judge Robert Martin, President of the Social Entitlement Chamber, has said:¹³

‘The principal flaw is the reliance on thematic categories of law as proxies for determining who is in need. These categories only have a loose association with real lives and real problems.’

In real life, as we all know and research has shown,¹⁴ clients come with a variety of interlocking problems. Family breakdown can easily lead people into debt, if debts are not tackled early and in the right way, they can easily lead to homelessness. People need the right advice and they need it early, before things have escalated into court. The idea that the law in some of these areas is simple and easy to understand is laughable.

These plans will of course have a disproportionate effect upon the poorest and most vulnerable in society. Indeed, the government’s own equality impact statement accepts that they will have a disproportionate impact upon women, ethnic minorities and people with disabilities.¹⁵ And they say that this is justifiable because they are disproportionate users of the service in these areas. This is an interesting argument

¹³ Quoted in Justice for All, *Saving justice: where next for legal aid?* (2011), p 1.

¹⁴ H Genn, *Paths to Justice*.

¹⁵ *Legal Aid Reform: Scope Changes*, available at www.justice.gov.uk/consultations/legal-aid-reform-151110.htm.

about which I had better not say anything more, as it is bound to come before us in one shape or form in future. The Legal Action Group fears 'that this would lead to an underclass of people disenfranchised from civil justice and indifferent to the rule of law'.¹⁶

But is a right to legal aid inherent in the right of access to a court under article 6? After *Golder*, the next important case in Strasbourg was about paying for a lawyer. In *Airey v Ireland*,¹⁷ a wife wanted to petition for judicial separation in the Irish High Court, but lacked the means to employ the services of a lawyer and there was no legal aid. The Government argued that the applicant did have access to the court, since she was free to represent herself: it was not like *Golder*, where the applicant had been positively prevented from going to court. The Strasbourg Court famously stated (para 24):

'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'.

The Court held that Mrs Airey would not be able to present her case properly without a lawyer: the procedure in the High Court was complex, there might be complicated points of law, the grounds for a decree would have to be proved, perhaps with the help of expert evidence, and 'marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court' (para 24). The Court did not accept that because there was no positive obstacle to Mrs Airey appearing in court, she had a right of access (para 25):

¹⁶ Evidence to the House of Commons Justice Committee inquiry into access to justice, available at www.lag.org.uk.

¹⁷ (1979-80) 2 EHRR 305.

‘... fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State. ... The obligation to secure an effective right of access to the courts falls into this category of duty.’

However, the Court made clear that the State did not have to provide free legal aid for every dispute relating to a ‘civil right’ (para 26). The State had a free choice of means to ensure that litigants did have an effective right of access to the courts. A legal aid scheme was one. Simplification of procedure was another. I will come back to that.

The limited scope of the *Airey* decision soon became clear in *X v United Kingdom*.¹⁸ Mr X complained that he had been denied access to a court because the only representation available before an Industrial Tribunal was through his trade union, but his union had refused to represent him or provide him with legal aid. The European Commission on Human Rights held that the Convention does not guarantee as such a right to free legal aid in civil cases (para 3):

‘Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings, can such a right be invoked....’

Mr X could have represented himself before the Industrial Tribunal, where the proceedings were designed to be conducted in a practical and straightforward manner. Further, the applicant had not qualified for the grant of free legal aid due to the level of his family income.

¹⁸ (1984) 6 EHRR 136.

Things may be different if there is a marked lack of 'equality of arms' in a complex case. Until the advent of conditional fees most defamation claims were the rich suing the rich. But there are exceptions. In 1986 some members of the environmental campaigning organisation Greenpeace published a leaflet called 'What's wrong with McDonald's?'. This contained some very critical comments on McDonald's policies and products. McDonald's sued for libel. The trial took 313 days. McDonald's were, of course, represented by a team of very experienced and highly paid barristers and solicitors. The defendants raised some money for their defence and had some pro bono help from lawyers. But mostly they defended themselves. And their formidable task was to try and prove that their allegations were true. They lost on most points and complained to Strasbourg.

In the 'McLibel case', *Steel and Morris v United Kingdom*,¹⁹ the Court held (para 61) that:

'The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.'

The Court found that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms (para 72).

¹⁹ (2005) 41 EHRR 22.

