Legal Aid -

The Master's Tool?

by
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Abstract

This thesis adopts a two pronged approach in examining the hypothesis that legal aid operates as a method of social control, more amenable to upholding the status quo than to promoting social change.

Firstly, it analyzes the existing structures for legal aid delivery in Quebec and in Ireland, to show how their mandate and operation exclude certain classes of individuals de facto from the benefit of legal aid. On a second level of analysis it highlights the existence of entrenched institutional bias within the legal aid system itself which effectively prevents the use of legal aid to challenge dominant meanings.

Piecing together the various parts of our social jigsaw, the thesis shows how the law and society, through a system of constructed realities, slot the individual into her given role. It is argued that our ability to relate to others and to develop understandings of each other's feelings and social needs can be integrated into the mechanisms of legal aid and of the law, so that the master's tools may be responsive to each of us.

Résumé

C'est à travers une approche bi-polaire que l'hypothèse de l'aide juridique en tant qu'instrument du contrôle social, mieux apte au maintien du statu quo qu'à l'avènement d'un changement social significatif, est examinée.

Nous analyserons d'abord les structures existantes au service de l'aide juridique, tant au Québec qu'en Irlande, afin de démontrer comment son mandat et son exécution excluent de fait certains groupes d'individus du bénéfice de celle-ci. Une analyse approfondie révèle les préjugés intégrés dans l'institution même de l'aide juridique. Cette dernière contient donc son propre obstacle à la remise en cause des conceptions prédéterminés et dominantes.

Les parties diverses de notre mosaïque social nous servent à illustrer comment le droit et la societé, au moyen d'un système de réalités construites, attribuent à l'individu un rôle donné. Nous défendons la thèse selon laquelle notre capacité de créer des rélations entre nous et celle de saisir nos sentiments et nos besoins sociaux réciproques, peuvent être intégrées dans les mécanismes du droit et, notamment, de l'aide juridique afin qu'ils soient véritablement au service de tout un chacun.

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Go raibh maith agaibh go léir

In memory of my father, Thomas Phelan

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Introduction:

"When a system of power is thoroughly in command, it has scarcely need to speak itself aloud; when its workings are exposed and questioned, it becomes not only subject to discussion, but even to change".

Kate Millett.[1]

The theory that there exists in each political community a single, uniform and universal body of norms and that everybody should be able to invoke these norms, had little place in developing concepts of law and the role of law.[2] The Access to Justice Movement is also very much a product of recent decades and seems to have been premised on the supposition that justice has an independent and determinable existence.[3] The increasing centrality of notions such as 'the rule of law', the rational and reasonable man[4] and ideals of equality, neutrality and

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[1]K. Millett, *Sexual Politics* 87 (New Tork: Doubleday, 1970).

[2]See generally Lawrence M. Friedman, "Access to Justice: A Social and Historical Context", in M. Cappelletti, *Access to Justice: Promising Institutions*, (Sijthoff and Noordhoof-Alphenaandenrijn Dott. A. Giuffre Editore - Milan 1978, Vol. II, Book 1 of the Florence Access to Justice Project). This development has given rise to what Arthurs terms 'the legal centralist paradigm' - see H. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in 19th Century England*, (Toronto: University of Toronto Press, 1985) at p. 8.

[3]Cappelletti and Garth, "Access to Justice as a Focus of Research", (1981) 1 *Windsor Yearbook of Access to Justice*, *Foreword* at p. xi for an overview of the history of the movement.

[4]See Donavan & Wildman, "Is the Reasonable Man Obsolete? A Critical Perspective on Self Defense and Provocation", (1981) 14 *Loy. L. A. L. Rev.* 435, cited by T. Grillo, "The Mediation Alternative: Process Dangers for Women", (1991) 101 *The Yale Law Journal* 1545, where the authors suggest that, despite a change in terminology from the reasonable man to the reasonable person, the concept was never intended to include women or minority groups - undermining the theory that the law may be invoked by everyone.

determinant individual rights,[5] have generated a belief in the rational and systematic character of the law. This is evidenced by the extensive juridification of all forms of social interaction.[6]

Increasingly the central position of the law has led to an imposition of the view that justice is epitomised by the law and, for many, access to justice and access to the law have become one and the same. Systemic justice could therefore only be legitimated as 'equal' and 'neutral' if there also existed procedural transparency and all rights holders were empowered to participate in the evolution of the social order.[7] Legal aid was introduced to address the undeniable absence of equality and neutrality within the legal system. With the costs of empowerment removed, it could be claimed that the law guaranteed equality, even to the poor.

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[5]See generally J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); H. Hart, *The Concept of Law* (New York: Oxford University Press, 1961); J. Raz, *Authority of Law* (Oxford: Clarendon Press, 1979); J. Rawls, *A Theory of Justice* (Cambridge Mass.: Belknap Press of Harvard University Press, 1971); R.A. Dworkin, *Law's Empire* (London: Fontana, 1986). D. Manderson examines this reliance on the 'Rule of Law' in "Statuta v. Acts" (unpublished paper, McGill/Canberra, 1993) p. 3-11. Each of these theorists, in different ways, seek to justify the *status quo* and work towards reform within the existing institutional structures of Western democracy. For an account of liberal legal thought as an attempt to legitimize the status quo through 'doctrinal exegesis', see D. Kennedy, "The Structure of Blackstone's Commentaries", (1979) 28 *Buffalo L. Rev.* 209, 211.

[6]See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, (Toronto: 1989)

[7]See further D. Trubek, "Critical Moments in Access to Justice Theory: The Quest for the Empowered Self" in *Access to Civil Justice*, (ed., Hutchinson, Toronto: Carswell Press, 1990) at 107-128.

Concerns about access to justice coincided with an almost explosive growth in regulatory activity,[8] dictating what justice should mean. Increasing resort to official, state law reflects a change in social norms and values.[9] Law as a social creation has always been an instrument of social control. Being the product of a formal law creating process, the law is believed to pursue a rational development[10] - but by whose rationality is this development controlled?[11] Existing legal institutions and processes are

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[8]A US study reveals dramatic evidence of an increase in judicial activity. According to the Report of the Study Group on the Caseload of the Supreme Court 5 (1972), in 1951 some 1,200 new cases were filed in the US Supreme Court and by 1971 this number had reached 3,600. For further statistics showing this same litigious trend see M. Marcus, "Judicial Overload: The Reasons and the Remedies", (1979) 28 *Buffalo L. Rev.* 111. It is interesting to note that a study cited therein, carried out in Detroit, polled citizens involved in civil disputes regarding their goals and found that only a tiny minority of those questioned went to court seeking "justice or recognition of their rights", *infra* p. 123. See further Mayhew, "Institutions of Representation: Civil Justice and the Public", (1975) 9 *Law and Soc. Rev.* 401, 413. Theodore J. Lowi writes that between 1969 and 1974, the national government of the United States went on a regulation binge enacting into law no less than 35 regulatory programs of fundamental importance to the economy and society - "The Welfare State, the New Regulation, and the Rule of Law", in *The Rule of Law: Ideal or Ideology*, (ed. Hutchinson and Monahan; Toronto: Carswell Press, 1987) p. 17.

[9]This growth of law is proportionate to the decline of traditional forms of social control - religion, family, entrenched class and hierarchical divisions. Research often highlights more active religious practice, greater community involvement, large dependence on family (familism), among minority groups than is found among socially dominant groups and this raises a problematic duality. Alienated from the political structure because it does not recognise their particular conceptions of social justice, facilitating the incorporation of minority groups into the 'system' through procedural means does not deal with the substantive problem.

[10]See Arthurs *supra no.* 2 at p. 86.

[11]As Stephen Utz writes, "The evolution of a legal system is somehow, usually incompletely, prefigured by the system itself - by the sorts of thing trained lawyers know and bring to bear in thinking about legal

context bound yet their claim to neutrality[12] inhibits our ability to understand the full extent of the access to justice problem.[13]

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issues" - "Rules, Principles, algorithms and the Description of Legal Systems", (1992) 5 *Ratio Juris* 23, 33. H. Arthur writes that since Dicey propounded the 'rule of law' and even before that, "lawyers have sought to equate the public interest with law, and law with their own particular form of professional knowledge" - see Arthurs, *supra no.* 2 at p. 5 and M. J. Horwitz, *The Transformation of American Law 1780-1860* (1977, Harvard) where it is shown that, historically, the law was developed to promote certain interests. There is a growing body of feminist legal writing that documents the law's inability to respond to the individual needs of the many who do not share its particular knowledge or world experience. See, for example, Bender, "A Lawyer's Primer on Feminist Theory and Tort", (1988) 38 *Journal of Legal Education* 3, 10-11, "Our legal system ....resolves problems through male inquiries formulated from distanced, abstract and acontextual vantage points", also quoted by Grillo *supra* no. 5 at p. 1547. See also C. Mackinnon, "Reflections on Sex Equality Under Law", (1991) 100 *Yale Law Journal* 1281, and *A Feminist Theory of State*, (Cambridge: Harvard University Press, 1989) where she underlines the fact that women, those of colour and non-property owners had no voice in the shaping of the legal institutions that govern the social order that she, as a North American, lives under. See further, M. Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Cornell, 1991) for an insight into 'difference', where the label comes from and the subjectivity of knowledge and experience.

[12]While the neutrality principle has been central to liberal theory, reasoning in defense of it or the way in which it is embodied in political theory, is far from decisive. See Larry Alexander, "Interpreting the Constitution: The Supreme Court and the Process of Adjudication", (1991) 8 *Constitutional Commentary* 255; Raz J., *The Morality of Freedom*, (Oxford: Clarendon Press, 1986), W. Kymlicka, "Liberal Individualism and Neutrality", in Avineri & de-Shalit (eds.,) *Communitarianism and Individualism* (Oxford: Oxford University Press, 1992) where he discusses 'consequential neutrality' and 'justificatory neutrality' and disagrees with Raz categorization of neutrality in Rawlsian theory. See also J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought", (1989) 27 *Osgoode Hall Law Journal* 123 where he highlights the non-binding interpretation process, suggesting that it is far from 'neutral' as between different social visions.

[13]This in turn explains an overly exclusive reliance on procedural reform. See D. Hoehne, *Legal Aid in Canada* (Lewiston, New York: Edwin Mellen Press, 1989), "The creation of Trudeau's 'just society', of which a comprehensive legal aid system would be a necessary part, was impossible without a major restructuring of the Canadian political system. Any attempt to start this restructuring would have resulted in massive withdrawal of popular support for the government" at p. 174.

Legal reform to enhance access to justice is typically comprised of two dimensions; the universal provision of legal services, and the simplification of procedural and institutional structures to reduce cost.[14] These reforms are firmly set in the framework of current thinking about the role and techniques of law. Throughout this thesis it will be argued that they have operated to suppress alternative viewpoints and inhibit meaningful social change.

Capelletti and Garth, distinguish three waves in the access to justice movement.[15] Legal Aid was a central feature of the first reform effort and it remains an important element of modern approaches. It will therefore be used as a focus to examine the way in which the legal system responds to the marginalized. This thesis argues that the more legally regulated society is, the less likely it is

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[14]Illustrated in Québec by the creation of the Small Claims Court in 1971, by providing legal aid services in 1973 and by enacting class action legislation in 1978. Also illustrative of the reform waves described by Cappelletti and Garth was the establishment in Québec of a number of administrative tribunals e.g. those governing consumer protection legislation in 1971, no-fault automobile insurance in 1977, workers compensation in 1978 and landlord-tenant relationships in 1979. Finally, it created public inquiry bodies: a citizen protection ombudsman in 1975, and a Human Rights Commission in 1976 - See further R.A. Macdonald, *Access to Justice, Legal Pluralism and Internormativity Project*, Summer 1993 (unpublished) and also *Jalons pour une plus Grande Accessibilité à la justice*, Rapport Groupe Travail, 1991. Although somewhat later in the Republic, similar reforms have characterized the last decade, 1980 Legal Aid Scheme, 1992 Small Claims Court.

[15]See Cappelletti and Garth, "Access to Justice: The Newest Wave in the World-wide Movement to Make Rights Effective", (1978) 27 *Buffalo Law Rev.* 181.

that justice will be readily accessible to those excluded from the law-making or the law-interpreting process. This thesis further hypothesizes that legal aid has merely served to confirm the substantive difficulties of a liberal view of social justice. It also assesses how the emphasis of the access to justice movement on procedural questions like legal aid masks structural inequalities[16] and limits our understanding of the social world.

The administration of civil legal aid programmes in Canada rests on assumptions not identical to those in Ireland and the systems in place seem more sophisticated than their Irish equivalents. Nevertheless, a broadly comparative approach, as adopted here, is useful as problems tend to remain unidentified because of our inability to recognize and name them.[17]

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[16]In Germany legal aid was available to eligible claimants from 1923 onwards, while in England the first major reforms were introduced in 1949 with the creation of the Legal Aid and Advice Scheme. In 1972 France eventually replaced its 19th century legal aid scheme and in the same year Sweden enacted its new programme. For a general account of the history and introduction of legal aid see the now dated findings of the Florence Project - Cappelletti & Garth (eds.), *Access to Justice: A World-Wide Survey* (3 volumes)(Milan, 1978). Ireland came in last among the Western European countries not estalishing a limited scheme of legal aid until 1980 - see Scheme of Legal Aid and Advice, (Dublin: Stationery Office, 1981). Québec introduced its first government financed legal aid programme in 1973.

[17]As Lord Wedderburn put it, comparisons are useful "not for the importation of solutions but for the discovery of questions which may help to find solutions" - See Wedderburn, "The Social Charter in Britain - Labour Law and Labour Courts?", (1991) 54 *Modern Law Review* 1, 35 quoted by M. Cousins in "Employment Courts: A Socio-Legal Comparison", (1993) 44 *Northern Ireland Legal Quarterly* 149, 163.

By comparing the operation of legal aid programmes in Canada, especially in the Province of Québec, and the Republic of Ireland, it is argued that, far from being 'the leveller', legal aid is inherently biased by its bureaucratic type structure and that it operates to protect existing rules from challenge.

Chapter 1 deals with the notion of a 'right' to legal aid, principally in civil cases, in Canada and in Ireland. Section 15 of the Canadian Charter and Article 40 of the Irish Constitution are briefly analyzed from this perspective. The chapter concludes with a description of how the protections enshrined in International and European Law may be used to support the claim that there exists a right to legal aid. Chapters 2 and 3 examine more closely the development and functioning of legal aid mechanisms in both Canada/Québec and in Ireland. The manner in which state bureaucracies exercise discretion so as to maintain the socio-economic *status quo*, is illustrated by evaluating legal aid practice in the areas of immigration and welfare law.

An attempt is made to understand the origin and maintenance of 'the nature of things' in Chapter 4, by looking at the effect of socialization, élitist politics and majoritarian government on consciousness creation and the manufacture of a social consensus.

Chapter 5 struggles to reconcile the implications of our developing understanding of the subjectivity of our knowledge of social reality, with the view that there remains a possible role for legal aid to play as an instrument for change within the access to justice movement. Alternatives to the current system will also be at risk of domination by majority interests that closely parallel existing power balances in society and it is therefore necessary to go beyond treating the law as merely "political propaganda", for such a view undermines the possible role of the courts in the administration of justice. Rather we need to struggle with 'recreating' a perception of justice that permits difference to co-exist in a framework capable of distinguishing injustice and disadvantage from the apparent 'reality' of the established order.

Chapter 1 Dimensions of the "Right to Legal Aid"

I. Specific Constitutional Guarantees

Much of the debate concerning the existence of a right to legal aid hinges on the courts' interpretation of constitutional *due process* and *equality* clauses.[18] Most Western jurisdictions now recognize a right to counsel in criminal cases.[19] In Canada, this 'right' to legal aid is said to inhere in the individual because of notions of fundamental justice, fair procedures and the right not to be deprived of one's liberty, except by due process of the law.[20] In Ireland it has been claimed that the concept of natural justice and the requirements of the maxim *audi*

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[18]See Mary Jane Mossman "The Charter and the Right to Legal Aid", (1985) *Journal of Law and Social Policy* 21 for an overview of conventional thinking regarding legal aid since the 1960s.

[19]In criminal matters a person may not be deprived of personal liberty without trial by jury and due process of the law - see the State (Healy) v. Donoghue (1976) I.R. 325 and *The Criminal Justice (Legal Aid) Act 1962* (the first systematic approach to the problem of the impecunious defendant in the Irish context). See further J. Casey, *Constitutional Law in Ireland*, (London: Sweet and Maxwell, 1987) at p. 411. See also R. Citron, "(Un) Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services", (1991) 101 *Yale Law Journal* 481.

[20]When a 'right' to legal aid is argued in Canada, it is generally based upon a combination of equality principles and the constitutional protections of s. 7, 10(b) and 11(d). S.7 guarantees the right to "life, liberty and security of the person". The courts have been reluctant to read into the concept of fundamental justice an obligation on the state to provide counsel at public expense - see R v. Powell, (1984) 44 C.R.D. 800-801, Litsky J. S.10 focuses on the right to counsel upon arrest or detention, s.11 deals with the legal rights of a person charged with an offence. There is still debate as to whether s.10 creates a right to legal aid. The Hon. Jean Chrétien denied the creation of a right to state funded counsel by the Charter - see Mossman *supra no.* 19 at p. 27. From her interpretation of the pre-Charter case of Re Ewing & Kearney v. R (1974), 449 DLR (3d) 619, Mossman concludes that it is legitimate to suppose the construction of a right to legal aid in criminal matters - *infra* at p. 29.

alteram partem, together with the wider substantive and procedural guarantees afforded by the Constitution, provide the citizen with a guarantee of basic procedural fairness.[21] The argument is also advanced that entitlement to legal aid springs from the notion that individuals are entitled to effective access to the law.[22]

While permutations of these formulae are used to found the principles upon which criminal legal aid is provided, as of right, in both Canadian and Irish jurisdictions, the courts in both jurisdictions refuse to extend this right to civil cases or before administrative tribunals. This seems to be because the courts adopt an artificial understanding of the concept of 'personal liberty'. Liberty within the legal structure is firmly rooted in a constructed version of reality that reflects the subjectivities of the judicial body.[23]

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[21]Deriving from Art. 40.3 of the *Irish Constitution*, (1937). See generally H. Delany, "Administrative Law - Legal Representation in Administrative Proceedings: A Matter of Right or Discretion?", (1992) 14 *Dublin Univ. Law Journal* 88, 89. See also the comments of O'Dalaigh C.J. in In re Haughey [1971] I.R. 217, 264, Walsh J. in Glover v. B.L.N. Ltd. [1973] I.R. 388, 425 - and further examples cited by Delany.

[22]The Ontario Justice Commission asserted as long ago as 1965 that "... legal aid should form part of the administration of justice in its broadest sense. It is no longer a charity but a right" - see the *Report of the Joint Committee on Legal Aid* (1965), Ontario Ministry of the Attorney General cited by Mossman *supra no.* 19. Marshall J. Breger "Legal Aid for the Poor: A Conceptual Analysis", (1982) 60 *North Carolina Law Rev.* 282.

[23]See Oppenheim, *Dimensions of Freedom*, (N.Y., 1961) and N. Chomsky, *Reflections on Language* (N.Y.: Pantheon Books, 1975) at 133. See also Stephen F. Williams, "'Liberty' in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions", (1981) 53 *Univ. of Colarado Law Rev.* 117.

In the recent Canadian Supreme Court Case of *Dehghani*,[24] a Convention Refugee determination case, it was argued that the rights enumerated in s. 7-14 of the Charter[25] are not rights exclusively reserved for an accused facing proceedings under the criminal law and the right to counsel in s. 10 (b) may arise in situations other than formal arrest and detention.[26]

S. 7 has frequently been applied outside the purely criminal sphere to any situation where life, liberty and security of the person are placed in jeopardy.[27] The

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[24] Dehghani v. the Minister of Employment & Immigration and the Canadian Council for Refugees, Judgement of March 25th 1993, file no. 22153; and Dehghani v. the Minister of Employment and Immigration (1991), 11 Imm. L.R. (2d) 51 (F.C.A.)

