

Towards Tomorrow’s Justice System

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I sometimes wonder if, when our ancestors stood at the end of the nineteenth century, they had any conception of the rate of social and political change and technological change that was going to occur just round the corner in the twentieth century. I suspect they were confident that their way of life would go on indefinitely. The Hapsburg Empire was thought to be an Empire on which the sun would never set. Of course, the peace of the world was shattered in the second decade of the new century and the world has never been the same since. A hundred years later, we are at the end of another century. Many would say that around the corner in the new century lies, not just incremental, but radical, change in the justice system that will profoundly affect the lives of all the people who are involved in it. So, are we presiding over one of the biggest scene changes on the judicial stage that has occurred in modern times? Or are the changes that are occurring all part of a natural evolution whereby great constitutional institutions are refreshed to meet the demands of a changing society? Is the system fulfilling itself in exactly the way it is predestined to do?

These questions are extremely difficult for any contemporary observer to answer. They are made more difficult by conflicting messages from current events. I propose to examine the questions I have posed by reference, first, to judicial independence and constitutional change, and then to civil justice reform, with particular reference in each case to the position in the United Kingdom.

I. JUDICIAL INDEPENDENCE AND CONSTITUTIONAL CHANGE

Our current Government — a Labour Government led by Prime Minister Tony Blair — is keen to go down in history as a modernising government. Little is sacred; officials have been told "to think the unthinkable." In addition, because this Government has a very large overall majority in the House of Commons, policy proposals are sometimes already well-developed by the time they are published for public consultation. The large overall majority in the House of Commons has implications which go well beyond the justice system.

The previous Conservative Government, with a small overall majority, had a less ambitious legislative programme. Nonetheless, there were many widely publicized instances when a decision of the previous Government was successfully reviewed in the courts. On some celebrated occasions politicians appeared to respond by being critical of the judiciary. This could have threatened judicial independence but the tension evaporated when the Conservative Government lost the general election in 1997.

Since the Labour Government came to power, a number of issues have arisen between the judiciary and the Government. These are issues of varying importance but some of them could develop into more major issues in the coming year. There have been skirmishes on sentencing policy, and some criticism of the conditions in which High Court judges live in lodgings when they travel on circuit. There has been a request by a Select Committee of the House of Commons that judges provide details of their membership in the Freemasons, an organisation that conducts its meetings in private. The Freemasons do good work, but there is a suspicion in some quarters that justice is not always done where the police, accused and judge are Freemasons. The Select Committee's request raised the issue of the extent to which (if at all) judges are entitled to privacy in respect of their private lives. Steps were taken to obtain the information from judges voluntarily without any attempt to identify the correct principle for the future or to limit the Lord Chancellor's power to require this sort of information in future from all new judges. In addition to this matter, there has been regular discussion in the media of the judicial appointments system (we do not have a judicial appointments commission) and whether, contrary to the present situation, there should be circumstances in which superior court judges can be removed if they do not perform their role properly, perhaps because of ill-health or delay in issuing judgments. By and large, judgments are delivered promptly but there are occasional, well-publicised lapses.

The issues to emerge since the last election which are of greatest importance in the public relationship between the judiciary and the legislature concern legal aid and rights of audience in the higher courts. There is likely to be legislation on these matters in the Parliamentary session starting in October 1998.

The Government proposes radical measures to control the amount of legal aid. Legal aid is provided by the state in the United Kingdom in both civil and criminal cases. At the end of the Second World War it seemed fair and reasonable to set up such a system, but since it was set up the amount of litigation and the cost of legal services has increased exponentially putting the cost of the system beyond what the taxpayer can afford. In 1996, a budget of £1.4 was allocated to the scheme. This amounts to a contribution of 50 per week (C\$ 1.25) for every man, woman and child in the United Kingdom. This may suggest that legal aid is freely given in civil cases but there are stringent financial limits which mean that this is not the case and, in any event, much of the legal aid budget goes to defendants in criminal cases. What appears to have happened is that legal aid has been granted at an early stage in a case, when it looked to have a reasonable chance, but that factors have tended to emerge at a very late stage which have resulted in the claimant failing. In 1997, for instance, £27 was spent on medical negligence claims but in only 17% of cases was more than £50 (C\$ 125) recovered. Successive Governments have been troubled by the fact that the demands on legal aid have far outstripped inflation. Indeed the amount spent on legal aid has doubled in the past five years. Various measures have been introduced such as introducing fixed fees for lawyers for certain steps. One of the principal causes of the increase in the amount required to be spent on legal aid appears to be that lawyers are required to spend more time on cases than they did previously. A number of measures have been suggested, and some tried, in an effort to control the amount spent on legal aid, but without much impact.

