“The PHSO And ‘Paths To Justice’: A Just Alternative or Just An Alternative?”
ANN ABRAHAM, Parliamentary And Health Service Ombudsman (PHSO)

Introduction
Lord Woolf remarked in 2002 that ‘the contribution made by the Ombudsman system to achieving justice and improving administration in both public and private sectors has been immense’. This paper examines the role of the PHSO (and of public sector Ombudsmen more generally) in providing ‘paths to justice’ in the post-Woolf reform era. In particular, it argues that the PHSO should be seen as an integral part of the administrative justice framework and as a ‘system of justice’ in its own right, different from, but complementary to, the courts, the tribunal system, and negotiated forms of alternative dispute resolution.

The paper discharges that task by reviewing the scope and reach of PHSO investigation, by assessing the processes and ethos within which that work is conducted, and by judging the extent to which the PHSO and other public sector Ombudsmen deliver substantive justice for the users of public services.

The paper is set in the broader context of the ‘mentalities’ that shape the work of Ombudsmen and that distinguish it from the rather different juridical interventions anticipated by a common law outlook. It suggests that a more concerted effort is now needed to integrate the Ombudsman system of justice more effectively into the system of administrative justice as a whole.

The Ombudsman as a ‘system of justice’

The paper examines the sort of investigations undertaken by public sector Ombudsmen, the issues raised, and the volumes of cases handled. It considers to what extent Ombudsmen schemes meet otherwise unmet public need and engage with the sort of ‘justiciable’ events identified by Genn (and others) as of most importance to most people. That examination entails construction of a snapshot of the PHSO’s caseload and a review of the statistical evidence base. It will suggest that, notwithstanding the ‘MP filter’ imposed by the 1967 Act and the unenforceability of PHSO recommendations, the PHSO (and other public sector Ombudsmen schemes) is uniquely placed to tackle the issues of most concern to the users of public services (scope) and to provide access to effective dispute resolution processes (reach).

The paper also considers the defining processes and ethos of public sector Ombudsman practice. It takes seriously the recent remark of Bean J (in R v Sec of State for Pensions on behalf of Bradley and others [2007] EWHC 242 Admin) that ‘A public adversarial hearing is not the only fair way of finding facts, and it is not the way that Parliament has required to be followed [by the Parliamentary Ombudsman or the Local Government Ombudsman]’. It considers the extent to which an inquisitorial process enables real engagement with the underlying issues in dispute, the extent to which an...
Ombudsman investigation can get beyond a cursory review of administrative process (maladministration) and instead address matters of substantive value, and the ability of Ombudsmen to provide meaningful redress and broader systemic remedy.

The paper addresses the ‘otherness’ of Ombudsmen in rather broader terms by considering the relationship between Ombudsmen and the courts, the differences of approach entailed by their remit and histories, and the extent to which the two systems can fruitfully coalesce. It asks to what extent Ombudsmen practice challenges common law assumptions, and it identifies the sort of ‘justice’ on offer from Ombudsmen, especially those operating in the public sector. Whilst conceding that there is scope for rivalry between ombudsmen and the courts, the paper suggests that after ‘Woolf’ the two systems are now less than ever polar opposites. The emphasis in both courts and tribunals upon making the system work for those who use it is underpinned by a ‘horses for courses’ philosophy and recognition that most ‘justiciable’ nuts are scarcely well cracked by judicial sledgehammer alone. Seen in this reformist light, the potential rivalry evaporates into partnership, the apparent trumping of the rule of law (or rule of lawyers) by the Ombudsman’s ‘individuated’ justice a sign of legitimate difference.

The future of administrative justice

The paper concludes by considering the role of the PHSO as the guardian of principles of good administration; it asks how far ombudsman schemes can contribute to the Government’s plans for a new ‘human rights culture’; and it considers the relationship of PHSO redress to public law remedies more generally.

The final conclusion emerges that the distinctive place of public sector Ombudsmen within the administrative justice system deserves wider recognition and that the Ombudsman ‘system of justice’ must be integrated effectively into the system as a whole if its potential is to be realised. The PHSO on this account is not merely a ‘just alternative’ but an alternative that offers an intriguing juridical model for making a reality of a human rights culture, for delivering meaningful redress and for contributing to the process of public service reform.

“The Permission Stage of the Judicial Review Procedure and Access to the Administrative Court”

VARDA BONDY, Public Law Project, and MAURICE SUNKIN, University of Essex

The permission stage plays a key role in determining access to the courts in public law matters in England & Wales. This paper draws on the findings of an eighteen month Nuffield funded empirical research project, the first independent study of the permission process and the dynamics of judicial review litigation since the process was reformed following the Bowman report in 2000.

As well as providing new data on the effects of the procedure and the important issue of judicial consistency at the permission stage, the paper also utilises an extensive programme of interviews with practitioners (representing both claimants and defendants) court administrators and judges to provide a unique insight into the way the procedure is perceived and its effect in the litigation process.

“Mediation and Judicial Review: Introducing an action research study”

VARDA BONDY, Public Law Project, MARGARET DOYLE, and VAL REID, Advice Services Alliance

What role might mediation play in resolving judicial review claims? The use of alternative dispute resolution (ADR) in administrative law cases is a timely and controversial topic with, on the one hand, considerable enthusiasm for its increased use amongst policy makers and some members of the judiciary and, on the other hand, concerns expressed about the dangers of privatisation of justice and the vanishing trial amongst academics and public law practitioners. The Legal Services Commission has expressed an interest in introducing compulsory mediation in judicial review cases through changes in funding arrangements for these cases, and both the JR pre-action protocol and the Civil Procedure Rules encourage judges in the Administrative Court to consider the use of ADR at any stage of
proceedings. Yet currently it appears that few JR cases are referred to mediation. Why is that?

Public Law Project is conducting a year-long research project, funded by the Nuffield Foundation, to explore the potential applications of mediation in judicial review actions. The project team is interested in analysing why the take-up of mediation in JR cases is so low, and it seeks to establish an independent evidence base for identifying both the potential and the limitations of mediation in this context. The research will focus on the views and experiences of practitioners and judges in order to identify and examine the factors that influence their decisions to refer and/or recommend mediation in particular cases.

The project will start in April 2007, and the Hart workshop in June 2007 will be an ideal opportunity for the project team to present the project to colleagues and give an overview of the progress in the first three months of the project.

“Access of Individuals to the European Court of Human Rights:
Protocol No. 14 Amendments”
DR IRIS BOUSSIAKOU, University of Leicester

The paper will focus on the individual access to justice under the changes proposed by Protocol No. 14, which amended the procedure of admissibility of cases brought in the European Court of Human Rights. The main aim and purpose of Protocol No 14 was to assist the court dealing with an overwhelming number of cases brought by member states seeking redress by the Court in cases concerning alleged violations of human rights. Therefore, Protocol No. 14 was the result of pressures to improve the efficiency of the Court to deal with a huge volume of cases. Protocol No. 14, although still requires universal ratification by all Council of Europe member states to come into force, made a number of significant changes to the system and process of the European Court of Human Rights. The main objective of the paper would be on a number of concerns raised by human rights organisations on the changes to admissibility criteria, which may produce difficulties for individuals in various member states to gain redress to remedy alleged violations of human rights. The focus of the paper will be to test whether the new admissibility criteria proposed by Protocol No. 14 would be applied differently in respect of different member states and result in arbitrary decisions regarding access of individuals to the European Court of Human Rights for the purposes of the admissibility of cases on human rights.