[25] *The Canadian Charter of Rights and Liberties* (Part 1, Articles 1-34; Constitutional Law of 1982, Annex B of 1982 Canada Act, 1982, R. - u., c. 11; L.R.C. (1985) app. 11, no. 44 (hereinafter the Charter).

[26] See Reference Re section 193 and 195.1 of the Criminal Code, [1990] 1 SCR 1123, 1174-1175 and R. V. Thérens [1985] 1 S.C.R. 613 (641 i-j, per le Dain), cited in *Dehghani*. It is noteworthy that in the *Dehghani* Case the Canadian Council for Refugees argued that a right to counsel should not depend on whether the Convention detainee is under detention but, by reading s. 7 and s. 15 conjunctively, the Council claimed that s. 15 required that the fundamental liberty and security interests of Convention refugee claimants be respected without discrimination and, therefore, the right to counsel should be made available to all Convention refugee claimants undergoing the initial examination. The right to counsel has been recognized as one of the principles of fundamental justice in the context of s. 7 of the Charter - R. v. Herbert (1990) 2 SCR 151, 176 a-j; 177 a-d, *per* McLachlin, J. The right of access to the law for citizens of Ireland is not specifically mentioned in the Irish Constitution (1937) (but see 'due course of law' S. 38(1) and equality under the law protections in s. 40(3)1) From the decision in Healy v. the A. G. [1976] I.R. 325, however, it seems that the Irish Courts will recognize a constitutional right to legal aid only where the defendant is at risk of losing his liberty in the sense of incarceration following a criminal conviction.

[27] Singh et autres c. M.E.I. 1985 1 R.C.S. 177., Re s. 193, *supra no.* ,

Appellant in *Dehghani* argued that s. 7 protection applies wherever the life, liberty or security of the person are infringed upon by a State decision-making mechanism.[28] Despite the persuasive force of the Appellant's reasoning however, the courts have persistently refused to recognize a right to counsel in civil cases stating in *Dehghani* that

> "while the right to counsel under s. 7 may apply in other cases in addition to those which are encompassed by s. 10(b), for example in cases involving the right to counsel at hearing, it is clear from my earlier comments that the secondary examination of the appellant at the port of entry is not analogous to a hearing".[29]

Yet many 'non-hearings' have consequences that seriously affect the whole course of an individual's life. The judgements in the *Dehghani* case reveal that tensions between diverse interpretations flow from the inability of judges to leave behind their own individual cultural baggage when deciding cases.[30]

1175 c-d, *per* Lamer, J, and Kaur v. M.E.I. (1989) 104 N.R. 50 (F.C.A.), 53, para 6, *per* Heald J. A right to counsel under s. 7 would seem to have broader implications than that under s. 10(b) of the Charter.

[28]See Reference RE S 193 and s. 195.1 of the Criminal Code [1990] 1 SCR 1123, 1175 c-d; 1176 h-j-1177 j; 1177 i-1178 *as per* Lamer J, cited in *Dehghani* at p. 22 of the Appellant's factum, Supreme Court Document 22153, March 1993.

[29]*Per* Iacobucci J. at p. 28 of *Dehghani* transcript.

[30]In Mahoney J.A.'s judgment in the Federal Court of Appeal (majority judgement) he wrote that, "Everyone, including a Canadian citizen or permanent resident who has a right to come into Canada, is detained when he presents himself for admission at a port of entry". Mahoney J. shows no sensitivity here to the diverse impact that the same treatment will have on people in differing positions. The detention that he undergoes as a Canadian citizen reentering Canada cannot compare at the subjective level to that of a person seeking refugee status. For a contrasting approach see the minority judgement of Heald J.A. where he relies on the same authorities as Mahoney J.A. to reach a different conclusion.

II. Access to Legal Aid as an Equality Issue

A conception of legal aid as an access right in a social contract and, as both a 'civil/political' right and a 'socio-economic' right, has been of significance in the application of constitutional equality provisions to the issue of court accessibility, but the inherent limitations of the courts construction of equality rights and what they protect is evident when one considers the question of economic class.[31] In Ireland and in Canada, classifications which have a discriminatory impact upon the poor, such as a

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[31]This is as true in the Irish and Canadian context as in the American. Although the 6th amendment gives the accused in federal courts a right to be represented by counsel, and the Supreme Court has interpreted this guarantee to include the right to court-appointed counsel if the defendant is too poor to retain counsel, there is no similar guarantee to appointed counsel in civil cases. This classification affects a suspect class, to use the terminology of American equality analysis, namely, the poor. In Harper v. Virginia Board of Elections 383 US 663 (1966), the court stated that "lines drawn on the basis of wealth or property, like those of race..., are traditionally disfavoured", and later in McDonald v. The Board of Election Commissioners, 394 US 802 (1969), "A careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race,... two factors which would independently render a classification highly suspect and therefore demand a more exacting judicial scrutiny". The ratio of these cases has been undermined by more recent cases that make it clear that the court does not consider classifications based on wealth lines to be highly suspect and they may be justified on a rational basis - see U.S v. Kras, 409 US 434 (1973). 'Rationality' being begged in aid to favour the existing order with no question as to the universality or legitimacy of that rationality. See also R. Winters, "Poverty, Economic Equality, and the Equal Protection Clause", (1972) 41 *The Supreme Court Review* 41, 96-102 where he outlines the historical and philosophical reasons why economic class was not meant to be included within the terms of the 14th amendment and the converse inequalities created by providing free legal services in a market economy at p. 96 *infra*. See further Luther M. Swygert, "Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel?", (1982) 39 *Washington and Lee Law Rev.* 1267, esp. at p. 1276 *infra*.

failure to provide legal aid, by reason of their economic position, are generally excluded from constitutional protection because of the courts' conceptualization of the 'human person'. Under traditional legal equality theory poverty is not 'natural', as race or sex are. Nor is it 'immutable' in that it is not genetically determined. Poverty becomes something which gives rise to a need for housing, or food - which we duly give - but 'poverty' does not happen to people, or at least they are never allowed to talk about it as an equality issue. Poor people are further disenfranchised and excluded by our tendency to see them as having a bundle of basic needs rather than as human beings who are the best able to speak of their need for dignity and freedom within the system.

Section 15(1) of the *Canadian Charter* provides that every individual is equal "before and under the law" and has a right to the equal protection and "equal benefit of the law without discrimination". The *Irish Constitution* reads that, "All citizens shall, as human persons, be held equal before the law...The State guarantees in its laws to respect and so far as practicable, by its laws to defend and vindicate the personal rights of the citizen".[32] In both

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[32]*Bunreacht na h-Eireann*, 1937 - Art 40.1 and 40.3.1. See J.M. Kelly, *The Constitution of Ireland* (2nd ed., Dublin: Jurist Publishing, 1987). See generally R. Grimm and P. Horgan, *Introduction to law in the Republic of Ireland*, (Portmarnock: Wolfhound Press, 1981) especially at Chapter 8, and further J. Casey, *Constitutional Law in Ireland*, *supra no.* 19 especially at Chapter 13.

cases, the extent to which a right to legal aid can be read into the language of the provisions is dependant on how the court chooses to interpret certain key words and concepts - discrimination,[33] human person,[34] before and under.

Given that section 15 of the Canadian Charter guarantees equality before the law and the Irish Constitution promises the equal benefit of the law, then our construction of what "law" is determines the ambit of our constitutional guarantees.[35] To borrow from Gibson's

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[33]15(2) and its equivalent provision in the Constitution allow for affirmative action and positive discrimination type measures and would thus support any discriminatory effects of a legal aid scheme which did not apply to the entire population. It would not seem to support discrimination between subgroups of a discriminated against 'minority' groups such as the poor - See further the court in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 141 and in R v. Turpin, [1989] 1 S.C.R. 1296. The Irish Constitution specifically lays down that laws may legitimately differentiate between persons on grounds of "capacity, physical and moral, and of social function". The State's power to discriminate in its legislative enactments in this way has been tested in the legal aid context in a 1971 Irish High Court decision - O'Shaughnessy v. A.G., *unreported* , 16 February 1971, where O'Keefe P., refused to declare the *Criminal Justice (Legal Aid) Act*, 1962 invalid because it was discriminatory as between civil and criminal actions, considering that it was for the legislature to determine how the personal rights of the citizen are to be vindicated. This disclaimer has been described as "too sweeping" - see J.M. Kelly, G.W. Hogan and G. Whyte, *The Irish Constitution*, Supplement to the 2nd ed. (Dublin: Jurist Publishing Co., 1987) at p. 156.

[34]The phrase "as human persons" has been used in order to limit the range of the equality precept to contexts in which the alleged discrimination relates to what the courts seem to view as essential, rather than contingent, features of a citizen's existence - See Murtagh Properties Ltd. v. Cleary [1972] I.R. 330 Kenny J. and Quinn's Supermarket v. Attorney General [1972] I.R. 1 Walsh J. See Kelly at p.449 *supra no.* 33. The Court has not subsequently shown itself ready to explore what 'social' might mean, although it does apply the equality guarantee to discrimination on grounds of social condition.

[35]See Dale Gibson's comprehensive analysis of what the courts see as encompassed by this term in his book *The Law of The Charter: Equality Rights* (Toronto: Carswell, 1990) at p.88. This characterization of law

enumeration in the Canadian context, one can say that the law includes Statute,[36] Regulations and Rules,[37] other Requirements,[38] the Common Law,[39] the Constitution, Programs and Activities.[40] It follows that equality provisions could in fact play an extensive role in all institutional activity.[41]

Section 15 of the *Canadian Charter* enumerates a number of grounds upon which discrimination is proscribed. The *Irish Constitution* also prohibits discrimination particularly on certain listed grounds i.e. sex, religion,

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is centralist in nature and doesn't encompass 'law' as seen by a growing body of legal pluralists. See for example M. Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law", (1981) 19 *Journal of Legal Pluralism* 1.

[36]Gibson, *supra no.* 35 at p. 88 where he relies on McIntyre J.'s judgement in *Andrews*. In Ireland there is a dispute as to whether Article 40.3 applies only to laws or also a failure to legislate - see further the court's decision in *O'Shaughnessy supra no.* 33.

[37]*See* Douglas /Kwantlen Faculty Association v. Douglas College (1988) 49 D.L.R. (4th) 749. Also supporting the application of s 15(1) to rules and regulations see Stoffman v Vancouver General Hospital (1988), 49 D.L.R.(4th) 727. For the equivalent Irish authority see McHugh v. Comm of Garda Siochána [1985] ILRM 606.

[38]*See Gibson supra no.* 35 at p. 91.

[39]*Ibid.*, p 92. See also R.W.D.S.U v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

[40]In his treatment of what constitutes a law, Gibson extends its meaning to include legal institutions (at p. 94), saying that "Discrimination in the provision of court services ..would violate the right to equality before and under the law, and the right to equal protection of the law, even if the discrimination were not embodied in any law....equal protection of the law would be a hollow pillow if it did not include equal access to law-enforcement facilities".

[41]As the Irish courts have yet to decide what constitutes a decision within the scope of its powers of judicial review, it is suggested that this question is far from settled. See Hilary Delany, "The Scope of Judicial Review - A Question of the Source or the Nature of Powers", (1993) *Irish Law Times* 12.

race, age etc. The language in these equality provisions need not limit equality protection to these grounds alone. Recent Canadian jurisprudence suggests that the alledged grounds of discrimination must be *analogous* to those expressly listed in order to fall within the range of s. 15.[42]

Analogy, sameness and difference are useful concepts in evaluating a given situation. Unfortunately the manner in which they have been used to determine what is inherent to the person and what is external or of marginal value, has been narrow and restrictive.[43] These interpretations illustrate how effectively 'the system' can curtail the scope of constitutional rights. Thus certain interests have been undervalued, while those of the autonomous and independent self are favoured.

A need to draw analogies, to find links between words

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[42]See the Supreme Court's judgment in *Turpin supra no.* 33 where they refused to hold a legislative provision concerning the operation of jury trials in Alberta to be discriminatory. They relied on McIntyre J. in *Andrews* where he said that the "enumerated and analogous" grounds approach more closely accords with the purposes of s.15 (see particularly the judgment of Madame Justice Wilson *ibid.*, pgs 126/27).

[43]McIntyre J's inspiration in framing his test in *Andrews* would seem to be based on a mistaken interpretation of a judgment by Hugessen J. in the Federal Court of Appeal case of Smith, Kline & French Laboratories ltd., v. A.G. of Canada, [1986] 1 F.C. 274 (T.D.). Furthermore, it is open to question whether Wilson J. and La Forest J. were in agreement with McIntyre J. in limiting s. 15 to listed or analogous grounds - see *Andrews supra no.* 33 at p. 194. For an interesting analysis of the *Andrews* decision on this point see David W. Elliott, "Comments on Andrews v. The Law Society of British Columbia: The Emperors New Clothes" (1989) 35 *McGill Law Journal* 235, 243.

and ideas, shows a reversion to pre-19th century thought where theorists saw words as representative of an absolute. Concepts were linked in such a way as to give a seeming coherence to thought and thus to lend 'truth' to a world view that dominated others.[44] The way in which analogous criteria have been used supports the worrying proposition that the courts manipulate them to present a certain vision of the norm and of the person, at the cost of social diversity and equality. Instead of supporting equality, concepts like those of *analogy* and *immutability*[45] have become tools to be used by powerful players to validate existing classifications and the image of a human as consisting of certain determinate qualities and not others.

A different approach to analogy has however, been taken by some judges. For example, in *Turpin*, Wilson J. focused on the *condition* of those disadvantaged. For her, disadvantage due to lack of political power was sufficient to constitute an analogous category to those enumerated in section 15.[46] Wilson J.'s approach could facilitate an

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[44]See M. Foucault, *The Order of Things*, Chapter 1. For a defense of analogy arguments see C. Sunstein, "On Analogical Reasoning", (1993) 106 *Harvard Law Rev.* 741.

[45]A troublesome aspect of the La Forest's judgment in *Andrews* was his reliance on "immutability" as a requirement in determining what might constitute an analogous ground. The term is open to a number of interpretations and used by a conservative court might greatly restrict the ambit of s. 15 powers.

[46]As Elliott also highlights, Wilson J. in *Turpin supra no.* 33 held that a finding of discrimination will often entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

understanding of poverty, as a social condition, which is neither stigmatic nor oppressive of the poor as a social group, but recognises the impact of socio-economic position upon our ability to participate and be treated equally.[47]

While there is some judicial support for the application of s.15 to legislative categorisations such as that of *economic class*,[48] and a growing body of caselaw treating this issue,[49] the prevailing view is still one that

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[47]For example, as Winter points out, *supra no.* 31 at 98, poverty is not absolutely inalterable. He links it to 'individual merit'. See also K. Selick, "If the Poor Don't Care Why Should We?", 6 *Canadian Lawyer* 60, and "The Smokescreen of Poverty", The Globe and Mail, Wednesday May 27th 1992 where she questions why she should be expected to alleviate the discomforts of people who *choose* to live in poverty.

[48] See R. Moon, "The Constitutional Right to State Funded Counsel on Appeal",(1989) *14 Queen's Law Journal* 171 where Moon relies on Kask v. Shimizu 28 D.L.R. (4th) 64 to support the inclusion of economic class in equality criteria - see McDonald J.'s judgement *infra* where he says that one's sense of what is essential in a free and democratic society is violated if the state draws a distinction between one person and another person or one group of persons and another group of persons, "on the basis of their wealth or poverty or their large or small income". For a case that considered economic class as a grounds for consideration under s. 15 see Bernard v. Dartmouth Housing Authority et al (1988) 53 D.L.R.(4th) 81 (N.S.C.A.) cited by Gibson *supra no.* 35 *ibid.*, p.251.

[49]The Québec decisions of *Paquet* and *Duchesne* support the view that poverty is a *social condition* (within the meaning of s. 10 of the Quebec Charter) by refusing to accept that being a recipient of social aid was sufficient to render the plaintiffs members of an identifiable social category, namely the poor. Both decisions were extremely narrow readings of the law. Being a recipient of social aid did not attest as to social condition and was not sufficient to show that the plaintiffs were being discriminated against on these grounds. Had they been discriminated against because they were poor in either *Paquet* or *Duchesne*, they would have been entitled to the protection of the equality provisions of the Québec Charter. As receipt of social aid did not necessarily signify poverty, the Charter was ineffective - La Commission des Droits de la Personne c. Marie Paquet [1981] C.P. 78, and Duschesne v. C.A.S. & P.G.Q. (1990) R.J.Q. 2292. See *Paquet* at p. 83 where the judge said that "ni la loi de l'aide sociale, ni la Charte ne créent avec les assistés sociaux une condition sociale différente et separée et ne changent la définition généralement reconnue de 'condition

refuses to acknowledge economic class as protected by equality provisions.

After all, poverty is not 'immutable', or rather, it remains possible to change unilaterally one's social condition.[50] The traditional attitude adopted by the courts denies the true nature of poverty, in that it does not accept the view that one's socio-economic position can influence one's opportunities in life in the very same way as 'inherent personal attibutes' such as gender. Discrimination is rooted in *our beliefs* about what certain personal attributes mean. Poverty, as a social condition, bears connotations which can be the object of discrimination.[51]

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sociale'." See also the *Court Challenges Program*, Annual Report 1992 for a description of the intervention of a Québec Consumer Group in the Federal Court of Appeal to challenge the Canadian Radio-Television and Telecommunications Commission's (CRTC) licensing of Bell Canada to impose a per call charge for the use of a feature that blocks the display of the originating number at the request of the caller. In 1992 the CRTC ordered Bell Canada to provide free blocking mechanisms to those Bell subscribers who desired it.

[50]In *Andrews*, La Forest J. found that citizenship was immutable because it was not, "alterable by conscious action". Gibson offers a number of examples of what might be considered "immutable" by the court for the purposes of s. 15 at *supra no.* 35 p. 158. He includes political affiliation, marital/family status, social rank, language, and economic status. On the cyclical nature of poverty see further L. Brunet & D. Desrosiers, "R..., Chambreur et Pauvre", in M. Gauthier, ed., *Les Nouveaux Visages de la Pauvreté*, (Institut Québecois de la Recherche sur la Culture, 1987) 119.

[51]See H. Echenberg & B. Porter, "Poverty Stops Equality: Equality Stops Poverty: The Case for Social and Economic Rights", in *Human Rights in Canada into the 1990's and Beyond*, (Ottawa, 1990) p. 1 where they highlight the range of possible interpretations for 'discrimination' depending upon the vantagepoint of the interpreter. The low-income person is subjected to systemic discrimination which is reinforced by the court's convenient use of the public/private distinction.

Balkin writes that to understand the nature of law we must understand the nature of legal understanding.[52] We vest in the law an independence of existence and of meaning that is unfounded.[53] As legal subjects, we understand the legal system to represent certain universal, objective and coherent values or, conversely, to represent interests that are élitist, commercial and biased. Under most liberal theories of law the act of interpretation is predominantly deductive and meaning is essentially constrained by an existing text.[54] This is a disputed perspective, but it has contributed to an inability to effect change through the law because it operates to legitimate the view that the law reflects an incontestable social reality. Being a construct, even the existence of law is largely dependent on individual understandings of it.[55] Through their reluctance to consider economic class as a ground for discrimination

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[52]See J. M. Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence", (1993) 103 *Yale Law Journal* 105.

[53]Balkin *ibid*, says that the subjective and objective are equal partners in the constitution of the legal system, and he explains that his emphasis on the importance of subjectivities is not to be understood to mean that the law does not have an existence independent of the subject's comprehension. See especially p. 108 where he speaks of a dialectic between the subjective and the objective aspects of moral life'.

[54]See P. Carignan, "De l'exégèse et de la Création dans l'intérprétation des lois constitutionelles", (1986) *20 R.J.T.* 27, cited by N. Roy "Intérêts Économiques Corporatifs", (1993) 34 *Cahiers du Droit* 426, 432.

[55]"Subjectivity is what the individual subject brings to the act of understanding; it is what allows her to construct the object of her interpretation so that she can understand it" - Balkin, *supra no.* 25 at p. 107.

which comes within the equality protections of the Constitution, the courts reinforce society's devaluation of certain people, who, because they are poor, do not conform to the courts' understanding of what constitutes the human being.[56] This reluctance is due to a lack of understanding of what it means to be the subject of discrimination and a failure to consider how this impacts upon a person's ability and desire to interact with others. It is therefore, not good justification for refusing to recognise a right to legal aid as an equality issue.