The Labour Government now proposes three main changes. First, legal aid should not be available for certain monetary claims, such as personal injury cases. Second, there should be expanded use of "no win — no fee" agreements. These are "not" the same as contingency fees in the United States or Canada under which the lawyer receives a share of the damages. Third, legal aid should be re-focused on welfare cases — housing, employment, debt and family issues. The professional bodies have been heavily involved in discussion of these measures. Although the aim is properly to help the neediest members of society, much depends on whether "no win — no fee" arrangements will be an effective substitute for legal aid. That in part depends on whether insurance will be available to protect unsuccessful litigants against orders to pay the costs of other parties under our costs-shifting rules, and it is not yet clear that this insurance will be available. Under our costs-shifting rules, costs nearly always follow the event, and the unsuccessful party is generally ordered to pay the legal costs of the successful party. The United Kingdom Government has recently put back the date for implementation of its proposals to October 1999 to allow the legal profession and the insurance market to adapt and respond to this change. But it has already removed the restrictions on lawyers entering into no win — no fee arrangements. So now lawyers can enter into no win — no fee arrangements in all civil cases except family cases. The maximum permitted uplift on these arrangements is 100% of the costs.

The Labour Government's proposals on rights of audience in the higher courts are also radical. A little explanation of the background is necessary to make good this point. As you will know, the legal profession in England is divided into two parts. There are barristers, who mainly specialise in advocacy, and there are solicitors, who mainly deal with advising the client on routine matters not involving litigation, and have the day to day conduct of litigation. Before the *Courts and Legal Services Act, 1991*, was passed, barristers could *only* be instructed by solicitors and therefore not directly by members of the public, and solicitors had no right of audience in most cases heard in the Crown Court or in the High Court or above. Solicitors, for their part, had a monopoly of the lucrative work of conveying real property. The professions could not agree on eliminating their respective restrictive practices.

In 1990, the Lord Chancellor announced that he considered it appropriate to make proposals for carrying out in the future the work conducted by the legal profession. To everyone's surprise, he published proposals which would abolish the barristers' exclusive right of audience in the higher courts. His proposal was that, in future, rights of audience should depend on whether advocates could demonstrate that they had appropriate education, training and qualification and were bound by appropriate codes of conduct. A new committee would be set up to advise the Lord Chancellor of the education, training and qualifications needed for advocates. The chairman of the committee would be a judge but the majority of its members would be laymen. The Lord Chancellor further proposed the removal of the solicitors' monopoly on conveyancing, and the introduction of contingency fees for litigation, on a restricted basis.

Barristers were opposed to the proposals to end their right of audience on the grounds that this would mean that solicitors would do the work and weaken the Bar, thus reducing choice in legal services for the public. They were not, however, successful to any great extent in their opposition to the Lord Chancellor's proposals, which became law in the *Courts and Legal Services Act, 1991*. Henceforth, rights of audience could be

extended with the approval of the Lord Chancellor and the four most senior judges, acting with the advice of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) and in addition the advice of the Director General of Fair Trading. The Lord Chancellor and the Judges could extend rights of audience only if the extension were compatible with the objective of introducing new and better ways of providing legal services, and a wider choice of people to supply those services, while maintaining the proper and efficient administration of justice. The extension also had to be compatible with the principle that rights of audience should depend only on whether the candidate was properly qualified and whether he was bound by appropriate rules of conduct.

In 1991, solicitors made their first application for increased rights of audience and it was granted in part. Solicitors who had successfully completed an advocacy course should have rights of audience in the higher courts, but (as advised by the Advisory Committee) this would not apply to solicitors who were employed in government or commerce but only to those in private practice. This placed employed solicitors in the same position as employed barristers, who were bound by a rule of conduct to the same effect. However, in February 1997, employed solicitors were given a restricted right of audience in the higher courts. They had to complete the same advocacy course as is required for solicitors in private practice who wish to have rights of audience in the higher courts. In addition, the application had to be a minor one, and not, for instance, one in a serious criminal case. If it was a major case, the employed solicitor had to be led by another barrister or solicitor with full rights of audience. It was clear that, as a result, consideration would have to be given to giving employed barristers similar rights.