“Access to Criminal Justice - The Role of Public Defenders in Different Jurisdictional Contexts”
PROFESSOR LEE BRIDGES, University of Warwick

This paper will consider what lessons should and should not be drawn from the recent experimental Public Defender Service (PDS) in England and Wales for those considering the use of such salaried criminal defence service as a means for increasing access to criminal justice in other jurisdictions. It will be argued that the circumstances surrounding the introduction of the PDS in England and Wales were unique, particularly given the fact that this jurisdiction already had one of the most comprehensive systems for providing criminal defence through private solicitors' firms anywhere in the world. This meant that the PDS was introduced into an already very crowded and competitive market, which prevented it in most areas from establishing an adequate client base and innovative forms of delivery of criminal defence services. While this may have prevented the PDS in England and Wales from operating economically when compared to private practice providers, it nevertheless was able to establish a good quality criminal defence service relative to that provided by private practice under contract, and one that appeared to raise no significant issues of independence. The lessons this points to in other jurisdictions where the introduction of a public defender is being considered, and where the provision of criminal defence services is perhaps less well developed, is the need to ensure that the public defender is adequately funded and staffed, provides a comprehensive service, and has sufficient legal protections in place to ensure its independence.
“Suspects in Europe: Towards a Real Commitment to Minimum Standards?”
PROFESSOR EDWARD CAPE, University of the West of England

In Spring 2004 the European Commission proposed that minimum safeguards for criminal investigation be agreed by member states and published a draft framework decision comprising, inter alia, the right to legal assistance. Since then, negotiations have continued with increasing opposition to the proposal emerging from certain member states, including the UK. One of the main arguments against a framework decision is that the ECHR already guarantees procedural rights to suspects, and member states are obliged to comply with this. Based on a research project in 7 EU states, funded under the AGIS programme, this paper examines the ‘lived experience’ of pre-trial processes in those jurisdictions. It questions whether the broadly framed text of article 6 of the ECHR is effective in establishing a common understanding of and commitment to minimum rights for suspects of crime. Furthermore, given that in most jurisdictions the police routinely detain and interrogate suspects and carry out other coercive methods of investigation, it argues that any European instrument must clearly provide that protective provisions must apply from the first moment that a person is subjected to investigation involving either detention or compulsory questioning or examination.

“Litigation Funding – Problems of Maintenance, Champerty and Third Party Costs Orders”
DR DAVID CAPPER, Queen's University, Belfast

Much modern litigation, particularly commercial litigation, is very expensive and presents a considerable barrier to access to the courts. The unavailability of legal aid and difficulties in obtaining after the event insurance to support a conditional fee agreement have necessitated turning to litigation funders to provide the finance to undertake this litigation. In turn this has provided opportunities for litigation funders to make profit from the civil justice system. Typically litigation funding takes the form of a loan repayable directly or indirectly from any damages awarded to the funded party.

The paper will consider the extent to which litigation funding might fall foul of the ancient principles regulating maintenance and champerty. It will address the questions of whether a non-funded defendant could obtain a stay of proceedings on the ground that they are being unlawfully maintained, and whether the funded party could refuse to repay the loan on the ground that the funding agreement was unenforceable. The paper will then address the related question of whether a successful opponent of funded litigation could obtain a third party costs order against the funder under section 51 of the Supreme Court Act 1981. Here the courts have been working their way to the position that the funding party should be required to pay at least some of the costs of a successful opponent.

The paper will consider to what extent the law in this area is in a coherent condition and whether it maintains a reasonable balance between the interests of funded and non-funded parties.

“Proportionate Dispute resolution: The Law Commission's housing project”
PROFESSOR DAVID COWAN, University of Bristol

Lord Woolf's report on access to justice contained a separate study of housing disputes (at ch 16). Amongst other issues, the complexity of housing law and the role of non-court-based dispute resolution were the subject of particular comment. The Law Commission’s work on housing has involved a wholesale re-thinking of the legal relationships between landlord and tenant in their work on security of tenure and ensuring responsible renting. The other strand of their work, on which this paper focuses, sought to identify an appropriate schema for the resolution of disputes which tied in with the focus of the then Department for Constitutional Affairs’ reworking of redress of grievances in terms of “proportionate dispute resolution” and which effectively superseded the access to justice frame.

This paper will set out the Law Commission’s ideas against the backdrop of an increasingly
entrepreneurial market amongst grievance redress mechanisms, which the Law Commission’s proposals sought to utilise and enhance. The paper will discuss the quite radical approach taken by the Commission, the responses received to its proposals, and the future direction of the project.

“Territorial Justice and Access to Knowledge: The Distribution of High-Level Legal Skills in the Regions of England and Wales”

PROFESSOR IWAN DAVIES, and LYNN MAINWARING, Swansea University

Constitutional developments have raised notable issues in respect of attitudes towards law and justice including the specific role of legal services firms in creating sustainable regional communities. The issue of formal access to justice within this context is interesting, not least because it does not always correlate with effective access to justice. There may be geographic barriers to access arising out of the ‘friction of distance’, that is, where certain categories of work become more difficult to obtain with distance. There is a ‘filter effect’ which varies depending on the type of legal problem and who is involved, which correlates with distance in respect of certain categories of work which, in turn, raises considerations of territorial justice.

While lawyers and geographers have examined the spatial distribution of legal services mainly from the standpoint of territorial access to justice, a parallel literature on the geography of advanced producer services has touched on the questions of whether and how the distribution of services affects regional differences in economic performance. Whereas the first group of researchers has made extensive use of the Law Society’s List of Solicitors on the geographical distribution of solicitors, the second has tended to treat law as one of several advanced services whose capacity is measured in monetary or employment terms using national statistics.

One of the advantages of the Law Society List is that it provides a thorough breakdown of solicitors’ areas of expertise. This, in principle, permits a mapping not only of solicitors but also of legal specialisms. One of the objectives of this paper is to conduct such a mapping for the regions of England and Wales and to explain the observed pattern in terms of spatial forces of gravitation. In this respect, one of the findings to emerge from localised studies of access to justice in rural areas is that these communities are not always badly served in terms of numbers of solicitors. What they lack is the range of services available in the cities, particularly in the specialist and complex areas of law. For many of the core-practice legal skills (such as conveyancing, wills and probate, personal injury, and welfare), the spatial distribution is relatively uniform across the rural-urban continuum. More specialist and – typically business-oriented – providers, on the other hand, are subject to powerful gravitational forces leading to city-located clusters.

Relative uniformity of core skills is also observable across the deprivation-prosperity continuum. Thus, a recent comparative study of Wales and the South West of England shows that, whereas legal services provision is generally much poorer in Wales, those areas of law that satisfy personal, family and social needs are as well, if not better, supplied in Wales. Moreover, within Wales, for example, the greatest inequalities of provision between the relatively prosperous coastal towns and the deprived but urbanised Valleys are found in specialist areas of law rather than in the traditional high-street range of services. This observation is particularly significant in relation to the potentially important role of legal services in facilitating economic regeneration. Hitherto, the territorial justice literature has generally concerned itself with the full range of services available to potential demanders. Little has been said specifically about the role of law as a critical component of the ‘knowledge economy’, despite the widespread recognition by governments and regional development agencies that, in a globalized world, economic success depends on the creation and exploitation of knowledge.

There is little in the literature to suggest that lawyers are aware of their potentially significant contribution to the knowledge economy despite the fact that lawyers are quintessential knowledge providers. Whether the role of law in this respect is thought of as a matter of access to justice or of access to competitive advantage, important issues confront policy-makers as to the effectiveness of the current organisation of the legal profession. Three questions seem to be pertinent in this regard. How, in fact, are the relevant legal skills distributed spatially? Is the observed distribution socially desirable and on what criteria? And what, if any, is the appropriate policy response?

In practical terms, the first question requires the specification of an appropriate geographical unit
and, in this paper, the government-office region, which has become the principal sub-UK territorial planning unit, is adopted. In relation to the second question, it may be argued from a Panglossian standpoint that the present structure exists because it is the best or, at any rate, the most economically efficient. If legal services operate within the framework of a spatially competitive market, then a strong case could be made that the spatial distribution is optimal, at least from the perspective of the whole jurisdiction. The argument is that geographical specialisation is determined by comparative advantage: under competitive pressures suppliers will gravitate to those locations that are most efficient in economic terms. This is, however, predicated on the absence of any form of market failure. In the present case, there are several reasons for doubting that the market functions effectively which will be considered.