III. Obligations under International Law to provide legal aid

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[56]When Walsh J. compiled his list of the characteristics constitutive of the human being in *Quinn's Supermarket, supra no.* 34, he intended it to be merely illustrative, saying that it was not "complete". As in the Canadian 'analogous' context, however, the act of enumeration has led to the unrealistic curbing of the recognized attributes of the human personality. Such a view is not necessitated by a reading of the words of the Constitution. The equality jurisprudence of the Irish courts reflects very much the dominant, majority *moeurs* prevailing in Irish society - thus a chapter in a leading constitutional textbook on legislation that has been challenged because of its discriminatory impact will typically read something like the following: Murphy v. A.G. [1982] I. R. 241 - A case in which income tax legislation left married couples worse off than they would be had they not been married. There the court said that the inequality was "justified by the particular social function of marriage under the Constitution of married couple living together.. and when set against the many favourable discriminations made by the court in favour of married couples" and thus did not constitute an unequal treatment forbidden by Art. 40(1). Discrimination on grounds of marital status was justified because of the existence of other favourable discriminations!; Norris v. A.G. (1984) I.R. 36 - Challenging the constitutionality of Ireland's homosexuality laws (s. 61 Offences Against the Person Act 1861); and, Dennehy v. the Min for Social Welfare, Unreported H. Ct. (Barron J.) 26 July 1984, legislation providing for payments to deserted wives but not to deserted husbands was challenged as discriminatory, but upheld on the grounds that the woman had a constitutionally protected role in the home.

The *Universal Declaration* adopted in 1948[57] contained most of the provisions now found in the *Covenant on Civil and Political Rights*[58] and the Covenant on *Economic, Social and Cultural Rights*.[59] *Art.14(3)(d)* of the former reiterates the principle of equality before the courts and the right to representation without payment to defend against a criminal charge.[60] Canada has committed itself to respect the rights protected in the Covenant[61] and the courts are bound to

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[57]Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948, See *U.N. Human Rights: A Compilation of Human Rights Instruments* (N.Y., U.N. Doc. St/HR/1/Rev. 3). Art. 10 reads that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and any criminal charge against him."

[58]International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI) Dec. 16, 1966.

[59]The Declaration was enacted in two separate covenants because many states were unprepared to accept the Economic, Social and Cultural Covenant, (1966) 993 U.N.T.S. 2, as binding, arguing that economic and social rights were aspirations not rights. Thus a two tier system of rights was introduced adding to the existing anomaly. Therefore, while the Covenant on Economic, Social and Cultural Rights (In U.N., Human Rights: A Compilation of Human Rights Instruments, N.Y. U.N. 1988, U.N. Doc. St/ HR/1/Rev.3) speaks only to governments, the Covenant on Civil and Political Rights spells out the rights of the individual in terms of entitlement. See generally Hon. K.H. Fogarty, *Equality Rights and their Limitations in the Charter* (Toronto: Carswell, 1987) at p.161 *et seq.*

[60]Thus we see that the protection of the individual charged with a criminal offence goes one step further than the Canadian Charter in s. 10(b) where it is not specified that the party has a right to free legal counsel if he is unable to pay for it. Min Jean Chrétien denies that it was intended that s. 10(b) be read to imply a right for state assistance - see the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada* (1980-81) 416:125.

[61]The Supreme Court has stated that legislation should be interpreted in conformity with Canada's international treaty obligations - see Daniels v. White, [1968] S.C.R. 517 at p. 541 cited by *Fogarty supra no.* 59 at p.182 and R. v. Brydges [1990] 1 S.C.R. 190 , 214, and see further Hogg P., *Constitutional Law of Canada* (3rd ed., Toronto: 1992) at p. 823. Under the optional protocol to the Convenant, which Canada adopted upon

interpret the right to counsel in conformity with its International obligations.

Canada's *Second Report to the UN on the International Covenant on Economic, Social and Cultural Rights*[62] indicates that it accepts that s.15 protects economic, social and cultural rights, in addition to civil and political rights, and so can be invoked in a challenge of discrimination on the grounds of income.[63] Ironically many of the cases cited in the Report to illustrate Canada's respect for Arts 10-15 were funded by the since discontinued *Court Challenges*

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accession to the Covenant itself, there are procedures enabling the individual to bring complaints to the International Human Rights Committee relating to alleged violations by a state of its obligations under the Covenant (see the Sandra Lovelace v, Canada (Communication No. R. 6/24), U.N. Doc. 40/36/40 (1981), p. 166. Normally the courts will consider themselves bound by principles of international law - see R. v Konechy (1983), 11 W.C.B. 209 (B.C.C.A.) especially Lambert J. *infra*. As Art. 26 of the Covenant also provides more listed grounds of equality rights than the Canadian Charter or the Irish Consitution, the Covenant should prove a useful indicator as to the nature of the ambit of s. 15 in the Charter.

[62]See generally *International Covenant on Economic, Social and Cultural Rights*, The Second Report of Canada on Articles 10-15, September 1992, the Human Rights Directorate Multiculturism and Citizenship Canada, where the authors support the view that the International jurisprudence under the Convenant will be relevant in the interpretation of domestic cases in conformity with the principle that statute should be interpreted as far as possible in conformity with international law - see Hogg *supra no.* 61 at p. 823 where he cites Re Powers to Levy Rates on Foreign Legations [1943] S.C.R. 208 and Jacomy-Millette, *Treaty Law in Canada* (1975) 280-290 to support this point.

[63]Canada has adopted the UNGA Resolution (32/130) which affirms that all human rights and fundamental freedoms are indivisible and interdependent. See Bruce Porter, *Riding a One-Wheeled Chariot: Poverty and Equality Rights in Canada, (paper delivered at a meeting of the National Equality Seeking Groups, March 23, 1991 - unpublished)* especially at p. 8 where he refers to the affirmation of the Supreme Court in Slaight Communications that the human rights contained in the Charter are to be interpreted so as to conform to the provisions of human rights instruments internationally.

Programme.[64]

By distinguishing between two orders of rights, the international legal order condones a double-standard of rights protection. These distinctions at international level are arbitrary and serve to legitimize discrimination that results from undisguised power imbalances between social actors. In effect, civil and political rights are contingent on the rights claimant belonging to a particular socio-economic class. Likewise, civil and political rights draw their meaning from the interpretation given them by the socio-economic class that invokes them the most frequently. So people of certain socio-economic classes, excluded from the civil-political process, will have little input in the shaping of their society.

The *European Convention of Human Rights and Fundamental Freedoms* has been of particular significance in the Irish context. In the *Airey case*,[65] it was held that the state is under an obligation to provide state funded legal aid under Art. 6.1 of the Convention.[66] This duty arises where a

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[64]Among those listed were *the above cited Andrews* and *Brooks* decisions, in addition to others such as *Allen & Dixon v. Canada Safeway Ltd. (1989)10 C.H.R.R. D/ 6183 (S.C.C.), Schachter S. Ct. July 9th 1992* - See the *Court Challenge's Program*, Annual Report 1991 at pgs 6-10.

[65]Airey v. The Republic of Ireland, October 9th, [1979] 2 E.H.R.R 305 - decided by the European Human Rights Court, established under by the Council of Europe.

[66]Art. 6.1 reads, "In the determination of his civil and political rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

remedy is not accessible to the applicant due to the complexity of the case and her inability to pay for a lawyer.[67] Dealing almost exclusively with family law cases,[68] there remain serious doubts as to Ireland's compliance with the Convention. This underlines the false promise of social and economic rights[69] and undermines the court's opinion in *Airey* that,

> **The Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective.[70]**

In a subsequent Irish case, *E v. E*, the court refused to decide the question of whether Ireland remained in contravention of the *European Convention of Human Rights* by

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independent and impartial tribunal established by law..". The court interpreted this provision to provide a right of access in the *Golder Case* (Golder v. *U.K.* 1975 ECHR,Series A, no. 18). Despite the absence of a right to free legal aid in civil cases in the Convention and the inclusion of a right in criminal proceedings, the court found that the lack of provision by the Irish Government raised a question of impeded access on the facts of the case. See further an article by Patrick Thornberry P., "Poverty, Litigation and Fundamental Rights", (1982) 29 *International and Comparative Law Quarterly* 250.

[67]An analogy with this argument can be made to support a right to counsel under Art. 24 of the *Charter* which states that, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate or just in the circumstances." See further Hogg *supra no.* 61 at p. 904.

[68]97% of legal aid certificates are granted in the area of family law (Legal Aid Board, 1991). Only 0.3% of the certificates are granted in relation to employment cases and no figures are available in relation to social welfare of immigration cases - see further M. Cousins & G. O'Hara, *Access to the Courts in Four European Countries* (FLAC, 1992).

[69]See FLAC's submission to the Council of Europe (1990) *8 Irish Law Times* 289, also the decision of the Irish High Court in M.D. v. The Legal Aid Board (1991) 2 I.R. 43.

[70]*Ibid.*, para. 24.

failure to provide legal aid in a timely fashion.[71] The judge was of the opinion that as the applicant could not prove an "existing right" in Irish law, that right having been derived from the Convention, the matter could only be determined by the European Court.

Since *E v. E,* European doctrinal developments suggest that it is in fact proper for national courts to interpret and apply Convention provisions in much the same way as the European Community does.[72] The European legal order could only legitimately claim supremacy over national legal orders, if it incorporated, at the very least, the minimalist principles of human rights protection that were to be found in national law.[73]

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[71] *E v. E,* [1988] I.L.R.M. 497

[72] The Convention has not been enacted into domestic law in the Irish context, and the Community is not a signatory to it but the European Court of Justice has read the Convention into the 'Community Constitution' - See Germany v. the Commission, [1989] E.C.R. 1263. A similar approach in Irish national courts might create problems to the extent that a conflict arises between a Constitutional interpretation and a Convention interpretation, yet in areas that fall within European Community competence, as legal aid increasingly does, it is difficult to see how national courts will avoid allowing the European Convention to be pleaded and applied directly. See further K. Lenaerts, "Fundamental Rights to be Included in a Community Catalogue", (1991) 16 *European Law Review* 367, and European Court decisions in Hoechst v. Commission Case 374/87, [1989] E.C.R. 3283 and Orkem v. the Commission - Joined cases 46/87 and 227/88 [1989]E.C.R. 2859.

[73] See A. Van Hamme, "Human Rights in Europe", Paper delivered to the Irish Centre for European Law, 13th February 1992 where he refers to the Nold case as the frist in a line of decisions establishing that Memebr States could not uphold measures imposed by membership of the Community which were incompatible with fundamental rights - Nold v. Commission, Case 4/73, E.C.R. [1974] 491. See also Schermers H., "The European Communities Bound by Fundamental Human Rights" (1990) *Common Market Law Reports* 255.

The European Court broke with tradition in the *Airey* Case by holding that, although the rights expressly protected by the Convention were civil and political, often these could not be divorced from social and economic realities.[74] The question of a right to legal aid has not been before the Court as a direct issue since Airey but in a number of decisions the court has outlined 'legitimate restrictions' upon the right to counsel.[75] The court manipulates the rhetoric of its own creation to mirror power distributions in the social order, all the while giving this image the legitimacy of a true and natural interpretation.[76]

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[74] "the mere fact that an interpretation may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water tight division separating that sphere from the field covered by the Convention" *ibid.*, para. 26. In App. No. 8158/78 (X v. UK 21 D&R 85) the court said that it "is self evident that where a state chooses a "legal aid" system to provide for access to court, such a system can only operate effectively, given the limited resources available, by establishing machinery to select which cases should be legally aided" - quoted in Mel Cousins, "Access to the Courts, The European Convention on Human Rights and European Community Law", (1992) 14 *Dublin University Law Journal* 51, 55. See also Commission decisions where this principle is applied - App. No. 9649/82 v. Sweden, (1982) 5 E.H.R.R. 292 and App. No. 1054/83 v. Sweden (1985) 8 E.H.R.R. 268.

[75] In App. No. 8158/78 (X v. UK 21 D&R 85) the court said that it "is self evident that where a state chooses a "legal aid" system to provide for access to court, such a system can only operate effectively, given the limited resources available, by establishing machinery to select which cases should be legally aided" - see Cousins *supra no.* 74 . For a decision upholding non representation before an industrial tribunal see App. No. 9444/81, S v. the U.K. [1983] 6 E.H.R.R. 136 (decision turned on the facts of the case and could not be termed decisive); acknowledging the necessity for means tests see App. No. 8158/ 78, X v. the U.K., 21 D & R 85.

[76] See M. Foucault, *Power/Knowledge* (ed., Gordon C., Brighton: Harvester Press, 1980) and *Les Mots et les Choses*, (Paris: Gallimard, 1966)

The European Court of Justice has oft reiterated the importance of an effective judicial remedy against a breach of European law.[77] Despite its importance, however, the only harmonization efforts made at community level concerning legal aid availability have been procedural. The provision of legal aid is treated differently in each country of the European Union and the *European Agreement on the Transmission of Applications for Legal Aid*[78] does not concern itself with the quality of the service or its token existence in certain states. Similarly the 1968 *EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*,[79] creates an obligation to provide the most "extensive exemption from costs or expenses provided for by the law of the state" and the "most favourable legal aid".[80] The Irish Government decided to exclude cases under the Convention from the means and merits

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[77]For example in Case 222/86 UNECTEF v. Georges Heylans [1987] E.C.R. 4097 the court held that in a case involving a question of securing effective protection of a fundamental right guaranteed by the Treaty, a person must be able to defend that right under the best possible circumstances. Those rights protected by the treaty comprise those rights of the Convention and those rights protected by general constitutional norms within member states.

[78]This permits an applicant to apply in his/her country of residence and then have the application transferred to the country in which legal aid is sought. The operation of such a scheme will underline the diversity in the protections offered that exist - different financial criteria, different coverage etc. See generally Irish parliamentary reports (1988) 383 *Dáil Debates cols* 344 *et seq.*

[79]This Convention was adopted under Art. 220 of the EC Treaty and has been brought into effect in Irish law by the Jurisdiction of Courts and the *Enforcement of Judgements Act (1988) - pl: 8277* see the '87, 88, 89 *Annual Report of the Legal Aid Board* at p. 16.

[80]A similar provision is contained in Art. 15 of the Hague Convention on Recognition and Enforcement of Decisions relating to Maintenance Obligations.

tests that otherwise apply under the legal aid scheme.

Law shaped to further élitist political interests, as in these international agreements, can work grave injustice within a given society.[81] Provisions under the *Child Abduction and Enforcement of Custody Orders Act* 1991,[82] for example, allow the central authority to obtain legal aid for a foreign applicant whilst the respondents to such proceedings, resident in Ireland, who lack the means to obtain private legal representation, remain on the lengthening waiting lists for an appointment with a legal aid lawyer.[83]

IV. The Illusion of Universal Rights

To use the language of individual rights, as we attempted to do in this Chapter, in addressing the issue of a right of access to the court, "gives the illusion of abstract universalism"[84] and disguises the structural

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[81]The interest being favoured here is increased mobility within the Community, but, of course, the philosophical roots of this mobility are deeply embedded in the economic needs of the community.

[82]The *Child Abduction and Enforcement of Custody Orders Act* (1991) gives the force of law in Ireland to the Hague Convention on the Civil Aspects of International Child Abduction (1980) and the Luxembourg Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, *(1980), Council of Europe*.

[83]As Shatter points out - See his comments in the Dáil on Nov. 3rd, 1993, (1993) 435 *Dail Debates* 855-859. See also the comments of the Minister for Justice, Mr. Ray Burke while the Act was passing through the second stages - 402 *Dáil Debates* col. 2344.

[84]See M. Minow, "Partial Justice", in *The Fate of Law*, (eds., A. Sarat & T.R. Kearns; The University of Michigan Press, 1991) p. 15, at 60. See

exclusiveness of the legal system[85] and the further exclusiveness of the right to legal aid, should such a right exist. Whether one has a right to legal aid or not is only important if that right can be effectively enforced by the rights holder to give a just solution to a particular problem. Chapters 2 & 3 examine in what circumstances the vision of a 'right' to legal aid is enforceable in Québec and whether a right can have practical effect where the social actors have a certain vision of how it should be exercised and by whom.[86]

CLS writers D. Kennedy, Tushnet, "An Essay on Rights", (1984) 62 *Texas Law Rev.* 1363 and R. Delgado, "Minority Critique of CLS: The Ethereal Scholar", (1987) *Harvard Civil Rights - Civil Liberties Law Rev.* 301, 302 where he says "We know, from frequent and sad experience, that the mere announcement of a legal right means little. We live in the gap between law on the books and law in action".

[85]See further Hutchinson & Monahan, "The "Rights" Stuff: Roberto Unger and Beyond", (1984) 62 *Texas Law Rev.* 1477 and Simon, "Rights and Redistribution in the Welfare System", (1986) 38 *Stanford Law Rev.* 1431. A. Freeman writes of the control enjoyed by those with the authority to interpret and rewrite rights texts - see Freeman "Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay", (1988) *23 Harvard Civil Rights - Civil Liberties Law Rev.* 295, 331 - and Pat Williams effectively illustrates structural exclusiveness in "Excluding Voices", *The Alchemy of Race and Rights*, (Cambridge, Mass.:Harvard University Press, 1991).

[86]This vision was advanced by Jerome Choquette, Minister of Justice in Quebec at the time the Quebec legal aid programme was established. Choquette was also responsible for the introduction of several procedural reforms during his time as Minister for Justice - the Small Claims Court, the Services of the Ombudsman etc. There has been no such major reform since then. During the parliamentary debates leading to the introduction of legal aid, Choquette said in parliament that everyone had a right to a lawyer, just like one had a right to a doctor under the Medicare system - see generally 12 *Journal des débats de l'Assemblée Nationale du Québec;* 3rd session, 9th legislature, July 7th 1972 p. 2082. Choquette never justified the nature of the 'right' to a lawyer that led him to create the *Legal Services Commission in Québec.* It would seem that the substance of a right to counsel depends on the political will of both government and government agencies and agents.

Chapter 2 Structures of Legal Aid - An Ambivalent Service

The true bearing of a right to legal aid on access to justice, whatever the theoretical scope of the right, can only be determined by closely examining the structures and processes put in place for the exercise of this right. Justice Pringle in his 1979 *Report on Civil Legal Aid and Advice* to the Irish Government,[87] drew heavily from the Canadian experience.[88] While the scheme recommended by Pringle has never been implemented, an interim scheme outlined by him in the Report as an emergency measure, has been in operation since 1980. Some 15 years down the road, on the eve of long awaited and welcome reform in Ireland, it proves propitious to consider just how legal aid is operating in Canada and, more specifically, in Québec.

I. The Structure of Legal Aid Schemes in Canada and Ireland

A.) Delivery Mechanisms

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[87] *Committee on Civil Legal Aid and Advice* (Pringle Report), Report to the Minister of Justice 1979.

[88] The proposed system of Civil Legal Aid very much resembled the Manitoba scheme upon which it was based. In Manitoba a mixed judicare-staff system, similar to that in Québec, was introduced in 1971 and is controlled by an independent Board of Commissioners. Staff lawyers working in the neighbourhood law offices created by the Board supplement the judicare system. For the operation of legal aid services in Manitoba see further the *Legal Aid Handbook*, Canadian Centre for Justice Statistics, 1991 and for the terms of the Irish scheme see further the *Scheme of Civil Legal Aid and Advice*, as amended, (Dublin: Stationery Office, 1986) laid before both Houses of the Oireachtas in May 1986.