This has all been overtaken, however, by the new Government's recently announced more radical approach. The Lord Chancellor proposes new legislation to permit all barristers and solicitors on qualification to have full rights of audience in the higher courts. They could exercise these rights immediately, provided that they meet any additional training requirements imposed by their professional body and complied with their professional rules of conduct. The Government's proposals would result in a considerable increase in the number of qualified solicitors and barristers able to exercise rights of audience in the higher courts, particularly solicitors, lawyers employed by Government, local authorities and in the private sector and lawyers working in the Crown Prosecution Service, which handles most prosecutions in England and Wales. Rights of audience before other bodies will still need statutory approval but, under a system which increases the role of the Lord Chancellor, ACLEC is to be abolished, and replaced by a smaller Legal Services Consultative Panel. The Lord Chancellor will consult the four most senior judges but, under the new proposals, he will no longer be bound by their views.

The Government's argument on rights of audience in the higher courts is on the face of it a very attractive one since it promotes choice for litigants and challenges restrictive practice of the Bar. The Lord Chancellor himself described the present rules as "antiquated." He continued :

Change is long overdue. The perception has grown that the legal system is dominated by the interests of lawyers, rather than by the need to provide justice for the people. I have one clear aim : the establishment of a modern and fair system which will promote quality and choice for those who need the help of an advocate while, at the same time, providing value for money.

There is, of course, a concern on the part of the judiciary that cases should be efficiently run. Under our system, in which judges do not generally have law clerks, the courts rely on the ability and integrity of the advocates. If this were not possible, cases would take longer and injustices might result. On the face of it, the right of the judiciary to control rights of audience has been considerably diminished since the beginning of the decade. The justification is that the public also has an interest in who has rights of audience in the higher courts and that the Lord Chancellor (as one of his many roles) is also nominally head of the judiciary. It is thus arguable that he should be entitled to take the final decision, but that makes an assumption (which is outside the scope of this address) about the continued acceptability of his current three-fold role as a member of the legislature, a member of the Government and head of the judiciary. The risk is that the Lord Chancellor, who is a member of the Government and not necessarily a judge himself or herself may make a decision which is contrary to the best interests of the justice system. It will be interesting to see whether the courts would then intervene by way of judicial review. It seems hardly likely that he would be permitted to act capriciously.

All the points which I have made so far suggest that judicial independence is being eroded in the United Kingdom. In the field of constitutional change, however, the courts are gaining new, open textured powers that could greatly increase their role, particularly in the field of human rights. Human rights in post-war Britain have an interesting history. The United Kingdom was one of the founder members of the *European Convention on Human Rights*, which was drafted in Europe in an attempt to prevent the occurrence of the inhuman acts committed in the last World War, for instance at the hands of the Nazi government in Germany. The United Kingdom adhered to the Convention as a matter of international law, so that citizens of the United Kingdom could take their grievances to Europe after exhausting their remedies in British Courts. However, the United Kingdom never incorporated the Convention into domestic law. Therefore British courts could not make findings that public authorities (to which the Convention was directed) had been in breach of the Convention or granted remedies based on the Convention. Why did the United Kingdom decide not to incorporate the Convention into domestic Law? The reason often given was that it would drag judges into politics, they would have to make value judgments on issues in which the public was vitally interested, and that might lead to demand, by the public for greater judicial accountability and a say in judicial appointments. But as we know, judges are often involved in law making and their territory abuts that of the legislature. Border tension is a not infrequent occurrence and there is no bright line between judicial law making and legislative lawmaking. There is a grey area where both may claim to act. That is no doubt one of the issues to be discussed in the sessions this afternoon on Judges and Public Policy. Be that as it may, at last — after 48 years Parliament has decided to give better protection to Convention rights in United Kingdom domestic law. The Human Rights Bill now before Parliament for the first time gives United Kingdom courts the power to make decisions on the basis that the European Convention on Human Rights applies. We in the United Kingdom have hitherto been content to proceed on the basis that Parliament would adequately protect our civil liberties. This has become difficult to maintain. Each year a considerable volume of legislation is passed. This includes both primary legislation and secondary legislation, legislation propounded by Ministers of State under powers delegated to them by Parliament. The case for incorporating the *European Convention on Human Rights*, to which the United Kingdom is already a party as a matter of international law, into our domestic law has become stronger in recent years. It is probably because the United

Kingdom was already a party to the *Convention* (and indeed had been heavily involved in its drafting) that the United Kingdom is legislating with reference to the rights conferred by the *Convention* rather than developing its own bill of rights.

