Jackson Reforms: A reform too far?

The legal profession and the legal services market have endured sustained and deep-rooted reform over the past few decades. Lawrence West QC in his article "Have the Woolf Reforms Worked" (The Times, April 9th 2009) said "Access to justice is central to the democratic process — and procedural rules are the gateway to that justice." He is right.

The Jackson Reforms, proposed by Lord Justice Jackson appear to be nothing short of a direct assault on "access to justice" and the "gateway to justice". Let me elaborate a little on this. "Access to justice" is a phrase that has been bandied about of late. When the legal aid budget was cut and the new franchise contracts meant many law firms who previously did legal aid work would not be able to do so in the future, the Law Society launched an "Access to Justice" campaign to lobby against those reforms. The Labour government at the time pressed ahead, driven by the need to reduce overheads and expenditure. The result is that criminal lawyers who provide legal aid are more or less now paid less than before, and many have ceased to practice as a result. The is a strong argument that a consequence of this has been that vulnerable individuals who find themselves arrested or facing criminal proceedings will not have "access to justice". I am not a criminal lawyer, but as a lawyer I do understand what "justice" is and why it is important that everyone has access to it. As Lawrence West said, it is "central to the democratic process". Really?

I want to consider what "justice" actually means before I go any further. Is justice a commodity of the constitution which the electorate need access to as part of the democratic process? Are the procedural rules really the gateway to justice or are they actually the justice itself? I thought I knew what "justice" was, I am a lawyer after all!

Talks about "justice" as being a personal responsibility. The Oxford Dictionary of Law (5th Edn) defines "justice" as:

"A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs. Justice is not synonymous with law - it is possible for a law to be called unjust. However, English law closely identifies with justice and the word is frequently used in the legal system; for example, in justice of the peace, Royal Courts of Justice, and administration of justice."

Gary Charter in Economic Justice and Natural Law (Cambridge University Press) talks about "justice" in the context of personal responsibility but also examines the balance of the rights and obligations of different people. In my mind, therefore, "justice" (in the context of the law) means:

"The ideal that an individual seeks the protection of rights and the punishment of wrongs through the legal system."

So, if this is a fair and reasonable understanding of what "justice" actually is, then it is an ideal, and as such is an ideal that any citizen of the Country should expect to be able to have access to throughout their life so as to ensure they can find respite from wrongdoers or defend themselves against actions brought against them. It appears, therefore, at least in the UK, that access to justice can indeed be said to be central to the democratic process. A citizen has the right, the power and the means to defend themselves in Court and to bring others to account, including the Government, Local Authorities and quango's who are subject to the individual's electoral power. So in a sense, access to justice could be said to be an established constitutional right in the UK, no? Well, that depends on what the UK Constitution actually is.

The UK Constitution has been defined as **"**a body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and the relations between persons and public
authorities" (Turpin & Tomkins, The British Constitution, 6th Edn). Ah, so it's a case of a citizen having the power over the Parliament that creates the rights and obligations he enjoys, but not the power to protect himself from those rights and obligations being varied by any particular Parliament, "You are free to do anything you wish…… as long as it doesn't break the law."

Ok, so we have established what justice is, who needs access to it and why, but how is this access exercised? Lawrence West talked about a "gateway". He spoke of procedural rules being the gateway to access to justice. Now I am not saying he is wrong on that, but it does seem to me that the gateway is in fact much, much wider. There are the Courts, of course, who are part of the procedural process, but an individual seeking the protection of rights and the punishment of wrongs through the legal system is unlikely to have the understanding or expertise to achieve this effectively on their own. They will need a lawyer, They will need a solicitor, a legal executive lawyer, a barrister. They will need the assistance of a

professional who understands the law, can advise them about their rights and obligations effective, can represent them at Court. So the gateway for the vast majority of people, isn't the procedural rules or the Court, but in fact the lawyers they first approach when they need advice on a particular issue. In essence, the legal profession is the gateway. We already know that under the last Government, the legal profession was significantly curtailed as being the gateway for criminal and legal aid based clients. By restricting and in some cases removing the legal profession (that is, removing the gateway itself) many people have been denied access to justice and found themselves instead being given access to procedural rules which they do not understand, often to their detriment.

The Jackson reforms appears to be seeking to extend this anti-gateway, and yes, attack on the central principle of the democratic process, further by seeking to change significantly the rules on costs in civil actions. Briefly, the Jackson reforms propose:

the abolition of the indemnity principle;
the abolition of recovery of success fees and ATE premiums, partially compensated by an increase of 10% in PI general damages;
a ban on referral fees in PI cases;
qualified one-way costs shifting;
fixed costs for fast track PI and in the future for all fast track cases;
legalisation of contingency fees;
the creation of a Costs Council to decide on guideline hourly rates and fast track fixed costs;
stronger case management including costs management;
a 10% increase of damages where a defendant fails to accept a claimant's Part 36 offer which is beaten at trial;
the increase of the limit of small claims to £25,000.