Legal aid services in Canada are operated at a provincial level. All plans provide for legal representation, advisory, referral and information services. Considerable variation exists between provinces[89] and this provides rich material for a comparative analysis of the relative effectiveness of the various types of legal aid delivery mechanisms in facilitating access to the courts for low income Canadians.[90] Constitutional considerations partly account for discrepancies in the protection offered by provincial legal aid schemes.[91] The absence of federal cost sharing funds for civil legal aid matters has generally resulted in less generous legal aid services for civil cases

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[89]For a detailed account of the development of legal aid services in Canada from the early initiatives of the Baron de Hirsh Institute in 1911 to the present day see D. Hoehne, *supra no.* 13. In 1922 the legal profession first discussed the feasibility of a Public Defender system in Canada, but, it was 1972 before a federal-provincial agreement detailed the conditions of Federal involvement in the provision of legal aid services. The Federal initiative established uniform standards across Canada and provided the provinces with the means necessary to meet those standards with respect to criminal legal aid, while civil legal aid was left within the jurisdiction of the provinces.

[90]There has never been a consistent treatment of legal aid matters by the Provinces. The *New Foundland Legal Aid Act* was proclaimed in 1976, Nova Scotia set up its legal aid on a non-statutory footing in 1971 and was finally placed on a statutory footing in 1977 following the recommendations of the Gunn Committee. New Brunswick's 1971 *Legal Aid Act* was only extended to encompass Civil cases in 1981 - see further, *Legal Aid Handbook*, Statistic Canada Justice Statistics 1992.

[91]In accordance with the provinces' responsibility for the administration of justice under s. 92(14) of the *British North America Act (1867)*, each province has its own legal aid programme. In criminal matters some uniformity has been achieved through federal/provincial cost sharing agreements for the delivery of legal services in criminal law matters pursuant to the federal governments responsibility for criminal law under s. 91(27) of the *B.N.A. Act*. For a more detailed account of the administration of the Quebec Legal Aid Plan see generally the *Legal Aid Handbook*, Canadian Centre for Justice Statistics 1992, and further, the 1991 Macdonald Report *supra no.* 14.

in most provinces.[92]

In Canada there are four basic delivery models for legal aid: judicare,[93] staff-lawyer,[94] clinics[95] and contracts.[96] There has been some discussion of the types of legal aid delivery mechanisms which best respond to the needs of the population, in light of cost considerations.[97]

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[92]In Québec the legal aid system is 99% financed by the two arms of government, federal and provincial. Government funding of legal aid is highest on Prince Edward Island where services are completely government funded and rates of contribution vary quite considerably overall down to a government contribution of 77% in Alberta - see further *Ressources et nombre de cas de l'aide juridique au Canada*, 1991-1992, Centre canadien de la Statistique juridique, tableau 1. In civil matters in Quebec the Federal Government pays 50% of the costs of those who are eligible under the regime d'assistance publique du Canada (RAPC). See further *Legal Aid in Quebec: A Question of Choice, A Question of Means*, Gouvernement du Quebec, Ministère de la Justice p. 11 and also, E. Lightman & M.J. Mossman, "Salary or Fee-for-Service in Delivering Legal Aid Services: Theory and Practice in Canada", (1984) 10 *Queen's Law Journal* 109, 119.

[93]The judicare model employs the services of private practitioners on a fee for service basis and clients receive services as if they were in the paying market. See further the *Discussion Paper on Delivery Models*, Canadian Bar Association (1989) p. 74.

[94]In the staff model, lawyers are employed directly on a salaried basis by the legal aid plan and they work from an identified fixed location. The staff delivery model encourages the development of fields of specialization within the centre in those areas of law which affect the eligible clientèle most.

[95]Based on a similar ideology to American style neighbourhood law offices, clinics are located in low income communities, serviced by staff lawyers and community legal workers. Most clinics concentrate on the distinctive needs of their community, a factor which facilitates a formulation of the particular needs of that community and as a result encourages activism in favour of law reform. See G. Singsen, "Legal Clinics and Access to Justice", Conference on Access to Justice in the 1990's, Tulane Law School, (Unpublished paper courtesy of the Macdonald Project archives).

[96]This delivery model is variant of the judicare system and it is generally used to service geographically remote areas. A Lawyer or group of lawyers are employed on contract negotiated terms with the Legal Aid Service - See the *Delivery Model Report supra no.* 93 at p. 8.

[97]Under the Québec mixed model, the client has the right to be represented by the lawyer of his or her choice. If a specific lawyer is not requested, the applicant normally receives the services of a staff

A narrow 'cost per case' orientation is evident at the federal-provincial negotiating table[98] where such issues as economies of scale[99] and specialization[100] are also

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lawyer. Private practitioners may be employed if the regional corporation lacks sufficient staff, the case requires specific competence or involves a conflict of interest. Choquette's (then Min. for Justice) intention was to combine the advantages of the English and Ontarian Systems with the advantage of increased specialization allowed by American type legal clinics - See Parliamentary Debates at the second reading of Bill No. 10., vendredi le 7 juillet 1972. Contrary to this official view is that of commentators that, in fact, the judicare aspect was introduced at the last minute to appease the barreau. These commentators, however, acknowledge that the existence of alternative methods of accessing legal aid creates a healthy degree of institutional competition optimizing the quality and cost effectiveness of the service. The ongoing tension between the staff members and the private practitioner is especially heightened by discussions of the Minister for Justice regarding reform of the Legal Aid Plan. Me Shea, a member of staff, spoke strongly in favour of the comparative cost effectiveness of the staff model at a workshop at McGill University on the *Economic Aspects of Access to Justice*, Access to Justice Conference (Canadian Foundation of Human Rights, June 17th 1993). Meanwhile the Québec Barreau set up a task force, whose principal mandate it is to convincingly argue the maintenance of a mixed system in Québec - see further (1993) 25 *Le Journal du Barreau* 1-2, 15 octobre 1993.

[98]The problem with the federal cost approach is the amount of uncertainty concerning the value to be attributed to cost per case comparisons. Without holding quality constant across the cases, cost differentials represent little more than disparity in the system as to the quality of the service provided. A failure to adjust variables to mirror differentials in operating expenses - see the 1986 *National Law Firm Survey* completed by the Canadian Bar Association, and uncertainty as to what constitutes a case for analytical purposes - see the CBA Delivery Models Report *supra no.* 92 at p. 55, suggests that these cost per case comparisons are fundamentally flawed.

[99]The *Delivery Model* Report showed that economies of scale result where services are delivered from firms with an excess of ten lawyers. They were able to show from their findings that in two areas i.e. family law and criminal law, only 5% and 2% respectively, of lawyers specializing in these areas were operating from firms with a number of lawyers in excess of ten.

[100]There can be no doubt but that specialization can save on costs and staff model in particular encourages such specialization. Three general factors influence the cost per case in the staff model - salary, work time and caseloads but, without considering the quality of the service however, it is impossible to judge cost efficiency. The Canadian Bar Association Discussion Paper reports at p. 71 on the increased number of cases being processed by the same and, in some cases less, staff.

considered. Legal Aid in Québec is today provided under a mixed judicare-staff lawyer model.[101] Most areas of law are included within the scope of the Québec plan.[102]

Organized movement for a civil legal aid scheme has a recent history in Ireland. There was no government scheme of civil legal aid or advice until 1980.[103] A voluntary, non-governmental organization, the Free Legal Advice Centres (FLAC), was founded by a group of post-graduate law students in 1969 and its original aims were to provide legal aid and advice to those who were unable to afford it and, by so doing, to prove the need for the introduction of a comprehensive civil legal aid scheme.[104]

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[101]Until 1971 legal aid was provided on a non-profit basis through an organization run by the Montréal Junior Bar. With the increase in demand for their services, however, the Legal Aid Bureau was unable to cope and eventually in 1972 the *Legal Aid Act* was passed and the Legal Services Commission was set up in 1973.

[102]The scope of the plan was duly commended by the Macdonald Task Force *supra no.* 14 and in a commentary by Jacques Frémont on the findings of the Task Force - "L'Accès à la Justice à l'Aube du XXIe Siècle au Québec", (1991) 11 *Windsor Yearbook of Access to Justice* 150. Only damage and interest reclamations and parking infractions are excluded from the the plan - See *L'Aide Juridique au Québec: une question de choix, une question de moyens*, Gouvernement du Quebec, Ministère de la Justice (1993) p. 6.

[103]Like the Canadian experience, there were, however, some individuals and organizations who provided advice and aid directly. Prior to 1980, the only arrangement under which legal aid could be provided at direct state expense was that introduced in relation to *habeas corpus* proceedings in 1967.

[104]In his account of the available services before the introduction of the 1980 interim scheme, Pringle writes that "the most important development as regards the provision of a civil legal aid and advise service in the State was the establishment of the Free Legal Advise Centres (FLAC)". See the *Pringle Report supra no.* 87, Report to the Minister of Justice 1979 at p. 31.

The FLAC campaign was already five years old when the *Pringle Committee* was established to examine the question of access to the law and to recommend the type of legal aid mechanisms that should be established.[105] Three years later, in 1977, what is popularly known as the *Pringle Report* was published.[106] Yet it was not until 1980, following the European Court of Human Rights decision in *Airey*, holding Ireland in breach of its obligations under the *European Convention on Human Rights*, that measures were finally taken to provide a minimal service.[107] The scheme that was implemented was in fact the interim scheme proposed by Pringle, referred to above.[108] The legal aid service operating between 1980 and September 1993 was provided entirely by staff solicitors employed by the Legal Aid Board, and the mixed system envisaged by Pringle did not materialize.

B.) Formal Inclusion and Exclusion

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[105]See further G. Whyte, "And Justice for Some" in *The Closed Door*, A FLAC Report on Civil Legal Aid Services in Ireland, 1987 at p. 11.

[106]The Report advocated the implementation of a comprehensive scheme of civil legal aid and advice which was to be administered by an independent Legal Aid Board appointed by the Government. The recommended scheme gave responsibility to the Legal Aid Board for educating the public as to its legal rights and the services of the Board were to be provided by both lawyers in private practice and lawyers in Community Law Centres.

[107]Mel Cousins and Gráinne O'Hara report the Irish Republic's jurisdiction to be the last to establish a civil legal aid service of the four jurisdictions surveyed in their 1992 Report, *Access to the Courts in Four European Countries*, at p. 56. (Other jurisdictions surveyed were Northern Ireland, France and The Netherlands)

[108]The present Scheme was introduced on an administrative basis in order to get it into operation with the least possible delay. See the Legal Aid Board, Annual Report 1987/88/89 at p. 17.

The Québec Plan has been subject to much attention in recent times. In 1991 the Task Force on Access to Justice completed its Report[109] and in 1992 a Justice Summit was organized in Québec City.[110] For many years, attention has focused intermittently on financial eligibility criteria under legal aid regulations.[111] Despite this emphasis the thresholds have not risen.[112] The administration of the financial eligibility provisions illustrates the power of certain structural features of legal aid delivery to facilitate discrimination in the manner in which legal aid is provided.[113] This 'operational discrimination' goes

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[109] *Jalons Pour Une Plus Grande Accessibilité à la Justice, supra no.* 14

[110] Les Actes du Sommet de la Justice, tenu à Québec du 17 au 21 février 1992. See also *La Justice: Une Responsibilité à partager*, le Ministère de la Justice, Gouvernment du Québec.

[111] The Macdonald Report, *supra no.* 14 recommended that the financial thresholds for eligibility for legal aid be risen to include all those eligible, under the original 1972 standards - Rec. 6. Jacques Frémont criticizes the Task Force's failure to address the issue of costs and the foreseeable effects of such an increase were their recommendations to be implemented - see J. Frémont, *supra no.* 102.

[112] See the 1990 Annual Report of the Legal Services Commission, 18e rapport annuel, 31 mars 1990 especially p. 197-198 *infra* and the 1989 Department of Justice report to the Treasury Department recommending a complete revision of the eligibility criteria. In August 1990 the Ministry for Justice recommended in a report to the Comité ministeriel permanent des affaires culturelles et sociales (COMPACS) that the eligibility criteria be increased to cover all those who were eligible at the time the Legal Aid Plan was introduced - See further *La Presse*, Montréal, Mercredi, 12 Decembre 1990 "Un Rapport recommende de hausser les seuils d'admissibilité à l'aide juridique", by N. Délisle.

[113] Financial eligibility thresholds are fixed by regulation - Règlement d'application de la Loi de l'Aide Juridique, A.C. 1798-73, (1973) 105 G.O. II, 2313 and the Charter applies to Regulations of a Provincial Government see Re McCutcheon (1983) 41 O.R. (2d) 652, 663 (Ont. H.C.). From Commission reports it is evident that the up-scaling of the financial threshold requirements has been a constant battle. In 1985 the *Commission* asked the responsible government bodies to raise the thresholds in accordance with the rate of inflation for the four

against the expressed tenets of the law itself.[114]

Under the terms of the 1972 *Québec Legal Aid Act* the *Commission des Services Juridiques* was mandated to ensure that legal aid is supplied to *economically disadvantaged* persons, identified in the Act as social aid beneficiaries and any person:

> qui n'a pas les moyens pécuniaires suffisants pour exércer un droit, obtenir un conseil juridique ou retenir des services d'un avocat ou d'un notaire sans se priver de moyens nécessaires de subsistence.

It is clear that the Act was never intended to benefit only those who are beneficiaries of social aid. It also included

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previous years, during which time the eligibility requirements had not been modified (34.5%). Amendments pursuant to Commission demands raised by some 7% eligibility cut-off points. Since this 1985 increase, the provincial government has failed to update the threshold requirements for legal aid for the economically disadvantaged. Of a total of 1,350 applications for legal aid refused and appealed in the year 1991-92, 896 were refused on economic grounds under Art. 2 of the Legal Aid Act and Art. 2 of modifying regulation (décret 1307-85, 26 June 1985). See further *20e* Rapport Annuel *1992 de la Commission des Services Juridiques* at p. 24.

[114]For the purposes of our equality analysis it is reasonably clear from a literal interpretation of the Act itself that its object is to provide legal aid to those who are unable to pay for legal services themselves. To prove that its failure to amend eligibility criteria negates the purpose of the Act requires an analysis of the socio-economic class of those who actually bring cases and receive legal services (with or without legal aid) and these statistics have not been compiled as yet. The Statistics Canada figures available are dated and scanty (See Legal Aid in Canada 1985, Statistics Canada Catalogue 85-216). What little empirical research that has been done suggests an over representation of commercial interests, and consumer type claims brought by professionals. See empirical evidence documented in Whelan,(ed.) *Small Claims Court - A Comparative Study* (Clarendon, Oxford 1990) which shows a preponderance of professionals and business related claims in the Small Claims Court. The results of a pilot study carried out by R.A. Macdonald in the Quebec Small Claims Court, where moral persons are disqualified under the Quebec Civil Code of Procedure from bringing Small Claims, shows that the majority of the courts users were white, male and professional.

those whose incomes fall below set limits.[115] It is arguable that as those on social aid are automatically eligible for legal aid, while those who are otherwise poor are subject to arbitrarily imposed limits, the Act is discriminatory on grounds of income and social condition.[116] The Act contributes to the multiple inaccessibilities confronting numerous poor people.[117] It forms a strand in the web that creates systemic inequality.

While provision is also made for these criteria to be waived at the discretion of the Commission by taking into account the person's available assets, his or her state of indebtedness, the nature of the case, or further if refusal would result in a grave injustice or cause irreparable harm,[118] it shall be seen that the existence of

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[115]Following an in-depth analysis of the governing regulations, however, the Committee decided that this jurisprudence was based on a mistaken interpretation of the law which explicitly creates two categories of eligible legal aid recipients who come within the term 'économiquement défavorisées'- those who are eligible by virtue of their receipt of social aid and those who do not have the real means to pay for such services themselves, without sacrificing something considered essential to their subsistence (at p. 2 *infra*, Décision No. 22353). The 1972 Act and the ensuing 1973 Regulation set the initial threshold levels, and from these levels it seems clear that it was intended that the eligibility levels for the working poor ought to be above levels of payment made under government assistance programmes.

[116]Eligibility criteria for legal aid have not changed since 1981 when the gross income limit for a single adult was set at 170$/week. In 1981 the minimum salary was 4.00$/hour in Québec or 160$/week. The same worker on today's minimum wage (5.55$/hour in Québec) working some 40hrs/week earns $220/week and is thus not eligible for legal aid according to the present scale.

[117]Not least it renders the job market more and more inaccessible for the poor.

[118]Règlement d'application de la Loi de l'Aide Juridique, A.C. 1798-73, (1973) 105 G.O. 11, 2313 - Art. 3 & Art. 4.

discretionary powers within the Commission does not necessarily negate structural bias.

The Québec Scheme has a far broader scope than the Irish, and all types of cases are potentially eligible.[119] As a result there are often controversial decisions where the Commission decides that the case in question does not necessitate legal expertise.[120] So many areas are effectively excluded from the Irish scheme, both expressly[121] and by reason of its operation,[122] that Whyte argues that the scheme is 'arbitrary or capricious' and consequently in breach of Art 40.1 of the Irish Constitution.[123] Pringle could find no logical basis on which to exclude any particular category of case, writing that "the merits of any case and the question of granting legal aid should be assessed, not by reference to the

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[119] Règlement sur les services couverts par l'aide juridique et sur les conditions de paiement des frais d'experts, (1983) 115 G.O. II, 2345

[120] See, for example, Décision No. 22626, 17/06/93

[121] G. Whyte identifies 16 different restrictions on legal aid in the Scheme itself. Among them are bills or debt collection for less than 150, defamation cases, disputes concerning land and conveyancing, matters coming before tribunals, class actions are excluded per se, as are test cases. The submissions of the Government in the Bray Travellers Case, Application No. 9596/81 to the European Commission, said that legal aid was available in challenges to the constitutionality of legislative provisions. This is welcome news in the light of a long-term policy to refuse legal aid for such cases.

[122] The Scheme is seriously underfunded and as early as 1980 the Board reported that it had received less than half the funds necessary to run even the limited service provided by the Scheme. See G. Whyte, "And Justice for Some", *The Closed Door*, at p. 13.

[123] See G. Whyte, "And Justice for Some", *supra no.* 122, at p. 17. He here relies on the Irish Supreme Court Decision of Dillane v. Ireland, [1980] ILRM 167, where the court held that for a discrimination to be constitutionally valid it must not be 'arbitrary or capricious'.

category to which it belongs, but by reference to the particular circumstances of the case".[124]

The purpose of the Legal Aid Scheme was to enable any person whose means were within the predetermined financial limits to obtain legal services, subject to certain criteria of 'reasonableness'. In 1992 these limits were fixed at IR£6,200 disposable income per annum.[125] However, the hidden reality behind these figures is that, "a great many people who are badly in need of legal services are being denied access to justice because of the Board's inadequate resources".[126] While people are theoretically eligible for legal aid, the service is unavailable.[127] Cousins and O'Hara

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[124]See *Pringle Report supra no.* 87 at p. 46. In reaching this conclusion Pringle referred to FLAC statistics for 1977 which suggested that a scheme which prioritized certain interests, for example family cases, would not cover the range of situations that poor people find themselves in. The truth of this observation has been borne out in the statistics of the Board which show that 96% of cases dealt with by the Board are family law cases while a FLAC figures dating from before the operation of the scheme show that family law cases formed 41% of their caseload.

[125]The figures compare favourably with Québécois figures and reflect an increase from IR£5,500 in 1991 - Part V of the Civil Legal Aid Scheme Financial Eligibilty. FLAC comments in its annual report that the waiting lists lengthened substantially during the year - See further *Equality Before the Law*, the 1992 Annual Report of the Free Legal Advice Centres, at p.8.

[126]See the 1987/88/89 Annual Report of the Legal Aid Board. See also the 1986 Annual Report where it is pointed out that reform of family law, though welcome, would have little impact absent an increase in funds to accordingly expand the legal aid service.

[127]On the recent evidence of the M.D. v. The Legal Aid Board (1991) 2 I.R. 43 one must incline to the view that the courts will almost invariably manipulate the letter of the law to give the desired result, the status quo reigns unchallenged. Consideration of M.D.'s application was deferred by the Board because of a backlog of claims arising from inadequate staffing. Due to this delay, the applicant issued proceedings seeking, *inter alia*, an order of mandamus directing the

deduce from this that, although the scope of the scheme is, in theory, quite broad, in practice it is extremely restrictive and, "there seems to be little political commitment to, or long term planning for legal aid". Therein lies the rub.