It has been said (in another context) that the British like to live in a series of halfway houses. The *United Kingdom Human Rights Bill* is a compromise between the Canadian and New Zealand Bill of Rights. The core provision of the Bill (clause 3) provides that all legislation, whenever enacted, must as far as possible be read and given effect in a way which is compatible with *Convention* rights. However, the courts cannot strike down incompatible legislation. They can only make a declaration of incompatibility (clause 4). The result is curious. The United Kingdom is a member of the European Community and its courts have a duty to strike down domestic legislation which is contrary to Community law. So we will have the inconsistent result that the courts may strike down legislation which is contrary to Community law but not that which is in breach of human rights. Moreover, such a declaration has no effect on the case in which it is made, nor does it affect the validity of the provision in question. In addition, the declaration can only be made by one of the higher courts and then only after notice has been given to the Crown. The significance of a declaration of incompatibility is that the appropriate Government minister will be able to introduce new legislation to remove the incompatibility under a special fast-track procedure (clauses 10 to 12). Making it unnecessary for the corrective legislation to go through all the Parliamentary processes necessary for primary legislation. The new fast-track procedure will also be available in future if it appears that legislation infringes *Convention* rights as a result of a decision of the European Court on Human Rights. There are other important provisions in the Bill, including the imposition of a duty on all public authorities (including the courts) to observe *Convention* rights where their powers enable them to do so (clause 6). In future, when ministers introduce legislation into Parliament, they will have to state whether or not the Bill complies with the *Convention* (clause 19). This greatly enhances the prospects that legislation will in future observe human rights.

The significance of the Human Rights Bill in the present discussion is the powers it gives the courts. The rights conferred by the *Convention* are of an open-textured nature in many respects. Article 6 confers the right on a defendant to a "fair hearing" in the determination of his civil rights and obligations and any criminal charge against him. Article 8 confers a right to privacy, hitherto not recognised in English law. Article 10 confers a right to freedom of expression. Article 8 and 10 are two of the articles which are subject to interference which is authorised by law and which is "necessary in a democratic society [...]." Those words add an additional layer of value judgment. The courts will have to take into account decisions of the European Court but, subject to that, will have considerable scope to interpret the *Convention* rights and give them substance in United Kingdom law. The courts have similarly been given wide powers under the legislation which provides for the devolution of legislative powers to Scotland.

It is difficult to overstate the effect of these changes. One distinguished constitutional lawyer, Professor Sir William Wade QC, recently said :

*The incorporation of the Convention on Human Rights into our own [United Kingdom] law must certainly be regarded as one of our great constitutional milestones. It makes a quantum leap into a now legal culture of fundamental rights and freedoms [...]. It will confront the judges with many new problems and it will call for new techniques. Value judgments will have to be made on imponderable questions of public interest, democratic necessity, and the protection of health or morals and similarly ill-defined matters. These rights and freedoms will often pull in different directions and delicate balancing exercises will be demanded. It does not seem too much to say that the judges will be forging a new constitutional framework within which the citizen will enjoy his rights and liberties. It will need to be done boldly and in a spirit of liberal interpretation.*¹

The Human Rights Bill is expected to become law in about November 1998.

The best advice to any observer must be to watch this one with interest. He should wait to see how the judiciary construe legislation to make it conform (as they are enjoined to do) "so far as is possible" with Convention rights. Also watch to see how easy it is for the Government of the day to observe human rights. In the last few months at least two major legislative changes have been proposed by the Government which appear to infringe Convention rights. Of course, as in Canada, there is nothing to stop Parliament passing such legislation but it will doubtless be subject to public criticism and accusations of hypocrisy if it does.

II. JUDICIAL INDEPENDENCE AND CONSTITUTIONAL CHANGE — CONCLUSION

To sum up, radical changes are occurring in the relationship between the judiciary and the legislature at this time. However, the changes are in opposite directions. What is the explanation for the apparent inconsistency between the developments which erode the position of the justice system and the judiciary, and those that appear to enhance it?