If it is the case that the existing distribution is undesirable, this invites scrutiny of the third question namely identification of the options available including the reform of the court system. As knowledge markets are improved through professional and social interactions that are promoted by proximity, there is a case to be made for the knowledge base to be spread more equally. This is an argument for territorial access to justice and given law’s input into the knowledge economy, spatial fairness in relation to economic welfare.

| Citizens’ or Lawyers’ Access to Justice? |
| PROFESSOR KIM ECONOMIDES, University of Exeter |

In this paper I review three major trends that pose fundamental questions for legal actors and observers concerned about the future context, governance and methodology of ethical legal work, arguably a precondition for ‘access to justice’. First, why is the increasingly global movement toward the ethicisation of law and legal work - which I see as the latest wave in the late Professor Cappelletti’s ‘Access to Justice Movement’ - taking place now? Second, what are the current reforms taking place across and beyond Europe, and within both civil law and common law jurisdictions, that seek to strengthen - and alter the balance between - the external regulation and internal education of lawyers’ professional conduct? And third, how is the trend within legal education and scholarship toward incorporating ethical perspectives in academic (including socio-legal) and professional legal training evolving? I argue that the failure of both academic and professional associations to recognise and deal effectively with ethics has resulted, in part, in the current onslaught on professional status and the incapacity to defend legal markets against intrusion by the state and other professions. Legal professions are under siege: the market for legal services is increasingly competitive and subject to external threats and internal dissension and, above all, the capacity of legal professions to self-regulate - the traditional badge used to define and defend professional status - has almost everywhere been eroded, if not removed, as lawyers are forced to defend the cost, quality and declining scope of the services they offer.

| “ADR: What’s Justice Got To Do With It?” |
| PROFESSOR DAME HAZEL GENN, University College London |

| “Lok Adalats: The Indian Experience in Ensuring Access to Justice through State Sponsored Mechanisms of Alternate Dispute Resolution” |
| AMIT GEORGE and ARUNABHA GANGULI, NALSAR University of Law, Hyderabad, India |

The importance of ‘Access to Justice’ as an essential element of effective social justice is a widely accepted idea at the normative level and its value is without question. However its unimaginable practical significance in improving the quality of human existence can probably be best understood by applying it to a modern democracy of more than a billion people, a large number of who have no effective access to the Courts because of factors like poverty, illiteracy and other social disabilities.
One of India’s primary concerns in the post-independence period has been to transform the image and working of its legal system from a colonial imposition meant to serve as a means for further colonial exploitation, to an effective mechanism to govern the lives of its citizens cutting across all lines of religion, caste, gender etc. and to inculcate the notion of ‘Equality before Law’ in a very stratified society. However it was seen that this notion of ‘Equality before Law’ remained unimplemented several years after the framing of the Constitution, Article 39 A of which provides for equal justice and free legal aid, and that in the access to justice, virtually no significant progress was being made. A variety of factors like the overburdening of the Courts with pending cases, poverty and illiteracy of the masses especially in the rural areas and the extremely technical and time consuming nature of Court procedure that had witnessed little change since the colonial period had added up to a debilitating combination that put justice out of the reach of the common man. This was an especially repugnant situation as the law in India was intended as much as a tool for social change as it was intended for resolution of disputes.

With the situation having reached the boiling point, the Indian Parliament enacted the Legal Services Authorities Act, 1987 which sought amongst other things to organize ‘Lok Adalats’, literally meaning ‘Courts of the people’, which sought to promote an informal and equal opportunity based system of dispute resolution. Matters pending or at pre-trial stage, provided a reference is made to it by a court or by the concerned authority or committee, can be referred to Lok Adalat and there is a statutory recognition of the resolution of disputes by compromise and settlement by the Lok Adalats. Permanent Lok Adalats have also been set up with original jurisdiction over disputes relating to public utilities. Unlike other methods of pre-litigation Alternate Dispute Resolution, Lok Adalats are unique because they are directly organized by the State, a necessity, keeping in mind the vulnerability of the target audience in terms of their ignorance of standard Court procedure and economic poverty, making them susceptible to being defrauded.

Since their inception, the Lok Adalats have witnessed sustained support and encouragement from several quarters due to their perceived success in tackling the traditional weaknesses in the Indian legal system. The over-riding argument in favour of the Lok Adalat system is that by ensuring a cheap, quick and impartial adjudication of disputes and by supposedly simulating a close resemblance to system of ‘Panchayats’ that have been the governing units of rural India from time immemorial, the Lok Adalats have not only proven a boon to the average Indian but have also helped in containing the massive backlog of cases in the formal Courts.

On the flipside however, the Lok Adalats have also attracted stinging criticism revolving largely around the patriarchal attitude of the state in the entire setup and the blatant preference for ‘quantitative’ justice over ‘qualitative’ justice, leading many to conclude that Lok Adalats are only an eyewash meant for the poor, to deflect attention from the stagnating and increasingly unworkable conventional legal system in India.

Keeping in mind the above conflicting views, the paper shall elucidate on the relative successes enjoyed by the Lok Adalats in certain areas and its critical failures in others. Highlighting its relative merits and demerits and formulating certain suggestions along the way, the paper shall aim to critically examine the effectiveness of the system of Lok Adalats as a state sponsored alternative dispute resolution mechanism in ensuring equitable access to justice, and its relevance on the world stage.

**“Do NGOs give trees standing? The Aarhus Convention and Access to Justice in environmental matters”**

GRAINNE GILMORE, National University of Ireland, Galway

The Aarhus Convention provides for the improvement of access to information, public participation and access to justice in environmental matters. This paper will examine the approach of signatory states to implementation of the Convention’s “access to justice” pillar. It will address, in particular, the tendency to improve the litigation rights of environmental NGOs as opposed to providing broader focus standi for ordinary citizens to review decisions concerning the environment. The paper will firstly address whether such NGOs can be deemed the most appropriate advocates of environmental protection. It will then look at the legislative record of two Aarhus signatories (Ireland and the European Community) to demonstrate that improved access for NGOs may in fact be accompanied by reduced
access for individual members of the public. The paper will accordingly examine two recent enactments – the Irish Planning and Development (Infrastructure) Act 2006 and the EC Aarhus Regulation 2006 – in order to evaluate the legislative implementation of Aarhus principles of access to justice.

“Equality before the Law”
DR CLAIRE GRANT, Birkbeck College, University of London

Arguments about 'access to justice' often are not robust in jurisprudential terms. They lack a sound basis of argumentation concerning the nature and justification of law. Absent such argumentation it is not possible to formulate a normative principle of equal access to law. An argument in support of that principle from basic tenets of liberal-egalitarian political philosophy may be adduced. The argument maintains that if law is liberty-promotive then law should be equally accessible to all. A prerequisite of such an argument is a demonstration that equality before the law is significantly valuable. This paper seeks to clarify the status of claims about legal equality. In brief, it is concerned with equality before the law, with what it is and with its worth. The paper considers the merits of some reasons to value equality before the law and questions whether acceptance of those reasons need lead us to construe the egalitarian promise of legal equality narrowly.

“Fixed fees, equality and diversity”
ADAM GRIFFITH, Advice Services Alliance

This paper will examine the proposal to introduce standard fixed fees in England & Wales from October 2007 in social welfare law, and in particular in the categories of housing, employment, debt and welfare benefits.

Drawing on an analysis of all cases reported in these categories of law in 2005-06, the paper will highlight concerns about the introduction of fixed fees, given the relationship between case costs and

- The types of cases taken on
- The types of clients helped
- The extent of work done for clients
- The outcomes achieved
- The geographical region where the case is handled

The paper will focus in particular on the potential impact of the introduction of fixed fees on members of BME communities, especially in London. It will argue that the introduction of fixed fees may have an effect which is indirectly discriminatory on racial grounds.

The paper will also consider

- The arguments put forward by the DCA/LSC in defence of their proposals
- Whether the LSC may be in breach of its general duties under the Race Relations Amendment Act

Whether the requirement to produce a Race Equality Impact Assessment has any significant value in such a situation.