The 1992 *Commission for the Status of Women* reports that women constitute 75% of the Law Centres' clientèle.[128] The long waiting lists that characterize the slow moving operations of the Legal Aid Board impact most heavily, therefore, on women.[129] The Commission also noted the absence of any female on the 12 member Legal Aid Board. This in spite of a previous, Government approved,

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Board to consider and to decide upon her application, and various declarations that the actions of the respondents constituted a failure to vindicate her constitutional right of access to the courts. The Board argued that the State's failure to make sufficient funds available to operate the scheme gave rise to any failure by the Board claiming that the State could not delegate functions to the Board without providing the means for their discharge. The State parried that there had been no infringement of any constitutional rights, as such rights only related to the right to initiate proceedings and did not extend to the right to be state assisted in the defense of civil litigation. Gannon J. ruled that the existence of the legal aid scheme did not impose on the State the obligation to provide legal aid to any individual litigant, but did impose a duty to ensure that the scheme was administered fairly and fulfilled its purpose. He concluded that the Legal Aid Board had a public duty of performance which could be enforced at the instance of a person who comes within the financial criteria for eligibility but no order of mandamus was forthcoming as Gannon J. did not feel that the applicant's interests were prejudiced by the delay.

[128]See further the *Second Commission on the Status of Women*, Report to the Government, January 1993 at p. 50. This figure was drawn from the Legal Aid Board's own calculations.

[129]At one of the four Dublin law Centres, Tallaght, an urban disadvantaged community, where the population is predominantly unemployed or poorer working class, the waiting lists were such that in February 1992, it had become "unrealistic" to keep adding further names to the list and applicants were asked to come back a year later - See the Commission Report *supra no.* 128 at p. 50.

recommendation by the Commission that Government appointments to Boards should guarantee a minimal 40% representation from both sexes among the direct government nominees.[130] No less than four members were appointed during the 1992 period following this recommendation - all of them male.[131] This is indicative of the prevalence of old power structures within modern institutions, which in turn ensure that the preferred values of the old order maintain their legitimacy in the existing social order. Indeed, they are favoured by the system's apparent neutrality.[132] The power relations of the Legal Aid Board's infrastructure do not influence the particular formation of its queues. They are neutral in that they refuse everybody, regardless of sex or creed.

A further limitation of the Irish Scheme is that tribunal hearings are not within its mandate.[133] Hogan and

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[130]See the *First Statement of the Commission* (April, 1991).

[131]As the Commission hastens to point out in their Report, certifying and appeals committees of the Legal Aid Board are drawn from the members of that Board. "This means that exclusively male committees are taking decisions on largely female clientèle" - see the Report of the Commission *supra no.* 128 at p. 50. It is only fair to say that when government responsibility for legal aid was transferred in 1993 from the Department of Justice to the Department of Equality and Law Reform, the Justice Department's representative resigned to facilitate the appointment of an official from the new Department. The new Minister (Mervyn Taylor) appointed a woman to replace him in October 1993. In the Dáil on December 14th 1993 he said that he was determined to "achieve better representation for women on the Legal Aid Board". The ratio to be improved is 1:12.

[132]Little attention is paid to why it is that women of a certain class outnumber men, of that same class, in the waiting lists.

[133]See the submission of W.N. Osborough to the Pringle Committee where he pointed out that many "bread and butter issues as entitlements to

Morgan point out that the growth of tribunals in Ireland is "largely due to the failure of the legal system to respond in a flexible manner to new challenges".[134] New challenges are created by the liberalization of democracy, the growth of our bureaucratic society and the need to provide dispute resolution fora for those claims that are new to the legal system - like those of social welfare claimants and employment appeals. These issues are not of secondary importance, especially to those whose lives are affected by them, but they are 'marginal' or minority interests to the extent that they were not influential in the shaping of the court system as it exists today, nor are they influential in reforming that system.[135] Their marginalization therefore, results from the structural constraints that the law and legal processes place upon them, by refusing to recognize the alternative social reality that they represent, rather than the impact they have upon lives.

The *Irish Civil Legal Aid Scheme* makes no realistic

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occupational injuries (referring to Kiely v. the Minister for Social Welfare (No. 1), [1979] I.R., 21) are likely to concern the prospective customers of a legal aid scheme", quoted in the Pringle Report *supra no.* 87 at p. 49-50.

[134]See G. Hogan and D. Morgan, *Administrative Law in Ireland*, (2nd ed., London: Sweet and Maxwell, 1991) at p. 227. The Irish Social Welfare Tribunal, for example, was set up in 1982 under an amendment to the *Social Welfare (Consolidation) Act*, (1981) - ss. 310A and 301B. See the Social Welfare (Social Welfare Tribunal) Regulations 1982 (SI 309/1982) and Dáil Debates, 337 *Dáil Debates* 2611-42; 2883-929 (15th July 1982).

[135]The advantages of the tribunal system could be significant, that is if those people and their interests who appear before tribunals are not undermined by treating those interests as less worthy or less complex than those advanced in a court.

attempt to balance the scales of justice to counter the powerlessness that many feel when faced with the might and anonymity of the State's institutions.[136] Is the solution that the Government finally implement the Pringle Report and give us a Legal Aid Scheme on a statutory footing[137] - a scheme that takes responsibility for the education of the public as to their rights; makes legal aid available to those considered eligible in a timely fashion; recognizes the reality of the lives of those on social welfare or in dubious employment situations, those whose only contact with the law of the State will be at Tribunal level and in whose lives these hearings are of paramount importance? Is this all there is to ensuring 'equal justice'?

Bias in the formal structure of legal aid delivery supports the established order,[138] legitimating existing

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[136]The scheme is not publicized, it takes months to see a lawyer, the courts doubt the existence of a 'right' to legal aid in Irish law, as respect for this right has been imposed through European law.

[137]So that the court can no longer prevaricate as to whether there exists a 'right', in the legally recognized sense, to legal aid and in what circumstances.

[138]On institutional racism see generally the discussion in J. Cook & J. Clarke, "Racism and the Right" in *Reactions to the Right*, (ed., Barry Hindess: Routledge, 1989) where the authors treat of the growing acceptance that there are structural forces that are to be inferred from the policies and practices of a wide variety of institutions and that these forces need not be consciously and politically developed to constitute institutional practice. In fact studies show that conscious and unconscious racism serve to immobilise the institutional changes that some social service policies are trying to achieve - see B. Rooney, *Racism and Resistance to Change*, (Liverpool, 1987). Institutional bias is perhaps the term which best describes the same phenomenon in the wider context of social exclusion in general.

'maldistributions of wealth and power'.[139] Québec's delivery mechanisms resemble closely the ideal of Irish policy makers in their structural framework and scope, yet our analysis of the Québec system would suggest that much more is needed to fulfil promises of institutional and social equality.

II. Structural Violence: The Face of Disadvantage

In Canada statistical evidence shows that not all those below the poverty line are in receipt of government assistance.[140] Although there is a body of jurisprudence concerning discrimination against a sub-group within a group, it is especially difficult to prove discrimination as between those in receipt of social aid and the other "poor". Regulations governing social aid or, income security as it is now called, are complex and it is impossible to get an accurate profile of the user or calculate her income.[141] It

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[139]Mari Matsuda, "A Minority Critique of CLS: Looking to the Bottom", (1987) 22 *Harvard Civil Rights - Civil Liberties* 323, 327.

[140]Indeed according to Statistics Canada's (1991) *Report on Income Distributions by size in Canada* 12% of Canadian families are on or below the poverty line but 8.7% of all families on the poverty line are active in the labour force. If we consider the statistic that 38% of families on the poverty line are in receipt of transfer payments, it seems evident that quite a proportion of low income families living on the poverty line are employed and are not in receipt of welfare payments and therefore would not be eligible for legal aid under the current thresholds.

[141]Indeed this problem is used by The Justice Ministry to justify their reservations vis à vis the use of Statistic Canada's low-income thresholds to measure poverty - see *Legal Aid in Québec supra no.* 102, at p. 19. For a good introduction to the operation of Canada's social security programs see Frank McGilly, *An Introduction to Canada's Public Social Services: Understanding Income and Health Programs* (1990). For his interesting comments on the social control thesis and his critique

is also extremely difficult to verify Government statements that income security benefits are index linked with inflation rates. According to the 1991 Regulation on Income Security, the minimum annual income for a person living alone is $8,631,[142] compared to a legal aid cut off point for a single person of $8,840, but the figures do not take into account the impact of other benefits on this.

There was an 80% increase in expenditure per capita per income security program between 1973-85.[143] During the same period, the legal aid ceiling for those with low incomes who were not on social aid rose by only 20%. Since 1985, there has been no increase whatsoever in the ceiling for legal aid while there has been an approximately 30% increase in individual income security benefits paid.[144] Clearly the present situation is not one that was envisaged at the time of the introduction of the Act, and while it was clearly intended to cover various classes and degrees of low income,

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of social assistance and the working poor see p. 185 *ibid*,.

[142]See the Regulation Respecting Income Security R.S.Q., c. s- 3.1.1 O.C. 922 - 8, s. 93, 1991.

[143]Social Security, Statistics Canada and the Provinces 1963-64 until 1987-88. Increases reported in dollar terms were from $107.80 in '73 to $191.85 in '85. Inventory of Income Security Programs in Canada, July 1990, Statistics Canada.

[144]The specific benefits that I was able to isolate but, which I imagine are indicative of a global trend were Unemployment Insurance Benefits (raised from a maximum benefit of $276 to $384 per week) and the War Veterans Allowance (from $670/month to $835/month for a single person). Disability Benefits illustrated a similar increase. According to the Justice Department's research, legal aid eligibility has been raised by some 143% while aide social has risen by 444% in the same 20 year period since 1973 when legal aid was introduced, in keeping with Statistic Canada figures for the low income cut off point during that time.

this has been so eroded that there now exists a large gap between legal aid eligibility limits and Statistics Canada's Low Income Levels, emptying the Legal Aid Act of its original utility.[145]

The real effect of the failure to update eligibility criteria at the rate of inflation is to disqualify a category of persons who are economically disadvantaged.[146] Whereas workers earning a minimum wage were once eligible, this is no longer the case and existing eligibility criteria operate to exclude sub-groups of the poor, contributing to a systemic web of inequality which perpetuates existing frameworks of disadvantage.[147]

Discrimination against the poor as a social group has a different face in the Irish Legal Aid Scheme. With "one

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[145]Figures taken from Statistic Canada (Household Surveys Division) Catalogue 13-207, *Income Distributions by Size in Canada*. For an explanation of Statistics Canada's "low income cut off points" see the 1985 *Poverty Lines* by the Canada National Council of welfare. See also *L'Aide Juridique au Quebec: supra no.* 102 at p. 20 where figures in Table 8 show that in some instances eligibility for legal aid is as much as 58% below the low income level.

[146]An apparent anomaly arises when one considers that there has been a 60% increase in federal funding to the Quebec Civil Legal Aid Plan since 1985, which corresponds with a 12% increase in the number of cases taken between these years. According to Statistics Canada, legal aid expenditure has only dropped below the rate of inflation once since 1981, in the fiscal year 1984-85, so why are so many less people eligible now than 10 years ago? It has been suggested that the absolute number of welfare recipients may have increased sufficiently to explain an increase in the absolute number of claimants. Furthermore, the impact of federal funds for refugees might weight calculations differently.

[147]See generally John Harp and J. R. Hofley (eds.) *Structured Inequality in Canada*, (Scarborough, 1980)

million poor"[148] amongst a population of just three and a half million, a large proportion of the Irish population remain eligible under the restrictive financial criteria of the scheme.[149] Further analysis of the dynamics of legal aid provision in Québec highlights the extent to which new structures of legal aid echo old biases. There is an identifiable link between patterns of bias and those evident from a statistical profile of the claimants who form the rank and file of the Irish queues - women and the poor.

In Québec the economic thresholds of the *Legal Aid Act* appear 'neutral', they apply to everyone regardless of their identity. They have, however, an adverse impact upon particular groups of poor people. There is a marked correlation between poverty and characteristics such as sex, age, and family status - classic grounds for discrimination which liberal constitutionalism supposedly spurns. As poverty is a social condition that predominantly affects certain people,[150] any disadvantage imposed by economic classifications impacts most heavily upon sub-groups of the

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[148]See Sr. Stanisclaus Kennedy, *One Million Poor; The Challenge of Irish Inequality* (Dublin: Turoe Press, 1981).

[149]In 1987, 143 people were refused legal aid for reasons of financial ineligibility, in 1988 this figure fell to 111 and in 1989 only 79 refusals were on grounds of financial ineligibility (p. 73, p.76 and p. 80). Thus, while financial ineligibility seems to be an important feature of a refusal of legal aid under the Québécois scheme, this is clearly not the case in Ireland.

[150]The 1991 Statistics Canada Report on *Income Distribution by Size in Canada*, paints a comprehensive picture of those on and below the poverty line.

poor population - women, the very young, the old and single parents.[151] This does not negate the fact that poverty, in itself, forms an independent ground for discrimination, but it does serve to highlight important considerations when addressing this issue.

Canadian statistics relating to family status, sex and age reveal the true face of exclusionary criteria for legal aid. In 1981, 13.4% of lone parent families were classified as low income families. In 1991, this figure had risen to an astounding 54.3%. Yet only 14% of all Canadian households were single parent families.[152] An examination of those head lone parent families gives greater cause for concern. Given the preponderance of female heads of lone parent families,[153] the fact that 58% of lone parent families headed by women are low income families as compared with 23% of those headed by males, the inescapable conclusion is that women are the principal victims of any

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[151]See Brooks v. Canada Safeway, [1987] 1 S.C.R. 1219.

[152]In *L'Aide Juridique au Quebec: supra no.* 102, at p. 18, it is pointed out that the eligibility criteria have known the greatest increase since 1973 in the case of lone parent families with one child, this does not suffice to redress the discriminatory impact of the law. Figures in the Republic show that in Ireland households headed by single lone parents have the lowest per capita equivalent incomes of all household types in Ireland have a higher than average risk of poverty - See further, J. Millar, S. Leeper, C. Davies, *Lone Parents, Poverty and Public Policy in Ireland*, (Combat Poverty Agency, 1992) at p. xii - xiii.

[153]CNBES figures paint an even more dismal picture. According to them 90% of single parent families headed by women are poor, while only 3% of those headed by men are. See further L. Saint-Jean, "La Paurété des Femmes: La Monoparentalité Feminine", Gauthier, *ed.*, *Les Nouveaux Visages de la Paurété* (Institut Quebecois de la Recherche sur la Culture: coll. Questions de Culture, 1987) 19.

legislation that imposes an arbitrary threshold as to eligibility on grounds of income.[154]

Another worrisome factor is the recent growth in the number of women aged 55-64 living on their own who are also economically disadvantaged. Approximately one half of all women aged 55-64 living on their own had low incomes according to 1985 figures.[155] This is partly explained by their low participation in the labour force, their concentrations in low paying service and clerical positions, as well as by chronic gender and age discrimination. Thus women are the victims of systemic discrimination on a combination of listed and constitutionally recognised grounds, age and sex, and analogous grounds, including historical disadvantage[156] and family status.[157]

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[154]For these statistics to be determinative of adverse discrimination on grounds of sex under the (1972) *Québec Legal Aid Act*, it would, of course, be necessary to show that a sufficient number of these lone parent families headed by females were not in receipt of government transfer payments. Given the fact that 44% of lone parent families are headed by wage earners it would seem to be a safe presumption that women are among the majority of those bearing the burden of poverty as working mothers, excluded from the scope of the 1972 Law. See further M. Gunderson et al, *Women, Women and Labour Market Poverty*, (Ottawa, 1990) at p. 19.

[155]Statistics Canada, 1986 Public Use Microdata File, relied upon in "Falling Through the Cracks: Women Aged 55-64 Living on Their Own", (1991 - Winter) *Canadian Social Trends* 16.

[156]The result of predominant norms earlier in this century.

[157]Many divorced women in this age bracket may have gone through divorce at a time when they were financially disadvantaged by divorce settlements, while recently separated women are often even further economically disadvantaged as they do not have the same level of access to family assets and savings.

Since 1980 an elderly person living alone, whose only income is the old age pension, is no longer eligible for legal aid. Yet the elderly are commonly recognized as among the most vulnerable in our society. Old Age Pensioners are essentially excluded from the system by the fact that they are over 65. Although poverty among Canada's elderly has been greatly alleviated in recent years by the introduction of comprehensive pension schemes, their powerlessness leaves them vulnerable to systemic injustices. This is disturbing when one considers that senior citizens are among the fastest growing demographic groups in Canada.[158] Over 65's are not a homogeneous group - women outnumber men and this ratio increases with age.[159] The incomes of less than one in four unattached senior men (23%) and more than three out of ten (34%) senior women fell below the low income cut off in 1991. These proportions were down from 39% and 52%, respectively in 1983.[160]

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[158]According to OECD Statistics (Organization for Economic Cooperation and Development) most industrialized countries are undergoing demographic shifts similar to Canada's - *Aging Populations: The Social Policy Implications*, 1988.

[159]See Pierre Gauthier, "Canada's Seniors", (1991 - Autumn) *Canadian Social Trends* 16.

[160]Statistic Canada's demarcation of low income is not universally accepted but is the most generally accepted. By way of contrast it is interesting to note that le Conseil National du Bien-Etre Social (CNBES) in *Progres de la Lutte contre la pauvrété*, (octobre 1986), p.7 published statistics to the effect that 70% of the elderly poor are women and 82.7% of the elderly living alone are women. It is also pertinent to note that eligibility for legal aid is calculated according to family income including co-habitation for varying periods of time. Nevertheless, there is no obligation on the putative "spouse" to assume legal fees.

A court faced with a challenge to the Québec Legal Aid Act based on equality grounds may consider whether the Act is directly discriminatory in its treatment of the poor. It may further ask which sub-groups within the low income group are effected by the arbitrary distinction in the Act and whether these effects are discriminatory.[161]

Another aspect of legal aid in Québec worth underlining, given our thesis that legal aid operates to reinforce the legitimacy of the legal system, is the structure of the delivery mechanism itself. In Ireland the legal aid scheme remains on a non-statutory footing and is directly answerable to a government department for every penny it spends.[162] Furthermore, although the Scheme allows

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[161]There are precedents for the challenge of legal aid provisions by interest groups. An example of this is the *Elizabeth Fry Society of Saskatchewan* which launched a case against the Saskatchewan legal Aid Commission regarding the minimum fee for legal aid that people in the province were forced to pay Elizabeth Fry Society of Saskatchewan Inc. v. The Saskatchewan Legal Aid Commission (1988), unreported (Sask C.A.) cited by Bogart, "The Opening Door: Standing and the Utility of Litigation", a paper prepared for the second national meeting of *Equality-Seeking Groups* and the *Court Challenges Program*, October 1989.

[162]Consecutive governments have promised that legal aid would be placed on a statutory footing "in the near future". FLAC reports that there were three such promises in 1992 (February, March and June). In 1993 we see the Minister for Equality and Law Reform, Mr. Mervyn Taylor, reiterating this promise, replying to a parliamentary question by Eamon Gilmore on Nov. 3rd and again in a news release on November 8th. His Department make assurances that it is indeed "true this time" (during telephone interrogation. My thanks to Máirtín de Búrca, Official responsible for legal Aid with the Department of Equality and Law Reform, Dublin, for his helpful co-operation and interest) - only time will tell. The fact that the scheme remains an administrative one poses problems as regards interpretation of provisions, and the scope and purpose of the scheme - See Sen. Mary Robinson, "The Strasbourg Connection", in *The Closed Door*, *supra no.* 122 at p. 27, 28.

the Board to employ its own staff, in practice decisions regarding the selection of staff to fill administrative posts are taken primarily by the governing Departments.[163]

The Québec Commission argues that legal aid services are independent of political influence because lawyers in the regional and local centres have no links with the State that pays them.[164] The Commission simply acts as an administrative middleman.[165] This view does not take proper account of the type of people who administer these services and the extent to which, as tax-payers and law-makers themselves, they have a vested interest in the system. Nor does it address the fact that Commission members, purportedly neutral middlemen, are government appointees. As Whyte points out in the Irish context, there is very little chance that the Board will, "be permitted to engage in activities which will embarrass the Government".[166]

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[163]See the Foreword of the Chairman of the Legal Aid Board, Vincent Landy S.C. to the 1987/88/89 Annual Report p. 3. Members of the Irish Board are Government appointees and there is a heavy representation on the Board of civil servants and lawyers.