But cases as dramatic as that are rare. The Government's scoping criteria may well have been written with an eye to the *McLibel* case. And they have added an exception for cases where failure to provide legal services would be a breach of Convention rights or rights to the provision of legal services under EU law. This may not take us very far. We may have to try and find other ways in which we can assure equal access to justice for all. In *Airey*, the Strasbourg court suggested that simplification of procedure was another solution.

More accessible procedures

This too is not a new problem. In 1648, it was said of civil proceedings, 'The remedy is worse than the disease . . . A man must spend above £10 to recover £5'.²⁰ The courts in the common law world have been trying to get a grip on the costs of civil proceedings for years. But as Lord Bingham points out,²¹

'. . . few people are competent to conduct litigation without professional help; but solicitors and barristers, like plumbers and electricians, ordinarily charge a fee; and since litigation is highly labour-intensive, with even a small case usually demanding more hours of work than, for instance, the longest surgical operation, the cost tends to be high.'

There are all sorts of factors at work here, including the way in which lawyers charge for their work. In some cases in the past they would charge something proportionate to what the job was worth to the client, but now they charge for how long the job has taken them. Another feature of our civil procedure, which can certainly inhibit access to justice, is the rule that the losing party has to pay the winning party's costs. The

²⁰ John Cook, *Unum necessarium: or, the Poore Man's Case* (1648), p 66; quoted in Christopher Hill, *Liberty against the Law* (Allen Lane, 1996), p 266; cited in Bingham, *op cit*, p 86.

²¹ *Op cit*, pp 86-87.

theory is fine – one should not have to pay to vindicate one’s legal rights – but in a system where legal costs are already high it doubles the risk of bringing or defending a case.

There has been review after review of civil procedure with a view to making it simpler and getting the costs down in that way.²² The answer is usually seen in putting the judges in charge of managing the case, rather than leaving it to the parties to set their own timetable and do things when it suits them. Case management can be effective in reducing delays but it has not been shown to reduce the overall costs. Indeed, it can make them worse, by requiring more to be done at the beginning of the proceedings, thereby ‘front-loading’ the costs in a case which will eventually end with agreement.

So if we cannot make the ordinary courts cheaper and more accessible, should we set up a different kind of court?

Access to tribunals

When the European Convention on Human Rights was drafted, it would not have been thought that most claims for benefits from the state were ‘civil claims’ for the purpose of article 6. Even so, the sponsoring departments had a genuine interest in getting the answer right and usually set up machinery for appealing against the officials’ decisions. These were generally known as tribunals because they often had three members. There were also cases where the state was trying to take something

²² Most recently by Lord Woolf, whose 1996 report on *Access to Justice*, led to the reformed Civil Procedure Rules 1999.

away from the citizen, such as his money in taxation, or his right to practise a particular trade, or if he was a mental patient, his liberty. The same idea was employed when legislation started interfering in freedom of contract in order to protect particularly vulnerable parties, to deal with certain kinds of dispute between employers and employees and between landlords and tenants of residential property.

The whole idea behind these bodies was that they should be ‘user-friendly’. They would have specialist judges who were expert in the body of law involved and so did not have to have it explained to them by the parties’ lawyers. They would have non-lawyer members who were expert in the factual issues involved and so would be able to resolve factual disputes, again without the help of the parties’ lawyers to examine and cross-examine the witnesses. They would not be bound by the technical rules of evidence which used to be such a trap for the unwary in the ordinary civil courts. They would engage directly with the parties appearing before them, rather than through legal representatives. In short, they would provide access to justice without the need for access to lawyers.

Hence the theory was that legal aid would not be needed. The parties could represent themselves or be helped by some of the non-lawyer services which could provide them with representation – the British Legion, for example, provided very expert help to ex-servicemen before the Pensions Appeal Tribunals. Trade unions would provide help before industrial or employment tribunals, and so on. The main exception was mental health tribunals, where legal aid was eventually provided, because they deal with the right to liberty, which is protected by article 5 of the European Convention.

But taking certain disputes out of the ordinary courts may not have worked very well either. The systems of law which tribunals administer are extremely complicated and seem to be changing all the time – this is certainly true of tax, welfare benefits and immigration law. So study after study has shown that claimants do much better if they have skilled representation of some kind, whether from a lawyer or a specialist advice worker.²³ And this costs money, either directly from the client, or more commonly from public and charitable funding for the organisations concerned.