“More Access to Less Justice: The Expanding Role of Efficiency in Canadian Civil Justice Reform”
COLLEEN HANYCZ, Osgoode Hall Law School, Canada

At the 56th Annual Meeting of the American College of Trial Lawyers held in London, England this past fall, Lord Bingham asserted as one of the eight principal components of the Rule of Law the requirement that means be provided whereby citizens can resolve civil disputes by resort to the courts without prohibitive costs or undue delay.\(^1\)

Especially over the past 25 years in Canada, we have witnessed rising concerns around the
economic efficiency of civil adjudication models, resulting in the knowledge that all but a small fraction of civil disputes are settled, although often ‘on the courthouse steps’, following vast expenditures of time and money. As lawyer fees mount and trial dates are set further into the future, we continue to ask whether the average citizen has meaningful access to justice. In response, we have seen a growing policy focus on procedural and judicial efficiency in Canada, culminating in significant civil justice reforms aimed solely at enhancing efficiency. At the same time, we are witnessing significant shifts away from the public adjudication of disputes into privatized, ‘alternative’ models. The discourse that has grown up around these trends has reinforced the tacit connections between judicial/procedural efficiency and meaningful access to civil justice. It is these connections that form the heart of this project.

To achieve just ends, legal processes must strike an appropriate balance between efficiency of inputs and accuracy of outputs. While the costs of a process guaranteeing perfect accuracy would render it virtually inaccessible, a process requiring no investment of time or resources would have unacceptable rates of output inaccuracy. What we have seen of late in Canada is a significant shifting of this balance in favour of efficiency, as our rules and practices of civil procedure urge earlier settlements and ‘less process’. My contribution to this discussion will be to suggest the consequences of a civil justice model that assesses itself solely on the basis of efficiency, without considering the procedural and substantive costs of such a policy.

The paper that I will present at the 2007 Hart Workshop adopts one procedural lens – that of inter partes costs awards – through which to view this growing tension between efficiency and access to meaningful justice. By comparing the civil costs regimes of Canada and the U.K., the extent to which the awarding of costs serves to hinder, rather than enhance, access to justice will be proposed for consideration. It is clear that procedural frameworks that provide for the successful party’s costs to be at least partially indemnified by the unsuccessful party marks a shift in the status of efficiency from a means to just ends to an end in itself, a shift that has not been accompanied by appropriate measurements of the resulting impacts on access to civil justice.

I hope to look closely at the Canadian experience with various rules of court models to trace this efficiency trajectory as a step towards problematising both the ‘access’ and the ‘justice’ resulting from these reforms. This paper will be the first block in that larger research agenda to the extent that it is able to illustrate the growing equation, in civil justice policy reform, of increases in judicial efficiency with enhanced access to civil justice. Missing from this framework are the appropriate means for measuring reform outcomes beyond savings of time and money. Principles of economic productivity tell us that, for access to justice to be meaningful, the quality of the justice being accessed must be either enhanced or maintained by the efficiency measures implemented.


“Regulation or Compensation: The Rationales and Challenges of Collective Redress Mechanisms in Europe”

DR CHRISTOPHER HODGES, Centre for Socio-Legal Studies, University of Oxford

This paper examines the phenomenon of the proliferation of collective mechanisms for redress in Europe. It identifies a proliferation of different mechanisms at national level, related to general court rules or specific sectoral instruments, and also proposals at European level in relation to competition and consumer protection. It then analyses the origins and policy rationales of differing types of mechanisms or proposals, and examines the strength of the evidence and arguments for each. It notes the adverse effects that are associated with class or collective actions, and then summarises the challenges that are faced in designing balanced mechanisms that provide effective regulation and compensation. Finally, alternative solutions are discussed that would solve the regulatory and compensation challenges, including wider use of ADR mechanisms, especially involving ombudsmen, and adopting a linked approach between regulatory enforcement and delivery of restitution, which might offer more efficient and effective approaches than current proposals.
“Access to Environmental Justice: Transparency, the Aarhus Convention and the enforcement of the Environmental Information Regulations: some early reflections.”
STEPHEN HOMEWOOD, Middlesex University

Within all debates about the need for the better protection of the natural environment, a key factor is seen as the need for greater transparency relating to the activities of both public authorities and the private corporation. In this paper it will be argued that, as the end result of a series of legislative and voluntary initiatives, new demands have been placed on such organisations to provide greater transparency. This is partly due to the adoption in law, from January 2005, of the UK Freedom of Information Act 2000. But these changes also arise as the result of the UN Aarhus Convention of 1998 and the resulting implementing EU Directive in 2003, which in the UK required the passing of the Environmental Information Regulations 2004.

These new laws, although building on earlier developments and existing voluntary measures in relation to environmental issues, could have a profound impact on the behaviour of the organisation. The impact of these requirements will depend on how they are implemented and interpreted by the regulator, the Information Commissioner, and the new Information Tribunal. If done in ways which meet the objectives of the Convention and Directive, these legislative and judicial moves could lead to a great improvement in notions of public participation and, if more open with much information, improvement and of greater access to justice in its broad sense. This, it is hoped by the legislators and by Aarhus, may in turn affect attitudes to and the behaviour of the organisation.

This paper will take an overview of these recent developments and their potential and actual impact on activities in England and Wales. It will be argued that organisations, by adopting a positive rather than a restrictive attitude to the new situation, could even obtain benefits. However, it is suggested that unless there is a more profound alteration in the state and corporate culture and in the attitudes to the concept of environmental freedom of information, the apparent objectives of the legislation could be frustrated. Equally the approach displayed by the Regulator and the Information Tribunal to these issues will clearly be of importance. These are early days, but experience from the developing practice in the England and Wales will be examined, together with some provisional conclusions. It will be suggested that these changes in the law are beginning to impact on the public and commercial world, and if successful, may assist in the better protection of the environment.

“The Hunan Rights Dimension – Open Justice”.
JOE JACOB, London School of Economics

This paper considers the justifications for open justice, its links with general freedom of expression and the way both are handled in the jurisprudence of the English common law and the Human Rights Court at Strasbourg.
It goes on to consider what open justice has meant in both systems and the exceptions to it including how far the courts have recognised the ability of private parties to waive a right to it. It makes a careful distinction between the openness of a trial and the judicial policy of encouraging private settlement in the name of efficiency, that is the relation of the open trial to ADR. It traces the development of the obligation on the State's courts to give reasons for their decisions.

“The first thing we do – let’s praise all the lawyers: Germans, access to justice and the legal profession”
DR. MATTHIAS KILIAN, University Of Cologne, Germany

Germans have little choice when they are experiencing legal problems: Comprehensive monopoly rights for lawyers leave little room for other providers of legal services. The legal profession therefore is the cornerstone of Germany’s system of access to justice. The first such study into access to justice in Germany in more than 20 years recently sampled more than 6,000 Germans and set up three sub-
groups: Those who have had a legal problem in a five-year-period and decided to instruct a lawyer, those who have had a legal problem but chose a different path to solve it and finally those who have not experienced legal problems. All three groups were asked about their thoughts about solving legal problems and the role and image of lawyers in this process. Those who have been in contact with a lawyer were asked in detail about their experiences of the lawyering process: What were their selection criteria, how did the lawyer handle the problem, how accessible, understanding, caring was the lawyer, how was the cost issue dealt with, how satisfying was the “lawyer ing experience” overall. Those who did not instruct a lawyer were asked about their motivation not to see a lawyer and how and if they were able to solve their problem. Comparing the results from the three sub-groups allows drawing a broader picture of the image of German lawyers. A preliminary result of the ongoing research is that Germans have a more positive perception of lawyers than the profession generally believes. The paper will present selected findings of the research project, focusing on the aspect of access to justice in Germany. It will also draw on results of similar research projects in other countries, e.g. Spain.