I would suggest that the developments I have described are not as inconsistent as they look. There is a growing notion that judges and the justice system should be more accountable to the public. Maybe, subconsciously, the legislature views increased accountability as the necessary counter balance to increased powers in the field of human rights and on other constitutional questions. The judiciary and the justice system are not under attack, but are evolving in response to a growing appreciation of the need for accountability. The areas in which judicial independence is being challenged are, of course, a source of concern but, as I see it, the constitutional developments are bound to underscore the value to society of an independent and effective judiciary. Properly managed, current events offer the judiciary an enormous opportunity to show how the justice system can evolve and respond to society's changing needs and values. Again, it

1. Human Rights and the Judiciary, Annual JSB Lecture 1998.

looks as if there will be a useful opportunity to pursue these issues in the Canadian context in the sessions scheduled for this afternoon.

III. CIVIL JUSTICE REFORM

In the last few years in the United Kingdom, there has been considerable debate about reforming the civil justice system. This debate has wide implications for society, democracy and the constitution.

Although judges try to level the playing field as far as they properly can, until relatively recently, civil justice remained little changed in character from the system described by Charles Dickens in *Bleak House*. Many interlocutory procedures were required without consideration of whether they were really necessary in the case in question. There was a real doubt in the public's mind whether the system was for the benefit of the litigant or the lawyer. The unrepresented litigant was at a disadvantage, not simply because of lack of legal knowledge but also because of his unfamiliarity with the system. Worst of all, the private litigant who did not qualify for legal aid was being squeezed out because the cost of even a relatively simple case was beyond the means of most middle class individual litigants. These are not problems of the past, and we hope that some improvement is on the way. It took a long time for the justice system to become aware of all the problems in the system. People would shrug their shoulders and say : "The law is necessarily complicated, and thus litigation is bound to be expensive. We have a Rolls-Royce system of dispute resolution."

Our approach to these questions is very revealing about our unspoken assumptions. We assume that it is better to have a system that is technically perfect and intellectually pure and satisfying and that, because legal argument tends to flourish on drawing fine distinctions and making the law more sophisticated, therefore the law has got to be complicated. I will return to that question when I have described briefly some of the work on civil justice done in the United Kingdom.

The leading work on civil justice reform has been done by Lord Woolf, Master of the Rolls and thus one of our senior judges. Lord Woolf conducted a two year enquiry into access to justice. He canvassed the views not just of lawyers, but also of consumer groups and others. I am not able to do more than mention some of the changes he recommended. His final report contained over 300 recommendations in all. The major defect in the civil justice system which Lord Woolf identified in his report was that the system was too costly even for the better-off citizen, and too slow. The recommendations which Lord Woolf made to meet these problems were detailed, since they concerned very many areas of civil justice.

The key recommendation was that judges should take over the management of more substantial cases from the parties. The judges should allocate cases to different tracks according to their size and complexity and in the larger cases the judge should call a management conference to narrow down the issues and set a trial date and a timetable which can then be controlled by the court. Thus, the courts will have much greater control over a case than formerly and there will be much more emphasis on the pre-trial stages of case than before. To give judges new powers of case management, the rules of procedure

must be revised. This will give rise to the opportunity to rewrite the rules in simple, up to date language.

There have been many criticisms of Lord Woolf's proposals for judicial case management. In particular, there has been a criticism of the lack of socio-legal research into the reasons for costs and delay in civil proceedings. It is said that the problem lawyers have in keeping to timetables under the present rules is endemic for, as a matter of principle, the parties should have control over their cases and the court should not have power to restrict the steps a legal adviser thinks are necessary in the client's interest. Case management will lead to costs being incurred in a case that settles that could have been avoided if the parties had been allowed to dictate the pace. Case management will lead to inconsistent approaches among judges. These appear to be formidable arguments, but the fact remains that the present system is unsatisfactory and that no better way of trying to solve the problems of cost and delay than judicial case management has been suggested. The courts ought to be able to make it work with sufficient training, and if the legal profession co-operates.

A second key recommendation of Lord Woolf's report was that there should be a less adversarial approach to litigation. For example, he recommended that the court should appoint single experts wherever possible. He also recommended that there should be codes of sensible practice which parties would be expected to follow once a dispute arises and before proceedings have begun. The protocols would encourage a more co-operative approach to dispute resolution. These pre-action protocols would be worked out by professionals in the field, not just legal professionals, and other interested groups and they would outline steps to be gone through voluntarily — for example voluntary disclosure of documents and voluntary disclosure of medical reports — before litigation is started. If the parties failed to observe these protocols, the courts would take their failure into account in determining the incidence of costs. The first of these protocols has now been formulated and published. It relates to personal injury and clinical negligence actions.