[164]That the independence of the Commission and its servants may be more apparent than real is evidenced by changes made to the original plan in 1982. Until 1982 the Commission itself held the power to determine the financial eligibility points under Art. 80 of the Loi sur l'aide juridique and they had adopted an indexation formula. A new Regulation in 1983 (Règlement sur l'admissibilité a l'Aide Juridique) introduced a principle of automatic indexation, controlled by the Government, who has not chosen to exercise its power since 1985.

[165]See *L'Aide Juridique au Québec: supra no.* 102 at p. 7, "L'un des objectifs recherchés par ce type de structure est notamment d'empêcher que les salariés du réseau ne soient placés dans une position ou ils devraient défendre les intérêts de leurs clients contre l'État qui, par ailleurs, les rétribue directement".

[166]See Whyte "And Justice for Some", *supra no.* 122 at p. 12. Whyte

In discriminating between different classes of the poor and by consistently using language like 'the undeserving poor', the 'culture of poverty' and the 'lower class', élite groups in society have been able to attribute a moral status to the economically disadvantaged. These moral assessments have nearly always overlain pragmatic distinctions.[167] In the discourse about poverty little is said about politics, power and equality. Yet poverty in modern society often results, not from scarcity and need, but because some people receive less than others. Inequalities result from the way power is exercised, and the politics of distribution that characterize capitalist society.[168] Within existing frameworks for the treatment of poverty legal aid is seen as a 'benefit' rather than an 'entitlement' and this institutional evaluation impacts upon a perception of legal aid and its potential uses.[169] Legal

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compares the situation with that in the U.S. where the Federal Government provides finance but otherwise has little to do with the operation of its neighbourhood law centres.

[167]See Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare*, (New York: Pantheon Books, 1987) *infra* p. 10.

[168]Figures quoted by G. Whyte in "Law And Poverty", *Law and Social Policy*, (*ed.*, W. Duncan Dublin: Dublin University Law Journal, 1987) at p. 90 to the effect that in 1980 the top 10% of households received 30% of direct income and this exceeds the share accruing to the bottom 60% of households.

[169]As Wilson J. points out in *Singh*, the dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the Canadian Bill of Rights - see Martland J. in Mitchell v. the Queen, [1976] 2 S.C.R. 570. Wilson J. adopted an approach resembling that of Brennan J. in the Goldberg v. Kelly, 397 U.S. 254 (1970) where he rejects the traditional argument that public assistance benefits are a 'privilege' and not a 'right'.

aid is structurally incapable of providing a meaningful access to justice because the standards and criteria it uses dictate that justice is available only in a particular form, for an eligible category, to certain people - thus justice is set and predetermined and existing social injustices are protected because they are not perceived as being injustices at all.

Chapter 3 Bureaucratic Structure and Social Control

"It seems to me that the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power."

M. Foucault[170]

Even should legal aid operate within a structural framework which neither limits the areas of law that are justiciable nor imposes arbitrary grounds for eligibility, legal aid would still fail to alleviate the access to justice problem in a society that makes legal aid an instrument of the law, subject to an existing legal system which is blind to injustice. The manner in which legal aid is administered facilitates its subjugation to existing dominant social values.

I. State Bureaucracy - Controlling Knowledge

While decrying the anonymous and dehumanizing power of bureaucracies, Weber was also the first to note their impending supremacy. Bureaucracies 1) are a form of controlling knowledge, 2) they orchestrate and co-ordinate work processes, and 3) they structure social interaction. Efficiency and profit are the major criteria by which capitalist bureaucracies are judged.[171] Bureaucratic

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[170]From "Human Nature: Justice versus Power", *Reflexive Water: The Basic Concepts of Mankind*, ed. Fon Elders (London, 1974)

[171]See M.J. Deegan, *American Ritual Dramas: Social Rules and Cultural*

decisions are both anonymous and protected by institutional complexity and inaccessibility. For this reason, bureaucratic decision-making has a veneer of finality that legitimates the social order it controls and limits our ability to envision alternative participatory forms of social organization.[172]

Legal centralism, the view that all law emanates from one central source, that source being the State, not only disregards the other important normative forces in our lives, but is becoming the constructed reality of our time. On an ever-increasing scale, the state intervenes in every area of our lives and the public/private distinction seems arbitrary and nonsensical.[173] Legal aid programmes take

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Meanings, "A Theory of American Drama and Ritual" (Greenwood Press, 1989) at p. 23. As Katz puts it "considerations of productivity, cost and eligibility have channeled discourse about need, entitlement, and justice within narrow limits bounded by the market" - See Katz, *supra no.* 167 at p. 3.

[172]The tendency in bureaucracies is to follow unwritten codes of conduct, or internal and private guidelines, which codes or guidelines reflect the interests of the bureaucracy. See Frug G., "The Ideology of Bureaucracy in American Law", (1984) 97 *Harvard University Law Rev.* 1276 - he notes *infra* at p. 1292 that rules can generate practically any result in a given situation.

[173]Furthermore, this division is conveniently manipulated to protect certain dominant interests - see H. W. Arthurs *supra no.* 2 at p. 2-8. This point was brought strongly home to us in Ireland in January, 1994 when the Irish Supreme Court ruled that the *Matrimonial Home Protection Bill* was unconstitutional, not because it was an undue infringement of property rights, the ground on which it was referred for interpretation, but because it undermined the autonomy of decision making within the marriage - see D. Gwynn Morgan, *Irish Times*, January 25th, 1994. It is ironic that the autonomy of the family unit is asserted when it is in the interests of maintaining a certain power distribution in society, while it is easily circumvented in other instances. Traditional liberal theory stops short of applying its principles within the basic social unit, the family (see for example Rawls) and this means that liberal

their place at this historical conjunction of State and bureaucratic power. Their internal operations are subject to the same decision-making processes that reign throughout the administrative system. They construct social realities through a manipulation of the discretionary scope and the rules of legal aid.[174]

A.) Discretion

For those who are dependant on legal aid for legal representation, the term 'discretion' takes on a special significance. Much depends on how legal aid is conceptualized and the personal ideology of the administrative officer. Whether the agent sees legal aid as an act of public largesse, charity, an entitlement, or a fundamental right, contributes to his/her decisions and attitudes.

The value of discretion is its humanizing influence, the human ability to consider different factors and weigh

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theories cannot address the discriminations and distinctions which affect people at their most vulnerable, thus forming the basis of further discrimination in the public sphere.

[174]See L. Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy*, (New Haven, Conn.: Yale University Press, 1990) where he describes three paradigms of agency decision making: adjudicatory fairness, scientific expertise and politics. Edley's politics paradigm focuses on the process of seeking compromises among different societal interests and groups in the course of a comprehensive regulatory decision making, *infra* p. 14-15. See also Gronbjerg, Street and Shuttles, *Poverty and Social Change* (University of Chicago Press, 1978) especially 'The Societal Creation of Poverty' p. 72 *infra* and 'The Bureaucratization of Inequality' at p. 134-145.

them accordingly in reaching a decision. Davis defined discretion as a situation in which the effective limits on an official's power leave him free to make a choice among possible courses of action or inaction.[175] Society is structured in such a way however, that, by endorsing administrative discretion, we are, in fact, endorsing a specific kind of human judgement, predetermined by the system itself and the socialization of its actors.[176] Yet it is not in limiting this discretion that we can make the system more just. Instead we need to influence human judgement and those who exercise discretion to use it in a different way.

B.) Formalization of Administrative Procedure / Rules that Alienate

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[175] K. C. Davis, *Discretionary Justice*, (Baton Rouge, 1969) p. 4.

[176] In Western society the dominant culture is undeniably that of the white, heterosexual, middle class, male and within given societies the tendency is towards unilingualism and certain dominant religious beliefs (Judeo-Christianism). These are all human attributes that may have discriminatory impact if the values, or lack thereof, that they endorse are supposed to be universal. Relativists tend to acknowledge that all cultures aspire towards universality - Bill Bowring, "Can Human Rights fill the Gap?", (1993) *The Socialist Lawyer*, p. 7 - 8, particularly his reference to the work of De Sousa Santos. See also R. West, "Relativism, Objectivity, and Law" (1990) 99 *Yale Law Journal* 1473 (book review of B. Herrnstein Smith, *Contingencies of Value: Alternative Perspectives for Critical Theory*, (Cambridge: Harvard University Press, 1988)). Objectivism is described by West as a way that stronger members of society maintain their position. "Objectivism masks both the necessity of their power for the general acceptance of their claims of truth...transforms social hierarchy and inequalities of power into descriptions of the external world", *infra* at p. 1474.

It is important to consider the implications of less formal institutions for existing power structures, whether the solution is to dejudicialize increasingly formalistic structures of state agency or, conversely, to extend judicial protections to the administrative order.[177] Given our use of the language of the law, with its extensive ability to declare unreasonable or irrational, or to legitimate the use of force by making it seem normal and necessary, it is debatable whether legal structures allow the detachment of 'the power of truth from the forms of hegemony, social, economic and cultural within which it operates at the present time'.[178] The law, itself an expression of the *status quo*, is ill-equipped to reform our prejudice it is true,[179] but to the extent that centralist law can be seen as the ability of power to authenticate its privileged position, then it is also true that all normative

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[177]Roderick A. Macdonald, "Whose Access? Which Justice", (1992) 7 *Canadian Journal of Law and Society*, 175-184 (book review). Macdonald advances an attractive argument for the creation of an alternative structure with 'concurrent jurisdiction' and the taking of such measures as the reversal of the onus of proof. See also J. Webber, "The Adjudication of Contested Social Values: Implications of Attitudinal bias for the Appointment of Judges", Ontario Law Reform Commission, ed., *Appointing Judges: Philosophy, Politics and Practice* (1991)

[178]From Foucault, "Truth and Power", Power/Knowledge: Selected Interviews and Other Writings 1972-1977 (ed. Gordon; N.Y. Pantheon) *supra no.* 76.

[179]It is not easy to legislate against the biased attitudes of the clerks of state officials. See the observations of research assistants working on Prof. R.A. Macdonald's ongoing Access to Justice Project, examining questions of legal pluralism and internormativity in the Montréal Small Claims Court during the Summer of 1993. Researchers witnessed overtly racist treatment of claimants of non-Canadian nationality and the sometimes openly hostile attitude of certain technicians in their treatment of language difficulties.

forces are an expression of some form of power. Power, no matter how we organise our social structures, will always exist to protect its preferred social order and it is more important that we target the manner in which power is exercised, and not necessarily the institutional vehicles of that exercise.

Administrative rules and regulations lend legitimacy to the exercise of administrative discretion, providing a semblance of pre-determinability and certainty and thus bringing the law into the administrative order.[180] The effect of this increased formalization is to "alienate the worker from the purposes of the norm she enforces."[181] There are several versions of this alienation; 1.) the worker is unaware of the purpose underlying the norm she enforces; 2.) the worker feels bound to apply the norms in spite of their purposes; 3.) the person seeking a response from the system is alienated from political participation through the social institutions.

A refused legal aid applicant is doubly disempowered by

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[180]As Unger explains, this is because the dominant/majority vision of society is derived from a style of sociological jurisprudence that proceeds by linking certain fundamental characteristics of modern society, efficiency, freedom, and fairness, with a particular type of legality and in turn with a particular type of enforcement mechanism, bureaucratic organization. See R. Unger, *Law in Modern Society: Towards a Criticism of Social Theory*, 23-37, 262-65 (New York: Free Press, 1976) and discussion thereof in W. H. Simon, "Legality, Bureaucracy, and Class in the Welfare System", (1983) 92 *Yale Law Journal* 1198, 1222 *et seq.*

[181]Simon, *supra no.* 180 at p. 1204.

the decision making process within the legal aid system. By refusing to acknowledge the validity of their claim, the system seems not only to reject them, but also what they stand for. Not only is it therefore unlikely that the claimant in such a position will pursue the claim, but they will be further isolated from 'official' justice and less inclined to participate in a social fabric dominated by these state institutions.[182] Thus it is that the very people who are denied access to the courts are those who might best present an alternative view of justice. It is likely that legal aid contributes to social injustice in this way by making it even more unlikely that the alienated actor will become involved in other participatory social structures,

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[182]It is important to emphasize that those isolated from the system are perfectly aware of that isolation and will not accept the reasoning of state officials at face value. Studies carried out by Prof. Macdonald in the Montréal Small Claims Court show that knowledge of legal rights does not diminish with the level of education, income, or sex of the claimant. His study shows that those with simply a high school diploma were slightly more apt at correctly identifying the nature of their legal problem than those with some university education who had not completed a degree as there was respectively a 71% and a 59% success rate between these categories. Research revealed, however, that there was a difference in attitude depending on the social position of the claimant. This is evident in the figures published concerning the use of the mediation services offered in the Quebec Small Claims Court. It was found that among those who reported an intention to request mediation services, persons with lower education and income were more inclined to use the mediation services. Those persons who had pursued studies to the CEGEP level or had less education than a CEGEP diploma were more likely to request mediation services. So too were most persons who had a family income of less than $45,000 per year. Where respondents had some university education or earned $45,000 per year or more, they were more likely to report that they did not intend to request mediation services. The results suggest that it may not be that those with lesser education or income are less aware of their legal entitlements as much as it suggests that they may either lack confidence in the judicial system or their own abilities to appear before a judge, or perhaps they have a more relational understanding of themselves and others.

which might bring about an evolution in the social order.[183]

Even should we want to remove value judgements from the system by introducing stricter norms,[184] we would nevertheless be unable to remove discretion from the process. Discretion is inevitable - every rule presupposes some discretion in its application. Paradoxically, the more rules we promulgate, the less likely they are to be adhered to and civil servants will prefer to follow instead, "a de facto code of discretionary conduct".[185]

Legal decision makers are in fact largely unconstrained by forces external to their own decision making

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[183]See furtner Elizabeth M. Iglesias, "Structures of Subordination: Women of Colour at the Intersection of Title VII and the NLRA. NOT!", (1993) 28 *Harvard Civil Rights and Civil Liberties Law Rev.* 395 where she speaks of 'structural violence' to describe the relationship between law and the social reality of subordination. Iglesias invokes 'structural violence' to examine how legal interpretation constructs institutional power and how the organization of institutional power obstructs our liberation of the relations of oppression that are constituted through the socially constructed categories of race or violence. She writes at p. 398 that "the concept of structural violence locates the problem in the relationship between the practices of legal interpretation, on the one hand and the aspiration towards objective justice on the other".

[184]On formality and the distinction between rules and standards see D. Kennedy, "Form and Substance in Private Law Adjudication", (1976) 89 *Harvard Law Rev.* 1685. This trend towards formalization is manifest in the fact that "statutes and regulations have become more voluminous and detailed and have been supplemented by still more voluminous instruction manuals that attempt to explicate them" - Simon, *supra no.* 180, at p. 1201. The Macdonald Report, *supra no.* 14 recommended that the government take the necessary measures to insure the uniform application of the admissibility criteria - *infra* p. 94-96. In 1989-90, 9% of all those cases accepted would not have been eligible under a strict policy of adherence to the threshold limits.

[185]des Rosiers and Feldthusen, "Discretion in Social Assistance Legislation", (1992) 8 *Journal of Law and Social Policy* 204, 207.

preferences.[186] The legal realist sees a rule not as a constraint, but as a means of masking 'particularistic decision-making'.[187] Sometimes the application of certain administrative laws is evidently arbitrary and non-neutral, but more often it is indiscriminate and the rules are not contextually informed or appropriate. Indeed, often, it is not even the content of the rule, but rather the personal manner adopted by the administrator that alienates users and further marginalises them. For this reason our focus in this chapter is on administrative agencies, namely immigration and social welfare authorities, and the manner in which state provision of legal aid impacts upon the unequal power relations evident in these fields.

(C) The Example of the Regulation on Eligibility for Legal Aid in Québec

Eligibility for legal Aid in Québec is governed by Regulation. Further to the discretion to waive the financial eligibility criteria, or to take into account other considerations pursuant to the Art. 3 and 4 of the *Reglement sur l'Admissibilité a l'aide juridique*, there also exists discretion in the evaluation of the 'vraisemblance

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[186]See generally J. Frank, *Law and the Modern Mind* (London: Stevens, 1949) and K. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceanon, 1981).

[187]See further F. Schauer, *Playing by the Rules: A Philosophical Discussion of Rule Based Decision Making in Law and in Life* (Oxford: Clarendon Press, 1991) at p. 168 *et seq.* esp. p. 192 *infra*.

d'un droit',[188] the nature of the service and, on occasion, the need for a legal service.[189]

A 1981 opinion[190] detailed the possible interpretations, using traditional canons of interpretation, that could be attributed to Art.3 of the Regulation governing eligibility for legal aid. Art. 3 sets out the criteria which go to determining eligibility for legal aid.[191] According to a literal interpretation of the article, an applicant had to be eligible under the set

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[188]"Une personne économiquement défavorisee doit, pour récévoir cette aide établir la vraisemblance d'un droit ou, selon le cas, le besoin d'un service juridique" - Art. 4 de la loi sur l'aide juridique, 1973.

[189]Lemieux's advisory opinion on the interpretation of the Regulation confirmed that the terms of the law itself gave a discretion to the deciding authorities in Art. 2 and Art 80. See L. Lemieux, *Opinion Pour le Verificateur general*, Québec, 21 avril 1976, p. 2. Eligibility for legal aid is determined, under the Regulation, with reference to personal assets, debts owing, living expenses, the nature of the services requested, the specific factors and circumstances of the case in light of the possible consequences of the case for the applicant.

[190]See A. G. Brodeur, *Opinion pour la Commission Des Services Juridiques*, le 30 septembre 1981.

[191]The 1981 opinion relied on a number of different interpretative approaches - the historical approach, the more global rules of interpretation i.e. the Mischief and the Golden Rules, the Interpretation Law, the context and, finally, the practice of the Commission. The practice of the Commission proved especially convincing, supporting the conclusion that unwritten codes of practice can be as normative as legislatively promulgated law, while enjoying none of the safeguards of public accountability. Des Rosiers and Feldthusen write that deviation from written rules, as we see in the Commission's failure to adhere rigidly to the eligibility criteria, is deliberate and reflects the interests of the bureaucracy itself and that of individual bureaucrats, *supra no.* 185 at p. 221-222. Rules of statutory interpretation have evolved within the liberal framework to create an image of determinable law and judicial neutrality. See R. Cross, *Statutory Interpretation* (London, 1987); F. Bennion, *Bennion on Statute Law* (Longman, 1990). Bennion argues that rules of statutory interpretation are incorporated at the legislative level by the drafter, who subsequently legislates in accordance with his knowledge of these judicially recognized interpretative norms.

financial criteria of the regulation detailed in Art. 3.14.1, and any of the conditions listed in Art. 3.14.3, could render the applicant ineligible. The jurisprudence of the Commission and the existence of discretionary powers in the law, led Brodeur to comment

> **De ce qui précède, on peut déduire que l'aide juridique a pu être accordée à des personnes qui dépassent les seuls barêmes financiers de l'aide juridique et qu'elle a aussi été refusée à des personnes qui avaient des revenus hebdomadaires en dessous des seuls barêmes d'aide juridique.**[192]

Brodeur thus showed the extent of the powers vested in individual members of the Legal Services Commission in deciding whether to attribute legal aid or not. While this discretion facilitates the administrator's refusal of a case which he judges without sufficient merit, it is not so illustrative of the manner in which legal aid maintains the established order as the discretion accorded under the vraisemblance du droit grounds of the Legal Aid Act.

Four types of cases are refused on vraisemblance du droit (appearance of law) grounds by Legal aid lawyers:[193] 1.) cases which are *prima facie* not justiciable; 2.) Appeal cases where legal aid may only be granted if there is a question of law and not if the question is one of fact; 3.)

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[192] *infra* at p. 18.