“Accountability: The Value of Courts in Light of the Alternatives”
JEFF KING, Keble College, Oxford

My goal in the paper is to explain why courts remain an important accountability mechanism for adjudicating welfare rights disputes. I engage principally with critical socio-legal studies scholarship, some American scholarship (Davis and Mashaw), and some of the more court-skeptical views that emerged at the LSE, notably those of Richard Titmuss and Harlow & Rawlings (but not Griffith or Loughlin in the present draft).

The goal is to emphasise the comparative strengths and weaknesses of both courts and the alternative accountability mechanisms in the welfare rights context - something very relevant in the wake of the Woolf and Carter reforms. I make some tentative proposals for improving the relationship between them.

"To Lawyer or Not To Lawyer: Is That the Question?"
PROFESSOR HERBERT KRITZER, University of Wisconsin-Madison, USA

A central aspect of much of the debate over access to justice is the cost of legal services. The presumption of most participants in the debate is that individuals of limited or modest means do not obtain legal assistance because they cannot afford the cost of that assistance. The question I consider in this paper is whether income is a major factor in the decision to obtain the assistance of a qualified legal professional. Drawing upon data from five different countries (the United States, England and Wales, Canada, Australia, and Japan) I examine the relationship between income and using a legal professional. The results are remarkably consistent across the five countries: income has relatively little relationship with the decision to use a legal professional to deal with a dispute or other legal need. The decision to use a lawyer appears to be much more a function of the nature of the dispute. Even those who could afford to retain a lawyer frequently make the decision to forego that assistance. The analysis suggests that those considering access to justice issues need to grapple with the more general issues of how those with legal needs, regardless of the resources they have available, evaluate the costs and benefits of hiring a lawyer.

“Improving Access To Justice In South Africa”
GAIL KUPPAN, University of Wolverhampton

The adversarial nature of the legal system in South Africa, which has its roots in apartheid, has been characterised by unequal access to legal services. One challenge of the transformation process has been not only to make institutions of justice accountable, but also accessible and affordable to all citizens in order to meet the constitutional obligation of making legal services available to all persons, in order to facilitate meaningful access to justice. This paper will analyse the creative and innovative approaches that have been introduced in order to address these challenges.
“Access to Babel?: the marginalisation of claimants in tribunal fact-finding”
KENNETH MACKINNON, University of Waikato, New Zealand

In this paper I take a look at the nature of the facts that administrative adjudicators are expected to “find” as part of their decision-making processes. I do this with particular reference to the review process that is built into the New Zealand accident compensation scheme. My thesis is that within the ACC review process, there has been a shift from identifying “brute” facts to a focus on “institutional” facts and the legal rules. This has consequences for the nature of the review process and has a particularly severe impact on unrepresented claimants who can be unable or ill-prepared to provide the evidence and arguments necessary to win their case, and become marginalised in the review process.

One of the prime reasons for abandoning the common law as a means of compensation for injury was the inadequacy of tort law remedies pursued through the courts. If the ACC route does not in fact provide better and more accessible remedies, then a significant part of its rationale vanishes. I suggest some improvements for making the review process more suited to claimants.

Alternative Dispute Resolution in International Business
PROFESSOR A F M MANIRUZZAMAN, University of Portsmouth

The paper will examine some of the impediments to using mediation to resolve international business disputes. It will also suggest ways to overcome these impediments in order to obtain the benefits that mediation has to offer - flexibility, privacy, creative business-oriented solutions, speed, less cost and preservation of the business relationship.

“Uncontested Professionalism: Phoney Turf Wars and the Myth of Holism”
PROFESSOR RICHARD MOORHEAD, Cardiff University

This paper considers the ways in which members of the public present problems to advice agencies and solicitors’ firms. It looks, in particular, at the incidence and management of clients with problem clusters; that is, clients with more than one problem that crosses more than one area of practice to see how well those problems are resolved. It shows that multiple problems are common, and are only partially recognised by the advisers that deal with those clients. Furthermore, whilst lip-service is paid to the idea of holistic service in both policy literature and professional propaganda, it is an idea which is more honoured in the breach than in practice. Whilst this research exposes the idea that solicitors are not holistic, whereas nonlawyers are holistic, as something of a phoney war; it also emphasises the important intersectionality between legal and social problems which poses a number of interesting dilemmas to for access to justice policy. The idea of intersectionality is that legal and non-legal problems interact causally (creating more problems) and on the capacity of clients (literally wearing them down and reducing their capacity to cope with and solve problems). How far should legal service models adapt to that intersectionality? Should non-legal problems be dealt with alongside non-legal problems? What skills and service models are best placed to meet such needs?

“Small claims, big problem? The personal injury perspective”
ANNETTE MORRIS, Cardiff University

What is the appropriate procedure for dealing with small personal injury claims? This has been a moot issue for some time but is now firmly on the political agenda. The Government is currently consulting on the matter and is expected to act by the end of the year. It seems to be widely acknowledged that something needs to be done as small claims are disproportionately expensive and
time-consuming. Unsurprisingly, however, there is disagreement about what that 'something' should be. The Government has been urged to adopt one of the following measures:

- To increase the small claims limit for personal injury claims;
- To introduce an administrative scheme for the handling of small claims similar to the Personal Injuries Assessment Board in Ireland;
- To introduce a streamlined pre-action claims process which would allow liability insurers to settle small claims at the earliest possible stage and without incurring the cost of claimant investigations and after-the-event legal expenses insurance.

This paper evaluates these proposals. It applauds the Government’s decision to reject the first two but questions whether the Government is right to embrace the third. Attempts to eliminate unnecessary costs from the system are undoubtedly laudable but what impact, if any, will the Government’s proposals have on access to justice? Could injured claimants experience difficulties pursuing valid claims and is there any cause for concern about the quality of the outcomes likely to be delivered? It is intended that any reforms should apply to claims of up to £25,000 – an estimated 90% of all personal injury claims. From this perspective, small claims are clearly a big issue – and big business. Indeed it is those with a ‘business’ interest in small claims that have largely motivated and shaped the proposals. This leaves an important question. Will the proposals serve the interests of the personal injury claims industry, including liability insurers, rather than the public?

“Access to Justice and Human Rights”
MARY ANNE NOONE, and LIZ CURRAN, La Trobe University, Australia

This paper details a new approach to measuring access to justice that utilises various human rights instruments as the reference point. Cognisant of the definitional issues around the concept of “unmet legal need” and the problems with relying on empirical measurement alone, the authors of this paper have developed new benchmarks within a human rights framework to measure access to justice.

The paper reports on a trial of this methodology in one of the poorest postcodes in Australia (West Heidelberg). The research project selected the right to income security under the Covenant of Economic, Social and Cultural Rights. Other human rights could be selected in further research. The trial explored how people should expect to be treated if a human right to social security existed (was recognised) within the Australian domestic context. A set of standards have been developed that allows a measurement of the right to social security in Australia. The project trials a range of methods gathering data about how people have been treated in the current social security system and how they expect to be treated if there is a human right to social security in Australia. This data is then assessed against the set of standards developed to measure the enjoyment of the right to social security in Australia. The paper examines findings from the research and what those findings indicate about the way people are treated and issues of respect, equality and dignity.

We conclude that benchmarks can, if carefully constructed and with sophisticated indicators and critical input from service providers and members of the community about their experiences of attaining their human rights, provide an appropriate evaluative framework against which the actual experience of people with access to justice can be measured and inform public policy.

“Access to Justice in International Courts by Indigent States and Peoples”
DR GBENGA ODUNTAN, University of Kent

It has been over a century since the first world body dedicated to the pacific settlement of disputes was brought into existence (~the Permanent Court of Arbitration based at the Hague). Since then there has been a proliferation of international courts and tribunals which perform significant functions in the resolution of international disputes in many areas of conflict situations. There is a dialectical development of the practice of the leading international courts and tribunals. The predicted increase in popularity of the judicial resolution of international disputes especially by the new states granted independence from the 1940s has
occurred. The record of these states in complying with the judgments of Arbitral and Judicial institutions is commendable. However it would appear that the costs of appearing before international courts have always been formidable for poorer developing states. Increases in costs coincide with worsening economic position of many of these states. The economic pressures on states, the growth of human settlements and populations and other vicissitudes of international politics necessarily mean that there would be a rise in conflicts that require international judicial and arbitral resolution. It is important, therefore, to ensure that the costs of appearing before international tribunals and/or the costs of implementing judgments and awards should not deter states.