Lord Woolf also considered that litigation should also be avoided wherever possible. He recommended that there should be a greater use of other methods of dispute resolution, such as mediation or arbitration. These other methods are called generically Alternative Dispute Resolution or ADR.

Traditionally, the view has been that judges should not become involved in ADR; that there are two distinct processes of adjudication and mediation. However, there are the beginnings of a fresh assessment of the extent to which judges should be involved in ADR, particularly in neutral evaluation. Thus, in 1996 the Commercial Court decided to introduce a new practice designed to encourage parties to try to solve their disputes by ADR. Under the new practice, if it appears to the court that the case is suitable for ADR but ADR has not been tried, the court can adjourn the case so that the parties can try ADR (if they wish). Furthermore, if the court considers that it would help the parties to have an early neutral evaluation of the case by the court, the court itself can agree to give that evaluation, but the judge involved will play no further part in the case if the early neutral evaluation does not in fact lead to a settlement. This is about as far as the courts can go, since they have no power to require parties to try ADR. It demonstrates the courts' resolve to reduce the delay and cost of litigation to the parties by ADR if that can be achieved.

Lord Woolf's recommendation has led to considerable interest in ADR, and some mediation is done in civil cases. In addition, a small amount of research is now available to show how it is working. A study of a pilot scheme at a county court dealing with smaller civil claims showed, however, that only a small minority of parties opted for mediation. Moreover, settlements seemed to be far less than roughly similar cases that went to trial or were settled independently, and doubts were expressed as to whether legal costs were in fact saved. There were some other rather worrying conclusions. The research showed that ADR worked to the disadvantage of the party who was less well-represented. It further showed that there was a lack of standards among the mediators. There was also a lack of consistency in mediators allowing documents and other evidence to be placed before them. These findings are worrying, and there is clearly a need in the United Kingdom, firstly to raise standards among mediators and, secondly, to ensure that vocational legal training (as in Canada) extends to ADR. It is early days, but clearly there is room for more than one view about the value of ADR, and the discussion at this conference tomorrow will hopefully take the issue forward. I had the pleasure of seeing the Wanuskewin World Heritage Site yesterday and gaining a small insight into the problems of the treaties and other problems involving the aboriginals, such as in family law. It was impressed on me how these disputes had to be resolved in a non-confrontational way. It is good to see that there are two sessions at this Conference on aboriginal justice.

Another important recommendation in Lord Woolf's report was that discovery should be limited to those documents on which the parties rely in support of the contentions that materially affect their case or support the other party's case. Currently there is a much wider test of relevance that includes any document that may lead the other party to a line of enquiry that may help it advance its case. This is one of the areas in which there has been the greatest criticism of the present system, since, depending on the size of the case, the cost of discovery can run into thousands if not hundreds of thousands of pounds. Every practising lawyer knows that there have been cases that have only succeeded because of the documentation produced by the opposite party as a result of discovery. In future, however, requests for orders for discovery will have to be targeted more specifically if they are to be granted under the new system.

Lord Woolf made several recommendations designed to help unrepresented parties. These recommendations are relevant to the discussion on special needs litigants that is to take place at this Conference tomorrow. In particular, he recommended that the court should provide advice and assistance to unrepresented parties through court-based agencies or other schemes. He also recommended that leaflets explaining the procedure should be prepared for their use, and there are now several such leaflets available, for instance, in the High Court and Court of Appeal. For example there are leaflets that explain the procedure for an appeal in everyday language. It is obviously beneficial if someone helps unrepresented litigants to get their application in order before their case comes to court since it saves valuable time in court. The number of unrepresented parties is high, especially in the appeal court and the bankruptcy court, which are probably to them courts of last resort. In 1995, unrepresented parties made 29% of the applications for leave to appeal. Unrepresented parties were the appellants in 9% of appeals of which 4% succeeded.

The problems for unrepresented parties in the court system are considerable. They find the procedure of the courts confusing and impenetrable. They often have no experience of court proceedings or advocacy. They may have language problems, if English is not their first language. (Some courts have tried to meet this problem by having certain information available in different languages). Even without language difficulties, they may be unable to understand why a particular order has been made. Many unrepresented parties are also affected by stress as a result of the matter that has led to the action or as a result of having to deal with it themselves. The simplification of court procedure that I have mentioned will go some way to help unrepresented parties, but they still have other immense hurdles to overcome. Court staff are instructed to be as helpful as they can but they are not in a position to give an unrepresented party legal advice.