Another problem has been the tendency for tribunals to become more and more like ordinary courts, however hard people try to resist this. This is particularly true of the employment and residential property tribunals because what they are doing looks and is very like what the ordinary courts are doing. But there is another reason. There is a long tradition of suspicion of tribunals set up by government apart from the ordinary courts and without the guarantees of independence which the courts have. Understandably, we want these tribunals to be and appear to be independent of the Government department with whose decisions they are concerned. Strasbourg has so developed the concept of a ‘civil claims’ that most of their decisions undoubtedly count as ‘civil claims’ for the purpose of article 6. So the tribunal has to be independent and impartial. It is also thought important that there is a right of access to the ordinary courts so that errors of law can be corrected: they should not turn into closed systems of law immune from scrutiny in the highest courts.²⁴

²³ Eg H Genn and Y Genn, *The Effectiveness of Representation in Tribunals*, 1989, Lord Chancellor’s Department.

²⁴ See *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

So we have had a radical restructuring of the tribunal system,²⁵ bringing them all (or almost all) into a single structure under one administration. There are understandable fears that the special qualities of tribunals will be lost, that they will become more and more like courts, and less and less user-friendly, and that access to justice for the very poorest and most vulnerable clients who use them will be reduced as a result. The problem, as I see it, is that in order to avoid spending money on lawyers you have to be prepared to spend money on the decision-makers – give them the right training, the right expertise, the right resources, and the right premises to be able to the job.

Additional methods of dispute resolution

Because the costs of litigation are so often disproportionate to what is at stake, there is a growing enthusiasm for resolving matters outside court, by ADR. Most often ADR stands for ‘alternative dispute resolution’ – the alternative being the courts. Lord Bingham would prefer to call it ‘additional’ means of resolving disputes, perhaps because this does not suggest that they are better than the courts, perhaps because they are often not alternatives at all, but additions to the ordinary court process. Family lawyers are fond of talking about ‘appropriate dispute resolution’, suggesting that the parties should be able to choose the way of resolving matters which is most appropriate for them and the subject matter of their dispute.

The oldest form of ADR is arbitration, where the parties pick and pay for their own judge and agree to be bound by his decisions. This has certain advantages over courts but can be even more expensive. Another form which has become popular in recent

²⁵ Under the Tribunals, Courts and Enforcement Act 2007.

decades is the industry ombudsman service. These began with the insurance ombudsman, set up by three large insurance companies in 1983 to handle consumer complaints. This was originally a voluntary scheme, with no statutory basis. But steps were taken to ensure that the ombudsman and his staff were independent of the industry, which agreed to be bound by his decisions. The banking ombudsman service was set up on the same basis, as was the building society ombudsman, save that building societies were required by statute to have some such scheme. All three have now been absorbed into the statutory financial ombudsman scheme. There is no statutory right of appeal, but as a public body it is susceptible to judicial review,²⁶ whereas the voluntary schemes are not.²⁷ The statutory occupational pensions ombudsman, on the other hand, is subject to a right of appeal to the High Court.

There is now a large number of such schemes covering many kinds of products and services for consumers. They have in common that they are funded by the industry, but independently appointed and managed; they are inquisitorial in that the ombudsman investigates the case, and usually decides it on the papers, although they can have oral hearings; their decisions are binding on the industry but not on the consumer, who retains his right to go to court instead. Their criteria may well allow them to decide the case in a way, more favourable to the consumer, which would not be permitted by the ordinary law. They are subject to varying degrees of oversight in the ordinary courts. They are perhaps the high water mark of the attempt to provide access to justice without access to lawyers – an attempt which can be frustrated if the

²⁶ Eg *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin). Counsel for the BBA was Lord Pannick QC.

²⁷ *R v Insurance Ombudsman Bureau, Ex p Aegon Life Assurance Ltd* [1995] LRLR 101. Counsel for the IOB was David Pannick QC.

industry member can then go straight off to court where an expert lawyer will be a necessity.

In a different category are attempts to resolve the dispute without submitting it to a third party to decide. The most popular recent form is mediation: where, as Lord Bingham puts it, an independent person ‘will explore the parties’ competing views and aims and try to coax them into reaching a mutually acceptable compromise’.²⁸ Mediation (sometimes known as conciliation) first became popular in the United Kingdom in family cases, especially in disputes about children. These are not like ordinary civil disputes, deciding upon compensation for past wrongs. They are trying to manage the family’s future – where they will live, what they will live on, who will look after the children and how much the children will see of each parent and other family members. The adversarial court process is not well suited to exploring the various options available. The parents are the experts in their own children. They ought to be able to work out the best solution to their practical problems. The judges themselves tend to feel that to impose a decision upon them is very much a second best to enabling them to work things out for themselves. No family judge who has had to decide who will pick the children up from school thinks that this is a sensible way to do things. Family mediation ought to be able to help the parties, not only to reach the right solution to their current problems, but also to resolve things between themselves in future rather than by going back to court.