This paper, therefore: (a) considers the development of the practice of Trust funds to aid access to international courts; (b) addresses strategies to increase access to justice to poorer, developing states (c) discuss the means to prevent the stalling of progress in international adjudication and arbitration due to financial incapacities of states (d) identify the other means by which the United Nations has been bringing international justice closer to developing states through funding judicial and quasi judicial bodies and processes; (d) explore ideas on better ways to structure the various schemes to grant legal aid to indigent states.

The paper will focus on the relevant work and processes of the International Court of Justice, the Permanent Court of Arbitration (PCA) and the International Tribunals for the Law of the Sea (ITLOS). References will however be made to other national and international courts and arbitral bodies for illustrative purposes. The thesis to be tested is whether poorer states lack adequate access to international justice on the basis of costs and whether there are easily remediable factors that contribute to costs of appearance and implementation, which may be addressed through concerted international action in order to facilitate access to poorer states.

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**"Lost and Found: Mediation and Case Management in Administrative Suits in the People's Republic of China"**

PROFESSOR MICHAEL PALMER, School of Oriental and African Studies

The paper considers the place of mediation (tiaojie) in post-Mao China's system of administrative suits. It gives particular attention to discourses within China concerning the appropriateness of mediation in public law disputes, and to the manner in which judicial practice has been transformed in an attempt to bridge the gap introduced by the 1989 Administrative Litigation Law between rule of law values and Chinese culturally-based ideals of access to justice. The study also seeks to contextualise the Chinese findings in wider debates about mediation and public law.

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**"So are Legal Aid lawyers any good anyway?"**

PROFESSOR ALAN PATERSON, University of Strathclyde

**“5 Short Stories on Access”**

PROFESSOR PASCOE PLEASANCE, University College London and Head of the Legal Services Research Centre

This paper sets out recent findings from the 2004 and continuous (2006/7) English and Welsh Civil and Social Justice Surveys and the 2006 New Zealand National Survey of Unmet Needs and Access to Services.

The findings are set out within five themes: vulnerability to problems involving rights, awareness and problems resolution strategies, the geography of problem resolution strategies, technology and access, civic exclusion.

**Vulnerability to Problems Involving Rights**

Problems involving rights are not uniformly distributed across the general population. There are strong links between the experience of problems and social exclusion. New evidence from England and Wales
and New Zealand suggests that people with mental illness are particularly likely to report problems, and that for some age groups this entails the great majority reporting problems. Promoting access to justice requires some degree of targeting vulnerable groups.

**Awareness and Problem Resolution Strategies**

Many people are not aware of their rights or locally available advice services. Not knowing rights or where to go to get help is one reason that people give for taking no action to resolve problems. While awareness of advice services is not associated with higher levels of advice seeking, it is associated with higher levels of attempted problem resolution.

**The Geography of Problem Resolution Strategies**

Blacksell et al. (1991) referred to the ‘friction of distance’ that affects advice seeking in rural areas. Data from the CSJS indicates that distance is not a key determinant of the likelihood of people seeking advice. However, as with the general population, the CSJS sample includes only a small proportion of people in ‘remote’ areas.

**Technology and Advice**

While no association is observed between distance from advisers and likelihood of seeking advice, there is a clear association between distance and mode of contact with advisers. Use of the phone becomes much more prevalent as distance increases. Use of the internet to access information about problems remains at a low level, and there is a suggestion that the internet is used more as a means to locate advisers. While younger respondents report greater use of the internet in general, this is not reflected in the use of the internet to obtain information about problems.

**Civic Exclusion**

Mirroring recent findings in Canada, data from the CSJS suggest people’s faith in the fairness of the justice system decreases with the number of problems experienced; although the relationship between attitudes and experience is complex. This suggests that, as well as facing social exclusion, vulnerable people may also face a form of civic exclusion – meaning that they become inhibited, through their experience, from utilising public mechanisms of dispute resolution.

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**“Incorporating ADR into traditional civil court processes: Should mediation be mandatory?”**

**DR SUE PRINCE, University of Exeter**

It has become increasingly popular, over the past ten to fifteen years, for legal systems to integrate ADR techniques into their civil legal processes so that mediation becomes an aspect itself of the procedure rather than an appendage to it. The Department for Constitutional Affairs Public Service Agreement objective is ‘to reduce the proportion of disputes resolved by resort to the court’. Consequently, professionally employed mediators now help settle disputes where a claim and a defence have already been filed at the court.

In England and Wales, the Civil Procedure Rules specifically promote earlier settlement of cases. These rules explicitly require the courts to consider ADR as an aspect of active case management threaten the possibility of adverse costs orders where parties unreasonably refuse to use mediation to help to resolve their dispute. It is also suggested that all solicitors should actively encourage their clients to use mediation through the use of pre-action protocols. In *Halsey v Milton Keynes General NHS Trust*, [2004] 1 WLR 3002, 3008, Lord Justice Dyson stated that the right of access to court is sacrosanct and that mediation should be voluntary. In other jurisdictions, however, there is a different view and mediation has become a far more compulsory element of the litigation process.

This paper considers the advantages and disadvantages of a compulsory mediation scheme looking in particular detail at the mandatory mediation scheme in Ontario, Canada as well as other jurisdictions where mediation is an institutionalised aspect of the civil litigation process. It considers the reasons why mediation is not compulsory in England and Wales and asks whether we would now benefit from the introduction of such a mandatory mediation scheme.
“Environmental litigation in South Asia: Linking development and human rights issues”
DR JONA RAZZAQUE, University of the West of England

Initially, environmental litigation in South Asia, especially in India, Pakistan and Bangladesh, was prompted by the human rights, poverty and development concerns. Judicial activism was prominent in India where the judiciary allowed disadvantaged community to access the courts through ‘social action litigation’. In recent years, the decisions of the courts integrate both social and ecological concerns with particular attention to questions of distributive justice, community empowerment and democratic accountability. Despite having several procedural routes to bring actions in the court, public interest litigation seems to be an often-used tool used by the community groups to protect the environment. While public interest litigation is sometimes criticised as nothing more than ‘tokenism’, the judiciary in these three South Asian countries has taken a forward-looking approach by relaxing standing of community groups and applying international environmental principles.

The recent trend of case laws suggests that it is difficult to have a clear-cut division between human rights cases and environmental cases. Moving away from the sectoral litigation of the 1980’s, the 90’s categories of public interest litigation became more sophisticated and dealt with complex areas of waste and water management, biodiversity, and relationship between labour rights and environmental rights. In recent years, with large infrastructure projects (e.g. dams) and privatisation of natural resources (e.g. water, gas), it is pertinent to examine the role of litigation in the protection of environment.

This paper discusses three issues: environmental litigation and access to justice; human rights, environment and development discourse; and the approach of the judiciary. The paper concludes the substantive right to a healthy environment, as interpreted by the judiciary, needs to be strengthened with adequate information and participation of affected communities to protect the environment. Access to courts may not ensure procedural justice. Participation of affected parties at the decision making process is crucial to make the linkages between social, environment and development concerns, and examples from all three countries show that a strong procedural regime is lacking. In these three countries, participatory provisions are still developing and it is difficult to assess whether these provisions can actually lead to a just substantive outcome.

“Small claims mediation – does it do what it says on the tin?”
VAL REID, Advice Services Alliance, and MARGARET DOYLE

The Department for Constitutional Affairs (DCA) recently published research into three pilot schemes offering mediation in small claims disputes (1). The DCA claims that these mediation schemes ‘are quicker, cheaper, less adversarial and provide a better outcome for the court user’. Based on the research into the Manchester pilot scheme, the DCA proposes to roll out this model to other court areas across the country during 2007-8. Headline conclusions do seem to show that mediation is highly successful in resolving small claims, and that the process is popular with the parties. However, a more detailed reading of the research raises serious questions about whether the DCA’s enthusiasm is justified.