Unrepresented parties can get some help from voluntary advice agencies. In particular there are Citizens' Advice Bureaux (CABX) throughout the country. CABX are the world's largest advice-giving agency. They offer advice on areas such as social welfare law, debt, immigration, housing, consumer issues, mental health problems, family law and employment. They do not generally employ lawyers, but often they have links with solicitors who are prepared to offer some advice and assistance without payment. The vast majority of the CABX staff are volunteers. They are generally funded by local authority grants supplemented by money raised privately. CABX play an invaluable role in the provision of advice and assistance. There is a branch in the Royal Courts of Justice in London where the High Court and the Court of Appeal sits, and it receives about 12,000 inquiries a year, mostly connected with litigation in the courts.

Lord Woolf recommended that the courts should take proactive steps to help unrepresented parties. His emphasis on access to justice has led to a change of attitude towards such persons. It is becoming accepted that to ensure access to justice the court must take such steps as it can to see that the unrepresented party is not disadvantaged by the lack of a lawyer. Thus, for example, it can give permission for the unrepresented party to have a friend in court to give advice and help and in some cases to speak on his behalf. Further examples can be given. While the court cannot itself give the unrepresented party advice, if it looks as if the party has a reasonable point but needs to have some help in presenting his case, it can suggest that he or she seek advice from the court-based advice agency and it can adjourn the case for the unrepresented party to have an opportunity to take advice. This is possibly so even if the other party objects and even though the adjournment will involve further costs. However, the court cannot compel the unrepresented party to take legal advice.

The change of approach has not been limited to the courts. There is now a much greater interest on the part of barristers and solicitors in providing free legal advice in needy cases. It is not, at least as yet, seen as a matter of professional obligation, as it is in some other countries, that a lawyer should provide his services free of charge in these cases, but there is considerable professional interest in doing professional work on a *pro bono* basis. Both the Bar and the solicitors have set up *pro bono* units with administrative staff and funding, which indicates the level of their commitment in this direction. The practising professions have also given considerable financial help to voluntary advice agencies.

The Government is also now itself talking about the development of a community legal service. This would have a more holistic approach to an individual's problems. Many existing services which provide information and advice would be co-ordinated to help people decide if their problem was really a legal one, and, if not, to point them in the appropriate direction.

The date of April 1st, 1999, has been set as the target date for the implementation of many of Lord Woolf's recommendations. This is a very tight timetable because there will first need to be judicial training, a new set of procedural rules, administrative changes and so on. Time will tell whether the reforms recommended by Lord Woolf will be successful in reducing the cost and delay which is involved at the present in the civil justice system. If they are successful, more citizens will be able to afford to bring disputes before the courts, and will no doubt do so.

A lasting benefit of Lord Woolf's work is that it has reminded us that the civil justice system is provided to help litigants. By keeping that point firmly in mind, we will start to question whether we need to have an elaborate and complicated system. Someone who goes out to buy, say, an electric drill to do do-it-yourself work in his home does not think about whether the drill is or is not a consummate piece of engineering. He thinks about the hole he or she needs to make. We need to reorientate our vision about the legal system in a similar way. We should remember that when lay people assess a legal system they do not admire the elegance of the legal process. They focus on the end result. As service providers we must start with the presumption that the customer should get what he or she wants. In a justice system, what the average citizen wants is a system which has at least three qualities : accessibility, affordability and good quality. In my view, the justice system can and must be simplified and made less confusing. One aspect of this question is how we can adapt the court system of adjudication and make the system of adjudication suitable to the context. There is a real place for tribunals which deal with specialist points in a way that it is appropriate to their subject and their users. We should view these tribunals as a welcome departure from the assumption I have mentioned that every case has to be dealt with in a Rolls-Royce way.

The other major assumption that I mentioned is our assumption that the law is complicated and therefore litigation has to be complex too. As Chairman of the Law Commission, I strongly advocate simplifying and modernising the substantive law. Doing that will often shorten dispute resolution and indeed help prevent disputes arising in the first place.