Ok, so on the face of it, it looks like these reforms are all administrative in nature, Nothing to do with the gateway as such, more to do with the rules of the CPR with an emphasis on costs. At first glance, that is a fair and reasonable conclusion. However, if one considers the impact of these reforms on the legal profession, as the gateway for access to justice, and therefore ultimately on the citizen, the picture becomes much darker and more controversial.

Reported in the Law Society Gazette (26th May 2011) Masters Campbell, Haworth and Leonard said they were 'unhappily' unable to agree with the majority view of the costs judges who supported recommendations made by Lord Justice Jackson. In a report from February uncovered by campaign group Access to Justice Action Group (AJAG), the judges said many of Jackson's proposals – most of which have been adopted by the Ministry of Justice – were 'inappropriate'. They said claimants who have suffered serious medical injuries could lose thousands of pounds intended to pay for their care.

The Claims Standards Council said on the 9th June 2011 Insolvency experts have warned that civil litigation funding reforms could deter small businesses from trying to reclaim debts.

There is widespread public opposition to the government's civil funding reforms, according to a survey seen exclusively by Legal Futures. The survey of more than 2,000 people by pollster Populus found that four in five (82%) people think that the current 'no win, no fee' system is fair, while almost three-quarters (73%) of people think that the defendant's side should pay the successful claimant's legal fees.

The Lawyer (18th April 2010) reported Lawyers acting for 18 claimants who won a landmark negligence claim against Corby Borough Council have slammed Lord Justice Jackson's proposals to move away from the conditional fee agreement (CFA) regime. Old Square Chambers' barrister David Wilby QC, who was instructed by Collins, agrees: "If you took away the CFA regime nobody would do these cases."

The Law Society, the Bar Council and the Institute of Legal Executives all appear to oppose the reforms, as does a significant part of the judiciary and the wider public. Why? It appears that the opposition is based primarily on the premise that the reforms will deny hundreds of thousands of citizens access to justice – or in other words, access to the lawyers who are the gateway to justice because the changes to the costs rules will result in lawyers being unable to unwilling to take on work from clients they would have previously acted for. The proposed increase in small claims to £25,000 alone will deter many lawyers from acting on claims under that amount. The current limit of £5,000 enables access to lawyers, and thus justice, to be enjoyed by many individuals and small businesses. Why would the government seek to undermine the very essence of democracy in this way?

The terms of reference for the Jackson review were:

“To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost”.

So, the very purpose of the review was to promote access to justice at proportionate cost. It turns out that the disproportionate costs that are frowned upon are the costs paid by the losing party in litigation. The losing party is potentially exposed to their own legal costs, the other sides legal costs, the court fees, damages/compensation and the cost of expert evidence and ATE insurance. I know that across these different elements there are commercial opportunities for layered revenue streams. ATE providers often pay kick-back commission to lawyers or claims management companies, which suggests the ATE premiums are artificially over-priced. Lawyers themselves often pay referral fees to introducers out of the fees they would recover, suggesting that they are artificially over-priced. Actually, the commercials are a little more complicated than simply leveraging the price to create flows of cash across a complex business model. What they are actually doing is taking a margin out of their own profits and sharing it commercially so that everyone benefits. In Jackson’s eyes, it would seem, no one should benefit.

I personally believe that, as the insurance companies are the primary targets in litigation, particularly personal injury, and since they are all owned by the banks, that the reality is the banks, who are under intense pressure after the financial crises (which is not yet over) have turned to their insurance divisions and sought to lobby the government to reduce their overheads significantly so that greater profit can be made for themselves. A purely monetary motive with no regard for the consequences on access to justice for the individual. If this is the case, then it is little wonder that a government desperate for increased tax revenue in the long term can see that adopting this policy would help the treasury. One has to wonder, however, whether they really understand the impact these reforms will have on the very individuals and small businesses they are dependent on to get the recovery going? I doubt it, because it would seem that in his Review, Lord Justice Jackson took a narrow conceptual view rather than a broad view of the situation. I am not saying there is no scope for reform, of course there is, but a wholesale attack on the legal profession that will leave millions of people and businesses disenfranchised from justice is not the answer, and the growing number of professionals, judges, individuals, organisations, businesses and charities who recognise this need to step up their game to avoid mass unemployment across the legal profession and a mass denial of justice across the nation.

A better more effective solution might be to allow contingency fees to operate along side CFA agreements and to prevent ATE providers from paying referral fees. At least that way there is more scope for reforms which actually promote access to justice and address the costs issue without denying access to justice by focusing entirely on the costs issue as Jackson appears to have done.

“Drop dead. Well that's good start to our negotiations.”