²⁸ *Op cit*, p 86.

But mediation is now thought suitable for other kinds of dispute. The President of the Supreme Court of the United Kingdom is an enthusiastic supporter:²⁹

‘It is madness to incur the considerable expense of litigation – in England usually disproportionate to the amount at stake – without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory. Litigation has a cost, not only for the litigants but for society, because judicial resources are limited and their cost is usually born – at least in part – by the state. Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the court.’

That last idea is controversial. It is one thing to encourage people to resolve their disputes amicably – by suggesting that they try to do this before taking court proceedings, by adjourning the proceedings so that they can try it, even by insisting that they at least go and find out more about it. But the idea that parties should actually be compelled to mediate their disputes is very controversial. As my colleague Lord Dyson has recently argued:³⁰

‘Can it be right that parties who have exercised their right to go to court can be forced to sit down with the individual they believe to have wronged them to try to find a compromise which would probably leave them worse off than had they had their day in court? Leaving aside any human rights issues then, in my view, this simply cannot be right. ...’

The human rights issue, of course, is whether compelling people to resolve disputes about their civil rights by mediation rather than through an ordinary court is to deny

²⁹ ‘Alternative Dispute Resolution: An English Viewpoint’, speech in India, March 2008.

³⁰ ‘Mediation in the English legal order six years after *Halsey*’, speech, October 2010.

them their article 6 right of access to a court. In *Rosalba Alassini and others*,³¹ the European Court of Justice held that making mediation a pre-condition to going to court, or imposing sanctions on parties who refused to go to mediation, was not. The requirements were a proportionate restriction on Article 6 rights, provided that: it did not result in a decision which is binding on the parties, it did not cause a substantial delay, that it suspended the period for the time-barring of claims and that it did not give rise to costs - or gave rise to very low costs - for the parties; and only if interim measures were possible in exceptional cases where the urgency of the situation so required.

My concern about compulsory mediation is with the power imbalances between the parties. Unless it is very professionally conducted, there is plenty of scope for the strong to bully the weak into agreeing a solution which is against their best interests. And professional mediation costs money. So those of us who are strong supporters of mediation in appropriate cases are also worried about the whole idea that 'litigation is bad and ADR is good'. This is damaging to the image and resourcing of the courts and ultimately to the importance of providing everyone with equal access to justice.³²

Is this an Anglo-Saxon problem?

I have referred several times to Lord Bingham's recent book on *The Rule of Law*. His rather pessimistic conclusion to his discussion of dispute resolution is that '... the goal of expeditious and affordable resolution of civil disputes is elusive, and likely to remain so.' He thinks that it is a particular problem in the common law countries like

³¹ Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, Judgment of 18 March 2010.
³² Professor Hazel Genn, *Judging Civil Justice*, Hamlyn lectures 2008.

the UK as compared with the civil law countries. The adversarial procedure which we adopt is heavily dependent upon lawyers preparing, presenting and arguing the case. They put the whole case before the judge and the judge, as neutral referee, decides which case she prefers. In civil law countries, he says, the role of the judge (paid for by the state) is much larger than the role of lawyers (paid for by the parties). The judge does much more of the donkey work of preparing the case and has much more control over the proceedings. So in his view, civil law countries may be better at achieving equal access for all, rich and poor, powerless and powerful, than the Anglo-Saxons.

My rather pessimistic conclusion is that we cannot look at access to the courts and access to lawyers in isolation from one another. We have to look at the total amount we spend on lawyers and judges of all kinds. Then our legal aid system does not look anything like so expensive because we spend so much less on courts. If we really want to spend less on lawyers we have to be prepared to spend more on a very different style of court from the ones which we are used to. And in any event we have to be prepared to spend money on initial advice and assistance schemes because that is where most problems are solved. Courts are and should be a last resort but they should be a last resort which is accessible to all, rich and poor alike. The big society will be the big loser if everyone does not believe that the law is there for them.