Can the law really be simplified? The answer to that question is — by dint of hard work — definitely, yes. It is not enough simply to rewrite law in less formal language. The substance has to be carefully analysed and the policy thought through. To give but one example, the Law Commission has been working on some rather complicated rules about directors' conflicts of interests. There are a number of different rules that apply to different types of company and to different types of transactions. The object of the exercise is to see if the law can be simplified. In order to try to rationalise this patchwork of regulation we have investigated the economic effects and rationales of different types of regulation. In this way we can ascertain what rules are worth keeping, whether they achieve worthwhile goals and whether common principles can be identified that will enable these complicated rules to be simplified and rationalised. These rules

were adopted comparatively recently. One of the most remarkable things that I have noticed as a result of doing law reform is how easily law becomes out of date and how difficult it is to discern the original reasons for the original rules. I would want to go further than just study the purpose of a rule for use in a law reform exercise. I would want practitioners, judges, students and the public to know the reasons why we have particular rules whose justification is not immediately clear. This would help ensure better understanding and awareness of the law and encourage development of the law consistently with its purpose.

Simplification of the law is a necessary process. Indeed I would suggest that in a highly developed democracy, like yours and mine, government owes its citizens a duty to keep the law up to date and make sure it is as clear as circumstances permit. That is what good government today involves. Law covers a huge area of people's lives and social circumstances are changing more rapidly than ever before. But simplification of the law is also a time-consuming process which requires expertise. How is it best done? In my view, without a doubt, it is best done by an independent body set up and funded for the purpose. A law reform body, if it is doing its job independently as it must do, will frequently be inconvenient to the government of the day since it will raise issues and require work the government might well regard as deflecting from its own legislative priorities. But ongoing, regular, non-party political law reform is a necessity and without an independent and expert law reform body it is too easy for Government to ignore it. We are very fortunate to have the Law Commission in England. It was set up in 1965. It is now well-established. The Government has recently re-affirmed its commitment to the Law Commission, following a review to which all public bodies are from time to time subject. Its method of working is now well-tried. It has also been reasonably successful in persuading the Government to implement its recommendation. In the period since 1965, over 70% of its reports have been implemented in whole or part.

To be successful, however, law reform needs the involvement and support of the judiciary. The Law Commission in the United Kingdom does work in which the judiciary expresses an interest and to which it contributes. It also supports us publicly. Most recently, the Lord Chief Justice gave a well-publicised speech on the need in England for a criminal code, such as Canada already has. Codification of the criminal law has been an objective of the Law Commission since it was set up over 30 years ago. I would suggest to you that it is part of the judiciary's law-making role to support an independent law reform agency. This is a concrete way of supporting reform of the law for the benefit of the public we serve. Law reform should of course be supported for the same reason by the professions.

It is therefore logical and appropriate that participants in this Conference should direct their mind to developments such as the work of UNIDROIT, and the draft convention on International Interests in Mobile Equipment, tomorrow.

IV. CIVIL JUSTICE REFORM — CONCLUSION

I would suggest that four points in particular emerge from the discussion on civil justice reform. First, we must reorientate the civil justice system towards users' expectations : we must keep that focus to the front of our minds. Second, we should recognise the importance of regular law reform, and the importance of permanent law reform today. Third, we should do what we can to see that law reform, and bodies responsibly carrying out the work of law reform, receive strong, public support from the judiciary and also the professions. Fourth, in this area also, there are great changes occurring, but I would suggest that they too show that the system is capable of major adaptation and change.

V. MY MESSAGE FOR THIS CONFERENCE

The events which I have described suggest to me, in answer to the questions that I posed at the start of this address, that the justice system is evolving to meet the demands of a changing society rather than undergoing abnormal change. But present events are challenging, and they carry an important further message for us all at this Conference. It is a message that it is in our interests constantly to repeat and emphasise. It is that the practice and administration of the law is not simply a job to be done. It is also a calling. That means, among other things, that there is a need for lawyers at every level to remind themselves that the work we do is not just about applying rules, nor is it about applying rules unthinkingly. We must try to understand their purpose and to help them fulfil that purpose. We must see that the justice system and the law are kept up to date. Those are some of the points of which we should constantly be reminding ourselves at this Conference. They lead inevitably to further questions. Do we match up to those ideals in what we do? Can we help the justice system evolve to meet future needs? I hope we can. It is all a question of approach and the proper management of change. There is nothing to fear. Change, if properly approached and managed, is not a threat but a great opportunity for all those involved in the justice system.