[193] My thanks to Prof. Katherine Lippel, Université de Québec à Montréal and ex-member of the Comité d'Appel, for her insightful comments concerning this part of my research and for her valuable time.

Cases where a refusal to grant legal aid at first instance (i.e. before appeal) was motivated by the legal aid lawyer's judgement of the facts, even though these facts should be judged by the Tribunal in question and not by the legal aid lawyer; 4.) Test case type requests for legal aid where the objective is to change the law. For our present purposes we are interested in the last two, as they are more likely to impede cases which challenge the existing social order.[194]

A large number of cases are refused because the lawyer making the determination does not see the case as meriting the expenditure of the tax payer's money.[195] Value judgments are very difficult to analyse from the files given the

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[194]Empirically it is very difficult to gauge just how arbitrarily this discretion is used. A major obstacle in the context of legal aid is that an enormous number of cases are refused on economic grounds. Often legal aid lawyers refuse to use their limited discretion to grant legal aid when the applicant does not fall under the limit. See for example three decisions of the Appeals Committee of the 5th of May 1993. 1.) Décision No. 22382, a claim to appeal a decision of the *Commission de la Santé et de la Securité du travail du Québec* refusing her on grounds of financial eligibility even though she was only barely beyond the $245 / week limit allowed under the financial threshold. The Legal Aid Centre did not elect to use the discretion it had under Art. 3 of the Regulation governing admissibility, preferring to fetter this discretion by adopting the set threshold as a rule of thumb. 2.) In Décision no. 22383 the applicant was refused legal aid in a Convention refugee case by the Legal Aid Centre, where the claimant's income exceeded marginally the $170 / week provided for under the programme for a single person without dependents. 3.) Likewise, in a third consecutive decision, Décision no. 22384, appealed to the Revision Committee, the divorced mother of two sought legal aid to help her claim an increase in her maintenance allowance and was refused by the Legal Aid Centre because her income barely exceeded the permitted $230 / week. In each of these appeals the Revision Committee overruled the Legal aid Centre's decision and through its application of Art. 3 authorized legal aid certificates in each of them.

[195]This attitude permeates the entire social welfare system - See "Vivre Selon Nos Moyens", *L'aide Juridique: supra no.* 102 at p. 51.

number of refusals each year. Reading behind the lines to see why legal aid was refused is not a very scientific exercise.[196] Changing politics within the Legal Aid Services themselves complicates the process.[197]

II. Decision Making and Legal Aid in Action

The politics of the Québec Commission of Legal Services and the Irish Legal Aid Board in relation to immigration law and social welfare law are informative because they involve social groups that have traditionally had little say in the creation of law and little opportunity to challenge its applicability to them.[198] The Canadian and Irish authorities

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[196]It is clear from the Annual Reports of the Legal Aid Board that the vast majority refusals are made on financial eligibility grounds. The *1992 Report* shows that about 66% of decisions of the director general are appealed on these grounds.

[197]Until recently it was the unwritten policy of the staff that the financial thresholds were not to be strictly adhered to due to the extreme hardship that would result. In the 1991 Report we see an increase of 29.91% in the number of cases accepted within "admissibilité complémentaire" category. At p. 157 of the Report the Commission underlines the fact that in (1990-91) 1,640 couples were admitted on these grounds, but their revenue was below that of the levels set by the 'securite du revenu' laws. Following a recent change in internal politics applicants are now being refused more categorically across the board.

[198]In Europe certain immigrant populations have been excluded from the law making apparatus because of the difficulty in gaining citizenship rights and consequently voting rights. In Germany, for example, citizenship is markedly ethnically determined and so Turks who have been brought up in Germany have no citizenship rights. Thus in Germany, where there is a predominant notion of the 'guest worker' i.e. workers explicitly recruited to supply a specific labour shortage and who entail none of the normal social costs of welfare, education, health etc., the combination of this policy and an ethnically based right to citizenship culminates in a racist social environment - see further J. Rex, *Race Relations*; and also *The Ghetto and the Underclass: Essays on Race and Social Policy*, (Aldershot, 1988). There remains an enormous difference

evidence a dichotomous approach to legal aid. This dichotomy illustrates how legal aid is used as an instrument of social control.

Immigration law rejects the conception of the individual as rights holder.[199] Conversely, a notion of the autonomous individual is used to justify the courts treatment of poverty and social welfare issues. In immigration cases, legal aid practice shall be shown by tracing the changing policies regarding applicants for refugee status in Canada[200] and in the Republic.[201] As regards Social Welfare cases, extensive new legislation was introduced in 1989 in Canada, and consequently, many of its provisions are still being interpreted for the first time. This allows some scope for an analysis of the way in which legal aid is used to maintain or challenge the *status quo* in

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between the electorates of Northern Europe and the population and each European country contains a significant disenfranchised community. This has a detrimental impact on the ability of immigrant groups to organize politically and their response to hostility, if any, must be non-political.

[199]The notion of a national community with a bundle of rights denied to non-members is inconsistent with the universality of rights. The alien has no rights except those given by the government - Wani I.J. "Fiction in Immigration Law", (1989) 11 *Cardozo Law Rev.* 51, 115. See also Scharpf, "Judicial Review and the Political Question: A Functional Analysis", (1966) 75 *Yale Law Journal* 517.

[200]Citizenship is not a factor in determining eligibility for legal aid in Canada or in Ireland.

[201]Ireland itself has a very small immigrant population, an immigrant being defined as a resident of a country who is not a citizen of a member state of the European Community. There are major differences between European countries regarding citizenship and the issue is no longer a national one, even if how we define National identity is a matter of social process, and varies from one country to another.

the interpretative process.[202]

A.) Appeals Against Refusal of Legal Aid in Immigration Cases

i. Québec - The preponderance of immigration appeals cases before the Comité d'Appel prior to 1989, is explained by an out of hand rejection of applications for legal aid in order to appeal decisions of immigration officers. Refusals were based on the subjective knowledge of the lawyer.[203]

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[202]As all social welfare recipients are automatically exempted from compliance with the financial criteria, these financial criteria cannot be used to mask other judgment calls, arguably 'politically' or 'culturally' motivated. One sees, however, a regular flow of cases before the Appeals Committee where recipients under the new securite de revenu provisions are refused legal aid because that aid is required for a reason which the administrative staff consider not to be a 'besoin essential'. See, for example, Décision 22353 of 5/05/93 where the continuation of this practice is evident, despite a decision of 21/03/90, where the Committee questioned traditional jurisprudence applying Art. 3 of the Regulation governing admissibility to those in receipt of social aid. Art. 3 lays down that it is proper to consider the nature of the case and the service required and to take into account the consequences of these for the protection of the person and their needs when applying the admissibility criteria. The Committee referred to its Décisions 17013 and 9879 to illustrate its practice of refusing legal aid in cases where the services required were of a commercial nature i.e. a will or a mortgage agreement, deciding that a recipient of social aid was automatically eligible for legal aid upon proof of vraisemblance du droit and the need for a legal service.

[203]One commentator noted how, during a period of time, there seemed to be a policy of refusing legal aid to people from Turkey because the legal aid lawyers considered that a Turkish national did not have a prima facie claim to refugee status. In one such case it was held that even though a person seeking refugee status was in a similar position to an accused person in a criminal case, it was nevertheless necessary to show, not only a need for a legal service but also the appearance of "un bon droit à invoquer ou à faire valoir". This despite the jurisprudence of the Comité that Art. 4 of the Legal Aid Act should be interpreted disjunctively 'en matière pénale et criminelle' and the view of the Comité that the elements of these case types that caused them to merit special protection (e.g. possible loss of liberty) were also present in immigration cases. See Décision 16917 at p. 3.

The Comité d'Appel, inundated with appeals, advised that all Convention refugee cases be treated as *prima facie* 'vraisemblable'.[204] The jurisprudence of the Comité d'Appel has said time and time again that:

> l'évaluation de la vraisemblance dans un dossier donné doit être effectuée de façon large et généreuse en fonction du secteur du droit du dossier pour lequel l'aide juridique est demandée. L'avocat, a cette occasion, ne doit pas s'ériger comme juge d'appel, mais doit plutôt évaluer si la cause se plaide.[205]

Continuing abuse of this discretion is testified to by the fact that appeals are <u>still</u> being brought by claimants against refusals on *vraisemblance du droit* grounds in immigration matters.[206]

A lawyer 's willingness to participate in a legal aid

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[204]In a 1989 decision the Comité sought to distinguish an earlier 1987 decision requiring the conjunctive reading of Art. 4 in Convention Refugee cases and, therefore, the necessity to establish both a vraisemblance AND the need for a legal service. Referring to the situation at the time of the decision, in relation to Turkish immigrants in particular, the Comité felt that the decision in the case should be limited to the facts of the case (Between June 1986 and October 1987, some 2,000 Turkish citizens arrived at the Canadian border, the majority of them to Quebec, claiming immigrant status) saying that "La nature même des procèdures de détérmination du statut de réfugié, ont convaincu le Comité que la réprésentation par avocat est, dans les circonstances, nécessaire au révendicateur du statut de réfugié afin de faire valoir pleinment son droit. Dans un tel cas, la vraisemblance de droit se trouve à se confondre, au sens de l'article 4, avec le besoin d'un service juridique".

[205]See <u>Décision 22235</u>, 14/04/93 where the Comité refers to this principle as 'jurisprudence constante'. Nevertheless, legal aid was often refused in the absence of a personal audience with the applicant from a mere reading of the decision sought to be appealed and without any attempt to verify the adequacy or authenticity of the proof submitted as a basis for such a decision.

[206]See <u>Décision no. 22772</u> of 14/03/93 and <u>Décision no. 22442</u> of 19/05/93.

scheme will depend on his opportunity costs. There are incentives to take on legal aid work where tariff rates cover variable costs and contribute to overhead costs. A legal aid case will only be worthwhile for a lawyer if he is paid his marginal opportunity cost. By ensuring that these fees are kept to a minimum, one asks the lawyer to balance his utility by offering as minimal a service as possible.[207] Refugee Appeals are lost for these reasons and justice is done. More importantly nothing really changes and gains from the swing of the 1989 decision are lost on the roundabout of a cut in fees to practising lawyers.[208]

After the Comité d'Appel's ruling in 1989, Montreal's Community Legal Aid Centre, taking advantage of the complex situation occasioned by changes in the *Immigration Act*, sent a memorandum to all those private practice lawyers who received mandates to work in the area of immigration law,

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[207]Under an economic analysis it is not efficient for a lawyer to devote quality time to immigration cases in these circumstances. The noble profession is, in effect, forced to compromise, at their client's expense, by accepting the mandate but recycling verbatim memoranda or doing completely inadequate case preparation. This might explain complaints from Employment and Immigration officials, responsible for defending the State's ruling in judicial review proceedings of decisions in Convention Refugee cases, that counsel for the applicant is usually badly prepared and often ill-acquainted with the particularities of the case at bar. See further K. Lippel, in her commentary on Thomas' paper on Thatcherism and access to Justice in Britain, (1990) 10 *Windsor Yearbook of Access to Justice* 534, 535.

[208]Would these qualify as 'secondary rules' within H. A. Hart's view that secondary rules are the rules that govern the introduction, modification and control of 'rules', primary positive law, and thus account for the continuity of the legal system? See further Utz *supra no.* 11 at p. 27.

announcing a unilateral reduction of 50% in the fees payable.[209] Although one may attempt to justify these cutbacks by reference to the streamlining of the process, resulting in the removal of a stage in the application procedure, an analysis of the costs and work involved and the nature of the cutbacks, shows that there is no degree of correspondence between the two.[210] Here political force prevents change in the protections available to immigrants which might result from increased legal aid availability for immigration appeals.

It seems ironic that, as soon as legal aid was granted automatically for refugee determination procedures, the immigration process was streamlined. Decisions are now taken by the Refugee Board and appeal from those decisions is by way of judicial review. Coincidentally, fees payable to lawyers who accept legal aid mandates in immigration matters have dropped. One possible conclusion to be drawn from this is that the Québec government are reluctant to assume the costs of defending refugee applications.[211] As

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[209]See the intervention of Madame J. Caron, *Débats de l'Assemblée Nationale*, le 8 juin 1993 (CI -1976).

[210]Discussions with lawyers practicing in this field show that where they used to be paid $300 for a hearing on the merits of the case, they now receive $136.50, and whereas they used to receive $450 for an application for leave to appeal, this has now been reduced to $304. Thanks to Me Eaton Freidman for discussing this with me and giving me his opinions on the question.

[211]Following negotiations the expenses incurred by the Legal Aid Commission in funding claims for refugee status are now assumed by by Employment and Immigration Canada for the period between November 1992 and the introduction of the new law c-86, which eliminates a stage in

announcd in parliament, a stage in the procedure has been eliminated for which legal aid is no longer required, reducing considerably the 'vertiegineux' costs of legal aid in immigration cases.[212]

An inability to address the humanity of individuals seeking to immigrate or to question the legitimacy of legal fictions such as sovereignty, is characteristic of immigration policies. As Wani points out, legal fictions abound in immigration policy.[213] These fictions serve to reconcile immigration policy with perceptions of what is constitutionally permissible. Dobson-Mack,[214] for example, relies heavily on the argument that the equality provisions of the Canadian Charter only refer to those people present in Canada.[215] Thus it cannot be applied to discrimination

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the procedure - see further Legal Aid in Québec, *supra no.* 102 at p. 11

[212] M. Rèmillard, *Débats de l'Assemblée Nationale*, le 8 juin 1993. According to Mr. Rèmillard, requests for legal aid in immigration cases had been reduced by 20% in the first half of 1993, and this on the heels of substantial increases in the number of cases in previous years. Recent statistics concerning those claims brought to the Refugee Board show that 40% are refused, and upon review 20% of these initial decisions are overruled. Not surprisingly, it is increasingly difficult to find a lawyer willing to accept a legal aid mandate.

[213] He deals specifically with four such fictions, the legal fiction of sovereignty, of entry, distinctions between concepts of detention and punishment, and criminal and civil categories, and the concept of the national community, see further I.J. Wani, "Fiction in Immigration Law", (1989) 11 *Cardozo Law Rev.* 51.

[214] See A. Dobson-Mack, "Independent Immigration Selection Criteria and Equality Rights: Discretion, Discrimination and Due Process", (1993) 34 *Cahiers de Droit* 549, 563-570.

[215] As Wydrzynski so logically explains, immigration laws are introduced to discriminate, and an application of equality principles to immigration law would "undermine immigration law completely" - See C. Wydrzynski, *Canadian Immigration Law and Procedure*, (Aurora: Canada Law Book, 1983) at p.467.

in immigration determination procedures dealing with those not present on Canadian territory, yet the fiction of entry as a valid determinant of a rights question has little to recommend it - it is irreconcilable with a theory of inherent rights.[216]

Immigration policies provide a blatant manifestation of the nexus between law and politics. In *Managing Immigration: A Framework for the 1990s*, Immigration Canada writes in an introductory piece that:

> Canadians are concerned about the growing costs of immigration, and about the increased processing delays for those who want to come to Canada. They want to be sure that immigration is managed properly to bring the greatest social and economic benefits to all regions of the country...They want to be sure that pressures on immigration and refugee systems do not undermine our ability to enforce the rules and to deal firmly with those who would abuse our generosity.

The report stresses throughout the need to protect Canadians from abuse of their generous system by a growing number of dishonest immigrants.[217] The bureaucratic organization of immigration control is becoming increasingly entrenched. New legislation moves away from independent

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[216]See L. Tribe, *American Constitutional Law*, (New York: The Foundation Press, 1988) p. 108.

[217]"We must ensure that criminals, terrorists and smugglers do not have the opportunity to take advantage of increased pressures on our immigration system.. vigilance is needed to ensure that Canadian society is protected..." *infra*. See also A. Dobson-Mack, *supra no.* 214 at p. 561 where she refutes the argument, forwarded by Walter Chi Yan Tom in "Equality Rights in the Federal Independent Immigrant Selection Criteria", (1990) 31 *Cahiers de Droit* 477, that immigration selection based on Canada's present labour needs is discriminatory. Dobson-Mack suggests that it all depends on how you view immigration - as a recruitment service, or as an international form of equalization.

decision makers to an administrative decision making process.[218] Although the five eligibility criteria to be applied by the Senior Immigration Officer under the new procedure, are 'objective' and do not involve the discretion of the officer, it has been pointed out that "criteria can be 'objective', in that they rely on facts, but at the same time the facts in question may be contested".[219] To guard against the reintroduction of judgement calls into the process,[220] the Committee recommended that there be explicit instructions to officers that, where the facts are contested by the individual on reasonable grounds, that the case should be referred to the Immigration and Refugee Board.[221]

It is significant that personal judgements and the discretionary exercise of power within the immigration procedure is removed from one limb of a process that assists challenge to a negative decision (within the legal aid

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[218]See the 13th Report of the Standing Senate Committee on Social Affairs, Science and Technology, a report on Bill C-86 presented to the Senate on Monday, December 14th 1992.

[219]Senate Report, *infra*.

[220]Following their removal from the decision making process governing the attribution of legal aid.

[221]The exercise of discretion by the Board has itself been the subject of controversy in the recent past. The Board is comprised of government appointees and there have been allegations that board officials have been meeting secretly with officials of Immigration Canada to share their opinions of claimants with tribunal members. See the Gazette, Thursday September 2nd, 1993, and September 4th, 1993, where the allegations made were based on internal board documents obtained under the federal access to information act. Certainly the fact that in Quebec Immigration Canada and the Refugee Board are found in the same building does nothing to calm doubts as to the Board's independence or objectivity.

system) but is subsequently re-inserted, under a different guise, at another level.

ii. Ireland - In Ireland the immigration authorities have absolute discretion in the granting of residency status, making it futile to establish procedural entitlements in national law to limit its exercise.[222] Ireland is a party to the *1951 United Nations Convention Relating to the Status of Refugees* and to its *1967 Protocol*,[223] but no legislation has ever been enacted to implement these provisions into domestic law.[224] The

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[222]See P. Glenn, *Strangers at the Gate*, (Montreal: Blais, 1992). Addressing an Amnesty International Conference on Irish Asylum Law at Trinity College in October 1993, Senator Dan Neville told how asylum seekers were not informed of the procedures and were not given any real opportunity to vindicate their 'rights' before the court or informed of the reasons for negative decisions.

[223]Article 16 of which guarantees "the same treatment as a national in matters pertaining to access to the Courts, including legal assistance", which means, in effect that refugees who satisfy the eligibility criteria would be entitled to the benefit of any Irish scheme, should the Convention be given force of law in the jurisdiction. The only existing protection for refugees under the Convention is the assurance of the Minister for Justice that the provisions of the Convention would be honoured in a letter addressed to the United Nations High Commissioner for Refugees (UNHCR) in 1985. This 'gentleman's agreement' is felt by the Department to be sufficiently binding upon it and to afford adequate protection of refugees - See further *Interdepartmental Committee on Non-Irish Nationals*, Report on Applications for Asylum (Dublin, 1994).

[224]Likewise no efforts have been made to introduce Art. 14 of the *U.N. Declaration of Universal Rights and Fundamental Freedoms* (1948) which gives the right to seek and enjoy freedom from persecution or the subsequent Geneva Conventions and Protocols, which give rights of access to legal advice and to an interpreter, into domestic law. Without such legislation they can have no direct force in Irish law. The failure of Ireland to implement the 1951 United Nations Convention relating to the Status of Refugees in domestic law means, in effect, that "the Irish Refugee or asylum seeker has no protection under Irish Law", see G. Fitzgerald, *Repulsing Racism: Reflections on Racism and the Irish* (Dublin: Attic Press, 1992). The *European Convention on Human Rights* does not guarantee the 'right' of aliens to enter, or to reside in, a

legislation governing immigration in Ireland, the *Aliens Act 1935*, contains no reference to refugees. The Department of Justice therefore considers that it is under no obligation to consider asylum applications and their process in the past has consequently been a purely administrative practice.[225]

There is no appeals procedure and reasons are seldom given when a decision is negative.[226] Any decision taken by the administrative agency in charge of immigration matters is subject to judicial review[227] and to applications for habeas corpus, but the courts have generally been willing to give a wide measure of discretion to the Minister in cases where the *public good* is cited as a grounds for refusal.[228]

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particular country, nor does it recognize a right to political asylum - see further a paper prepared by Wolfgang Strasser, Secretariat of the European Commission of Human Rights, relied upon in an address by Jane Liddy, the Irish Representative to the European Commission of Human Rights at a conference on the Legal Remedies Against Racial Attack and Discrimination, European Commission Office, Nov. 26th 1993. It was all too clear from oral contributions to this conference that the available remedies were very restrictive and normally only enforceable in connection with some other politically favoured policy. In Ireland, for example, provisions have been made for unfair dismissal due to race, there are no remedies for discrimination in getting the job in the first place.