The evaluation of the small claims pilot at Manchester County Court was carried out by Margaret Doyle, an independent mediator and ADR researcher/consultant. She found that 86% of mediations resulted in a settlement, all the settlements were complied with, and that user satisfaction with the mediation process itself was very high. However, her data showed that cases settled at mediation for around half of the original value of the claim (2). She also found that many parties’ satisfaction with the mediation process was linked to relief at avoiding what they feared would be a daunting court hearing (3). However, most had no actual experience of the small claims process, so their view was not necessarily realistic. One of the claims made for mediation is that it can offer creative settlements that are not available through court orders – apologies, changes in policies and procedures, donations to charity. However, in Manchester only 12% of mediated settlements included an outcome that could not have been ordered by the court. A number of parties felt that the focus was on compromise and bartering rather than achieving a win/win solution. Some also felt under pressure to settle – partly by the limited time available, partly by the implied threat of ‘going to court’, and partly by the mediator.
Val Reid, the ADR Policy Officer at the Advice Services Alliance, has written an article for Legal Action (March 2007) raising questions about the evidence base for the DCA’s claims about small claims mediation. She has also queried whether these schemes ought really to be called ‘mediation’, bearing in mind the very limited time available, the general confusion over voluntariness, and the lack of clarity as to just how neutral the parties perceive the mediators to be. Some claimants may be happy to settle for less in order to benefit from a quick, no-nonsense procedure with fewer enforcement problems, but this is not what is traditionally meant by the mediation process.

So how should we evaluate these schemes? Should they be compared with the aspirational aims of mediation, or the perceived failures of litigation? What drives the enthusiasm for these schemes in the DCA and amongst those who use them? And are they short-changing litigants in their search for justice?

Margaret Doyle and Val Reid discuss the small claims mediation pilot schemes, the research, the evidence, and the policy issues.

1) Evaluations of the schemes at Manchester, Exeter and Reading can be found in the Proportionate Dispute Resolution Team section of the DCA website at www.dca.gov.uk/civil/adr/index.htm See also An Evaluation of the Exeter Small Claims Mediation Scheme by Jill Enterkin and Mark Sefton, DCA Research Series 10/06 (pg 86) www.dca.gov.uk/research/2006/10_2006.htm
2) Enterkin and Sefton’s research into the pilot scheme at Exeter County Court found that the mean value of mediated settlements was 63% of the claim value, and where a judgment was issued it was 83%.

“Whither and Whether Adjudication?”

PROFESSOR JUDITH RESNIK, Yale Law School

This essay sketches (in part through a few charts and photographs) how adjudication has changed over the past one hundred years. Adjudication, an ancient practice, only became a requisite aspect of successful, market-based economies during the course of the twentieth century, as democratic principles of equality insisted on the dignity of all persons. An array of individuals became eligible to bring claims into courts, and both public and private providers became accountable through adjudication to explain a variety of their decisions.

In the United States, national groups of lawyers who were supported by leading judges and academics pressed Congress to create new statutory rights, to endow federal courts with authority over such claims, and to augment judicial resources. The growth in statutory mandates, the power of federal law to preempt state lawmaking, and the protections accorded life-tenured judges by Article III of the U.S. Constitution made the federal courts an attractive venue for litigants aiming to establish or to preserve principles of law. That increased reliance on the federal system resulted in its expansion as well as in efforts to diversify adjudicatory opportunities by using agencies and by reformulating the procedural rules of courts. Some litigants were routed to the life-tenured judiciary, increasingly interested in settling cases, and others were sent to administrative agencies, once celebrated for their simpler process but more recently a focus of concern about their deficient process.

Some celebrated the widening aegis of adjudication, while others objected to the broadening role of courts, as they struggled to respond to the many demands placed on them. The unwillingness or inability to generate popular constituencies sufficient to support the financing of access to high-quality adjudication for eligible claimants, coupled with opposition from those questioning the desirability of widespread opportunities to bring lawsuits, resulted in the revamping of doctrines and rules, both procedural and substantive. During the past thirty years, adjudication’s reach has been constrained - in part through requiring alternatives and in part by devolving much of the work of courts to administrative agencies and private providers. Thus, accounts of adjudication during the twentieth century must simultaneously record adjudication’s expansion as well as its constriction through delegation and privatization.

What is lost when litigation opportunities narrow? What adjudication offers to democratic governance are occasions to observe the exercise of state authority and to participate, episodically, in norm generation - occurring through a haphazard process in which vivid sets of alleged harms make their way into public purview. Adjudication is not necessarily an ideal mechanism for social
policymaking, but it does serve to disseminate information about the imposition of state power and to legitimate that power. Adjudication’s public dimensions also enable a diverse audience to see the effects of the application of law in many specific situations. As various sectors of the public gain insight into law’s obligations and remedies, reaffirmation of those precepts occurs, or pressures emerge for judges and legislators to expand or to constrict extant rules.

Courthouses are familiar features of local landscapes. Yet, recent shifts in practices put adjudication’s public dimensions at risk. As court-based processes focus on facilitating settlements, and as courts outsource their evidentiary work to administrative agencies and private dispute resolution providers, the power and effects of decision making become less readily accessible. Given the proliferation of the sites of adjudication and the pressures to seek alternative forms of resolution, I am not confident that adjudication will be as available one hundred years hence as it is today, nor that its substitutes will permit easy public observation and public knowledge of the deployment of power, both public and private.

(1) 86 Boston University Law Review 1101 (2006)

“From ‘Rites’ to ‘Rights’ of Audience: The Utilities and Contingencies of the Public’s Role in Court-Based Processes”
PROFESSOR JUDITH RESNIK* and PROFESSOR DENNIS E. CURTIS**, Yale Law School

This essay examines the history of public displays of the power of rulers, who relied on the open rituals of judgment and punishment to make and to maintain law and order. We map how the ritualistic performance for the public became a right of the public to participate in and to observe adjudication.

Using the United States as an example, we show why courts can serve as rich sources of information about legal, political, and social conflict. Yet, despite new technologies facilitating access, information about conflicts and their resolution is being limited through laws, doctrines, and practices that devolve court authority to low-visibility tribunals inside administrative agencies, outsource decision making to private providers, and reformulate court-based processes to promote private management and settlement in lieu of public adjudication.

These new processes reveal the contingency of the public’s role and require analyses of the premises for public rights of audience. The argument made for public processes relies not only on courts’ capacity to provide insights into the uses of both public and private power but also on how court-based public practices generate and reflect democratic norms. Open courts welcome popular input into the production of norms. Further, they provide an opportunity to observe the ordinary, bureaucratic imposition of authority. Whether expressing and creating commitments to human dignity, fair treatment of equals, and government accountability or demonstrating aggressive retribution that can foster sectarian strife, the display of conflicts (with its attendant cross-claims, fights over facts, decisions, and sanctions) enables contestation, change, or reaffirmation of the practices and rules shown. Open courts enact commitments to living in a social order in which disputes are neither the private and exclusive domain of those in disagreement nor owned by governmental authorities holding the power to impose law.

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“Forum Access Rules: A Comparative Perspective”
PROFESSOR LINDA SILBERMAN, New York University School of Law

Concerns about “access to justice” implicate the rules that regulate access to a forum -- that is, formal rules of jurisdiction and related concepts, such as the discretionary doctrine of forum non conveniens and the more rule-bound principle of lis pendens. Obtaining access to a convenient and fair forum is the first step in any litigation, and in transnational cases, burdens on the parties with respect to
travel and distance make the determination as to whether a forum is appropriate one of great significance. In addition, because there are substantial differences among legal systems, a court’s ruling on forum access has important consequences for the parties. For example, it may determine whether a plaintiff will have access to a lawyer on a contingent-fee basis or be exposed to a system of cost-shifting if he loses. Or it may leave a defendant open to both criminal and civil remedies, in a jurisdiction that has an *action civil*. Other differences relate to whether information may be obtained from one’s adversary or from others (the scope of available discovery), who the decisionmaker may be (judge or jury), or whether litigation may go forward on an individual or aggregate basis (availability of a class action).

Rules of private international law in different national systems balance the interests of plaintiffs and defendants in different ways in identifying a proper forum. This paper (or rather this chapter) explores the values reflected in different national systems. The chapter (and my remarks at the conference) will contrast civil law jurisdictions – where the emphasis is on formal rules, limited discretion, and unbounded policy choices – with common law systems, in particular the United States and Canada, where the rules are shaped in part by overarching constitutional norms. Even as between the United States and Canada, there are substantial differences in the constitutional emphasis, with the norms in the United States focusing on the relationship between the individual defendant and the forum, and the principles in Canada looking to the relationship between the dispute and the forum. Finally, my remarks will examine the role of discretion in common law countries, particularly England and the United States, when foreign plaintiffs seek access to a forum that has little connection to the underlying dispute but the defendant is amenable to formal jurisdiction.

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“Human rights and access to justice”

ROGER SMITH, Director, Justice

The question to be asked in the paper:

To what extent has human rights assisted in the provision or defence of legal aid for the poor as an aspect of access to justice in fair trial and due process rights within:

(a) countries with well established legal aid schemes, such as England and Wales or the United States;

(b) countries currently developing legal aid schemes, such as those in central and Eastern Europe, such as Lithuania or South Africa?

And what does this tell us about human rights, on the one hand, and the role of legal aid in different types of countries on the other?

What the paper will cover:

The paper will:

(a) seek to provide a coherent and comparative account of the development of legal aid in different jurisdictions around the world through the identification of common themes behind that development. They include the following:

(1) charitable, voluntary or professional activity or obligation eg Poor Men’s Lawyers in England and Wales from the 1870s, growth of pro bono services about a century later;

(2) anti-poverty or poverty reduction strategies, from President Johnson’s funding of legal services as part of a ‘war on poverty’ to the language of social exclusion to justify much current expenditure on ‘social welfare law’ – which stressed the funding of poor litigants to take cases they otherwise could not afford; funding as a way of ameliorating their poverty (as in the social exclusion justification) or systemic addressing of the (legal) causes of poverty eg discrimination;

(3) efficiency of operation of (particularly adversarial) legal systems eg Poor Prisoners Defence Act 1903 followed right of defendant to give evidence in own defence in 1898; magistrates courts’ escalating grants of legal aid in the 1970s to match increased jurisdiction; duty police station scheme in 1986 to match abolition of Judges rules.

(4) An element of the rule of law, as demonstrated in the language of international donors such as the World Bank and DFID;
(5) Professional self-interest of lawyers – as can be traced to some extent in the history of legal aid in England and Wales;
(6) Human rights (see below);
(7) Notions of empowerment or ‘constitutional inclusion’.
This would provide a further refinement on the analysis of Cappelletti and Garth’s major multi-country studies in the late 1970s.

(b) analyse human rights obligations in relation to legal aid in more detail, particularly under the jurisprudence of the European Convention of Human Rights (ECHR) and, in particular:
(1) the way in which the provisions of Article 6 ECHR have been expanded in caselaw;
(2) standards may be based on such caselaw;
(3) other relevant standards eg as drafted by professional or representative bodies such as the American Bar Association or the National Legal Aid and Defenders Association in the United States or the Legal Services Commission in England and Wales;
(4) how the ECHR mechanisms for enforcement were exposed as defective by the experience of the countries of central and eastern Europe where the European Union monitored compliance and by the history of patchy compliance of European Court of Human Rights’ decisions (eg good for Ireland, marginal for England and Scotland, ignored in some countries in southern or eastern Europe);
(5) how the right to legal aid indicates the issues that arise in extending the concept of human rights beyond core civil and political rights, such as the right to a fair trial, to rights that have a cost to government and are more akin to social and economic rights.

Reflect on the consequences of the above in terms of current debates about the future of legal aid in England and Wales and the debate about the nature of human rights.

“Reflections on the reconfiguration of Access to Justice”
PROFESSOR HILARY SOMMERLAD, Leeds Metropolitan University

Access to Justice, like its companion concept, the Rule of Law, is historically contingent. Universal access to justice was fundamental to the liberal Rule of Law but entailed little more than the creation of the formally equal legal subject. Social democracy and social citizenship required the expansion of both concepts, entailing the exponential increase in legal aid. As David Held has argued, the choice of democracy entails operationalizing a structural system of empowering rights and obligations.
Correspondingly, the hegemony of the neo-liberal model of material inequality entails not only the erosion of social justice discourse, and the marketisation and residualisation of social rights, and hence of legal aid, but also the production of what Wendy Brown terms the undemocratic citizen. This is manifest in the development of barriers to the use of law for political and public accountability purposes, the assault on rentier public sector professionals and the substitution of a professional, substantive understanding of quality by an economic conceptualization.
However this account suggests both that power is unified and that change can be understood teleologically, constituted by a linear evolutionary trajectory; rather societal change is both accumulative and contradictory. The process of legal aid reform has therefore been marked by struggles over meanings, and aims: elements of neo-liberal discourse (such as choice) have been imbued with resonances of social justice. For instance, a primary argument for the Legal Aid reform process was that in practice there has never been equality of arms, as poor people have often been treated with contempt by solicitors, and as a result one aim of the reforms has been to introduce a system where there is some transactional quality, even for the poorest.
Nevertheless, I will argue in this paper that the predominance of a neo-liberal paradigm has eroded substantive access to justice because its internal logic requires the imposition of a market and the use of least cost labour, thereby reducing the guarantee of due process to the lowest common denominator: process becomes an alternative to just outcomes.
This paper will draw on a series of research studies of the reforms to Legal Aid, to consider the wider social and political meaning of this development. It will be argued that it is a significant element in the destruction of social citizenship; that the microprocesses of change to legal aid – punitive audits, micro management, covert rationing, the prioritization of process over just outcomes - produce an
irresistible pressure towards routinised justice and the positioning of clients as ‘flawed consumers’. It will further be argued that this production of no or second rate justice can be construed as a process of dehumanization at work, and contains parallels with Arendt’s concept of the banality of evil.

“Unfinished Justice. Pinochet’s Escape from Judgement, 2000-2006”  
PROFESSOR DAVID SUGARMAN, University of Lancaster

When General Augusto Pinochet breathed his last on December 10 2006, this much seemed clear: the man who had lived his whole life and never paid for even one of his crimes had done it again. Once more - one final time - Pinochet had escaped judgment. This paper describes and analyses the struggle to prosecute Pinochet in Chile from his return home in March 2000, following his 18 month detention in Britain, to his death in December 2006. It examines how the numerous proceedings against the former dictator were successfully delayed, why Pinochet was never convicted of anything, and the implications for Chile, the international human rights movement and current debates about “access to justice”.

This paper seeks to make an empirically-based contribution to the largely theoretical debates concerning: the interaction between law and politics; the judicialization of power; the efficacy of human rights, and the ability of courts, activist lawyers and social movements to find new paths to substantive justice; globalization; the denial of organised atrocities and the struggle to acknowledge the past; and the impact of international (i.e., third country) as distinct from domestic accountability. It derives from my analyses of archival material, multiple secondary literatures and hundreds of interviews with key actors (including victims and their families, exiles, judges, NGOs, lawyers, officials, journalists and politicians) that form the basis of my forthcoming books Chile, Pinochet and the End of Justice and Prosecuting Pinochet: A Global Quest for Justice.

“Plea Bargaining and Access to Justice: Comparing England and America”  
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Recently, the England has moved to formally accept plea bargaining. This is especially interesting in light of the fact that France and China have also embraced the practice at just the same time. Proposals have been advanced for how plea bargaining might work in the new setting of the UK. Some, notably in the context of SOCA, are already being acted upon. This paper reflects on these developments in light of information from America about how plea bargaining originated during the 19th century there and how it has subsequently been transformed.