[225]See further Iseult O'Malley, "Giving the asylum-seeker a measure of protection" in the *Irish Times*, Tuesday, August 17th 1993.

[226]There is no independent scrutiny of immigration decisions and in order to comply with EC law on the free movement of workers the Irish Minister for Justice, then Mr. Ray Burke T.D., was forced to establish an EC Aliens Authority. Of course this Authority is only available to persons covered by EC law.

[227]Judicial review does not involve a rehearing of the case but simply a review of its legality. The procedures are complex and given the extreme difficulty in obtaining legal aid in such cases, all advocacy is done on a volunteer basis.

[228]According to figures quoted by Sen. Dan Neville, *supra no.* 222, there

O'Malley concludes that there's a clear need for a statutory procedure, providing for a fair hearing by an independent body, with a right of appeal. In legislating further we risk making the system more inflexible and institutionalizing a neglect for refugee rights.[229]

The *Schengan Agreement*,[230] the *Dublin Convention*[231] and the *Draft Convention on the Crossing of External Borders*, have led to a substantial harmonization of the substantive law of immigration within the Community, but there has been no attempt to incorporate the fundamental principles of asylum law to ensure rights to fair procedures and

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were only 216 applications for political asylum between 1988 and 1992 - only one application was granted. No further information is available. In effect the fate of the asylum seeker depends on the official with whom he comes in contact at the port of entry - In the Autumn of 1992 Kurdish refugees were physically forced back onto a plane without having any access to legal advice.

[229]This is the concern voiced by the UK based group the ILPA (Immigration Law Practitioners Association) who fear that harmonization of procedures within the European Community, will lead to a levelling down of procedural protections.

[230]See *Schengan Agreement*, July 1985

[231]The *Dublin Convention Determining the State's Responsibility for Examining Applications for Asylum Lodged in one of the Member States of the European Community*, (1990) *Imm. A. R.* 604, establishes criteria outlining which state should be responsible for determining an asylum request lodged in any one of the contracting states. Art. 4 - 8 set forth the criteria: the state deemed responsible may be the state in which the application for asylum is originally lodged. The Convention does not address issues of procedural due process or the substantive determination of asylum claims. Therefore because the quality of the determination procedures varies considerably as between contracting states, this means that in practical terms a person seeking asylum in an EC state may be forced to apply for asylum in a country whose procedures are simply incapable of identifying all those in need of protection. In practical terms, however, this Convention risks remaining ineffective as there is no decision making body to resolve disputes between states and as O'Malley writes, "such a situation seems guaranteed to increase the 'refugee in orbit' phenomenon".

appeals.[232] There are two schools of thought as to how best to provide legal aid in the different states of the Community or 'Union' in immigration cases: 1.) Asylum requests should be no different from other legal procedures. Therefore, legal aid should be granted for the same reasons, and in the same conditions as it is provided to any indigent person to pursue a legal remedy; 2.) A specialized pool of lawyers or legal professionals should be created to deal exclusively with asylum cases before specialized bodies.[233]

B.) legal Aid in and Social Welfare Decisions

i. Ireland The Irish Government has justified its refusal to provide legal aid in tribunal hearing because of a professed desire to dejudicialize these proceedings, to

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[232]As Jim Gillespie underlines, there exist at present substantial differences between Member States in terms of the extent of appeal rights available with respect to decisions made in the area of immigration control and in terms of procedural protections embodied in the decision making procedures. In his opinion, "an effective common body of relevant rights, duties and privileges in the area of immigration control cannot be properly achieved while there remain significant differences in the procedure for realizing and applying any common body of rules" - See Jim Gillespie, *Report on Immigration and Asylum Proceedings and Appeal Rights in 12 Member States of the European Community*, Immigration Law Practitioners' Ass., 1993, p. 7. The absence of community wide common minimum standards of fair procedures and appeals will present insuperable practical obstacles to the effective application of particular provisions of a harmonized immigration law.

[233]The example of the new French legal aid rules indicate that the movements in the E.C. to coordinate immigration policy, coupled with the influx of asylum seekers in the last 10 to 15 years, has caused thinking about legal aid to diverge. The trend in France limiting the availability of legal aid to asylum seekers, would suggest that this is the trend that will predominate in any harmonization of procedural protections and this trend is mirrored in the new Canadian provisions.

keep them simple and accessible to all.[234] One commentator describes this as a classic case of "closing the stable door after the horse has bolted".[235] Tribunal hearings in Ireland are often very legalistic and the procedures are complex. The experience of those working in the field is that the absence of legal representation for those appearing before the Employment Appeals Tribunal and the Social Welfare Appeals Officer places them at a distinct disadvantage.[236] This disadvantage is exacerbated by power

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[234]See B. Garth, "The Movement Towards Procedural Informalism in North America and Western Europe: A Critical Survey", in Abel (ed.), *The Politics of Informal Justice*, (N.Y., London, Academic Press, 1982), *infra* at p. 190-191. See also G. Woodman, "Alternative Dispute Resolution", (1991) 32 *Cahiers du Droit* 3, 20. This approach should be contrasted with the Quebecois approach where the Commission recognizes in its jurisprudence that because of the particular needs of their clientele it was necessary that their services be available also for administrative court hearings and before quasi legal organizations - See the 7th Annual Report of the Legal Aid Commission, 31st March 1979, "the persons subject to jurisdiction are confused by the diversity, variety, method of functioning, and the rules of evidence different from one to another". It is clear that tribunal and administrative hearings are an important part of the Commission's work - See the 18th Annual Report at p. 90-92 where one legal clinic gave a run down of its casework during the year.

[235]See G. Whyte, "Law and Poverty", *supra no.* 168 at p. 99.

[236]The categories benefited by a newly set up process are not always those who were intended to be benefited. In Ireland our Small Claims Procedure has just been formalized, (November 1993 following a trial period of one year). As with the Montréal Small Claims Court, the court is intended to assist individuals with few resources to assert their rights against larger opponents - see Woodman *supra no.* 234 at p. 27 *infra* and also Whelan,(ed.) *supra no.* 114, William A. W. Neilson, "The Small Claims Court in Canada: Some Reflections on Recent Reforms", (1982) *20 Alberta Law Review* 475. Yet it has been repeatedly found that these procedures have tended to be used primarily by businesses, or the larger opponent, against individuals. Thus, even in Quebec, where special rules of civil procedure are enforced to ensure that only physical persons have access to the court, the ongoing work of the Macdonald project shows that the average claimant was middle aged, well educated and middle incomed. See further the findings of a study carried out by K. Hildebrandt, B. McNeely and P.P. Mercer, "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their

imbalances in the relationships of the parties and the fact that employers are usually represented before the Employment Appeals Tribunal.[237] Effectively, this policy, when combined with difficulties in challenging administrative decisions,[238] protects the unequal relations from challenge.

The submission that the bureaucracy of the welfare state is one which most substantially affects the lives of the disadvantaged members of both societies, is hardly

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Attitudes", (1982) 2 *Windsor Yearbook on Access to Justice* 87 at 89 and B. Yngvesson and M. Hennessy, "Small Claims, Complex Disputes: A Review of the Small Claims Literature", (1965) 9 *Law and Society Rev.* 219. Interestingly, the Montréal Small Claims Court also incorporates an optional mediation service and the findings of the Macdonald Project would suggest that those at the lower end of the social spectrum, those with lower levels of education and lower family income were more inclined to request this service. This is relevant in light of findings which suggest that mediated settlements are generally much less than court settlements. Thus while mediators showed themselves favourable to considering all the factors - cultural, linguistic, social - the experience of the Montréal Small Claims Court could be said to favour the interests of certain social categories - just as the tribunal system and the absence of legal representation before them does in Ireland.

[237]See Paul Joyce, (1993) *4 FLAC NEWS* 4 reporting on the FLAC annual Labour law seminar at which concern was expressed at the Minister's comments to the extent that tribunal proceedings were excessively legalistic, as this was seen as a direct result of increasingly complex legislation of which the *Unfair Dismissal Amendment Act* (1993) was cited as a good example. The need for a pre-hearing conciliation procedure was highlighted.

[238]A large volume of decisions each year interpretes Social Welfare legislation. A copy of the deciding officers decision is sent to the claimant but there is generally no detailed explanation as to the reasons for the decision. Although the Supreme Court has said that decisions may only be determined summarily when there is sufficient documentary evidence to justify it - Kiely v. the Minister for Social Welfare (No. 2) [1977] I.R. 267, 278. - the practice is a little different. Many notices of appeal contain very little information and yet the appeals are decided without an oral hearing. The Appeal procedure is quite specific - See further M. Cousins and G. O'Hara, *Access to the Courts in Four European Countries*, *supra no.* 107 at p. 150 *et seq.*

contentious.[239] Nor is the assertion that social welfare is a complex and closely regulated area.[240] Yet in Ireland few lawyers have any contact with this field and there is a virtual absence of any serious expertise in the social welfare area.[241]

Efforts to create informal, unlegalistic practices seem to dominate in certain areas of law - invariably where they most benefit society's strongest political actors.[242]

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[239]In Ireland Department of Social Welfare figures show that there are over 1,000,000 new claims for social welfare each year - enormous contact given the Irish population of a mere 3,500,000 (even if it could be shown that there is probably some overlap and that a proportion of claims will come from the same claimants). There are over 19,000 appeals against the decisions of the deciding officer.

[240]The Canadian social legislation introduced in 1989 is lengthy and complicated, while Irish legislation is piecemeal and disharmonious. Efforts to provide an equitable repartition of resources have been weak and unsuccessful.

[241]As a result of FLAC's active participation in this field, there is however, some assistance available. While in Québec the Règlement sur les services couverts par l'aide juridique et sur les conditions de paiement des frais d'experts, R.R.Q., (1981), c. A-14, r. 6.2. makes provision for 'non-legal' expert advice, it would be necessary to show due cause to the Directeur Generale. In Britain an action brought against the Legal Aid Board in 1991, seeking the inclusion of the advice of a non lawyer, but an acknowledged expert in Welfare Law, within the English 'Green Form' system of Legal Aid, was lost on appeal - decision reported in The Independent July 12th 1991, R. v. The Legal Aid Board, ex parte Bruce.

[242]See S. Engle Merry, "Varieties of Mediation Performance: Replicating Differences in Access to Justice", in *Access to Civil Justice ed.* Hutchinson *supra no.* 8 at p. 256, "Some ADR processes operate at the top of the market, others at the bottom...these critical distinctions are blurred" (p. 261-262). Engle Merry's observations are borne out in Macdonald's research in the Montréal Small Claims Court, where one sees a sharp dichotomy in the type of people who will go to pre-hearing mediation. Settlements tend to be less significant in monetary terms and a profile of the typical participant shows them to be either business people who realize the monetary advantages of using a compromise technique or people at the lower end of the income and education scale who, although aware of their legal rights, seem to prefer to avoid the court situation. Whether this is because they

Before we can take the law out of society, surely we need to create a society that does not use law and before we can permit social welfare appeals to occur without legal assistance, we need to ensure that the claimant will not be disadvantaged by non-representation. A society that operates without statist law will nevertheless have dominant normative structures, which will also work injustice for weaker social groups. Thus while the law is targeted here, this is not to say that an informalized social structure would be any different.

Since 1991, the Irish Social Welfare Appeals Office has operated independently with its own premises and staff.[243] All appeals officers are departmental officials appointed directly by the Minister for Social Welfare,[244] of whom 13% only are women. The procedures used in Social Welfare Appeals are less procedurally formal than before the courts in general and the rules of evidence are certainly less strict. Nevertheless, they are undeniably legalistic and quite complex.[245]

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distrust the system, or feel intimidated by it, or whether they are more conscious of their relationships with others was not established - possibly a combination of each of these factors.

[243]Following changes introduced to counter fears that appeals officers were not sufficiently independent in the exercise of their duties.

[244]This despite the fact that appeals officers are quasi-judicial officers and are "required to be free and unrestricted in the discharging of their functions" - McLoughlin v. the Minister for Social Welfare [1958] I.R. 1.

[245]Comparative research carried out by Mel Cousins on the operation of employment appeals tribunals in civil and common law jurisdictions shows that common law employment tribunals are procedurally formalistic when

ii. Québec A comparison with Québec legal aid structures relating to social welfare suggests that legal aid is more noteworthy for what it conceals than for what it cures. Recipients of social aid may be the only people automatically eligible on financial grounds in Québec, but, when it comes to challenging the interpretation of a particular piece of social legislation and the existing order, then it seems that legal aid is of little utility.[246]

A total of twenty-three decisions between March 1990 and June 1993 were appealed to the Legal Aid Revision Committee in relation to the new Income Security legislation.[247] The representative significance of refusal in these cases could be much more important given the number

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compared to their counterparts under civil law systems. Given that the civil law systems have the benefit of extensive investigative powers (France) and/or funding for skilled representation (Fr & Ger), he questions what justification there can be for the failure to provide funding for skilled representation (and /or improved investigative powers) in the Republic of Ireland and the UK. This observation is equally applicable to social welfare tribunals.

[246]Lippel points to the structural bias of the tariff system in Judicare delivery. She comments on the fact that when legal aid tariffs were revised in 1990 there were no increases in fees for those working in the area of social security law. This has striking resonances with our analysis of the mandate system in relation to refugee claims. See Lippel *supra no.* 207 at p. 535.

[247]It is not felt that this list is complete as the computer expert was not sure if they would all have been classed so as to appear in relation to our search. Nevertheless, it seems likely that the decisions are representative of the types of appeals taken in relation to social legislation before the Committee. Sincere thanks are due to Audette Legendre, who is responsible for reporting the decisions of the Revision Committee, for her patient and unselfish assistance throughout the Summer of 1993.

of negative first instance decisions that are not appealed.[248] Only thirteen were decided on the grounds of interpretation of the new law, a further five concerned the types of service that a welfare recipient could receive legal aid for,[249] two involved the failure to exhaust the available remedies set up by the system that did not require legal assistance,[250] two were decided on the grounds of what constituted a 'besoin vital' and a final claimed discrimination in the welfare laws on grounds of physical disability.[251]

Let us consider the thirteen decisions relating to the interpretation of the Act. This is the only category of appeals isolated where there have been enough decisions to make conclusions meaningful.[252]

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[248]Of the 13 decisions regarding the interpretation of the Act, the Revision Committee refused legal aid to appeal in just one instance - suggesting a widespread misuse of interpretative powers by decision makers within the legal aid services.

[249]For the reasons for refusal in that particular case see Décision 22148, 31/3/93. The power of the legal aid authorities to decide what type of claims justify the attribution of a legal aid mandate and what exactly constitutes 'un besoin vital', allows the creation of a structured society that dictates which claims are legitimated and which silenced. See M. Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, (London: Tavistock, 1971). Foucault regards knowledge as a codification of social practice and experts as socializers who construct environments that manage the activities of people.

[250]Décision No. 19706 24/04/91 and Décision No. 20467, 22/12/92

[251]Décision No. 20033, 2/09/91

[252]At the end of the day it is true that legal aid was allowed in these cases to challenge a given interpretation of the legislation, but as so few refusals are actually appealed, this result is not very reassuring as regards the operation of the system as a whole.

From these decisions it was clear that where the claimant was challenging the interpretation of a deciding officer, legal aid was invariably refused on *vraisemblance du droit* grounds and this refusal based on the finding of law made by the deciding officer. If the arguments advanced by the party seeking legal aid to appeal a decision under *la loi sur la securité du revenu*, could be countered by the deciding officer with a decision of the Social Welfare authorities to the contrary, legal aid to appeal the decision was refused.[253] The greatest irony must be the decision to refuse welfare because of the contested existence of income, and the resultant refusal of legal aid to help disprove its real existence, based on the original disqualifying finding that it did exist![254]

The theory that a social security law should be interpreted generously is not manifest in practice. Of two possible interpretations of a provision, that which disfavoured the claimant proved determinative.[255] From the

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[253]See Decision 19608 of the 6/3/91 where a finding by an officer of the Commission of Social Affairs to the effect that "la décision que nous a produite votre procureure ne s'inscrit pas dans le courant jurisprudential majoritaire", *infra* p. 2,

[254]Décision 22539, 9/6/93.

[255]See Décision 20569 , 19/2/92, where the claimant appealed a refusal to grant him legal aid to challenge the decision of a Welfare officer partly based on article 79 of the Regulation on Security of Revenu, saying that there were two possible interpretations of this article and that there is a duty to consider that which favours the claimant. The claimant in that case supported his arguments by relying on P. A. Cote, *Interpretation des lois*, and the decision in Abrahams c. Procureur General du Canada, see *infra* p. 3. The jurisprudence of the Revision Committee has reiterated that where an applicant for legal aid claims

Legal Aid Office decisions appealed to the Revision Committee, it seems that the administrators of the plan consider themselves free to interpret the facts of the case at will, despite the repeated directive that it is up to the proper forum to determine the truth or falsity of the facts of each case.[256]

To refuse legal aid to a claimant who seeks to challenge the incoherencies implicit in a particular majority interpretation, precisely because this dominant interpretation is the law as it currently stands, makes legal aid incapable of being used to challenge the existing order of things.[257] Likewise, the applicant who seeks to challenge the constitutionality of Québec social legislation under the Québec Constitution and the Canadian Charter, is refused legal aid on *vraisemblance du droit* grounds.[258] When new legislation is introduced such as *la Loi sur la securité du revenu*, it takes some time for a 'settled' interpretation

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that a provision is badly interpreted, and advances arguments to support an alternative interpretation, as the claimant did in Decision no. 20589 26/2/92, then 'il n'est pas nécessaire, pour satisfaire aux critères de vraisemblance du droit; qu'un requérant d'aide juridique démontre qu'un tribunal lui donnera raison", *infra* p. 4.

[256]See Décision no. 21658 of the Comité de Révision, 16/12/92, "Il faut laisser au tribunal approprié....le soin d'étudier cette question", *infra* p. 2.

[257]See Décision no. 21658, 16/12/92, where the favoured interpretation of a law, that had led to the refusal of welfare assistance and subsequently legal aid to challenge this interpretation, was such that it discouraged adults from returning to school, because they would then be considered 'enfant à charge'.

[258]See Décision 19948 du 26/6/91 where the applicant wanted to challenge the constitutionality of social legislation which accorded financial assistance not .."susceptibles de lui assurer un niveau de vie décent".

of the various provisions to emerge.[259] It seems evident that if legal aid facilitated access to the law, it would facilitate efforts of applicants to play a role in this interpretative process.[260]

The strongest criticism of the legal aid plans operative in Ireland and Canada, is that they effectively stunt social change by giving an illusion of equality in accessing the system, thus controlling the form our reality takes, accepted by us as locally universal. Legal aid operates with the object of strengthening the position of its clients within the adversary system of justice, but in doing so it subjects them to an unresponsive logic, quelling a momentum for change.[261] In fact those that are alienated by the system encounter the greatest difficulty in using legal aid mechanisms to make their presence felt from

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[259]The interpretation given to different but similar provisions in that law's predecessor (Social Aid Act) will not necessarily hold sway under the new régime and the two provisions should not be treated as analogous - see Décision no. 22094, 17/3/93, concerning the interpretation of the new article 123 para 2 of the Regulation on securité du revenu, 1989 which no longer authorized a judgement of the bad faith of the applicant, unlike earlier provisions, but the words 'à manière de' should instead be interpreted to give the Commission the power to consider the situation and the reasonableness of the applicant's behaviour. The applicant was able to rely on prior decisions to this effect in putting his case to the Comité de Révision - see *infra* p. 2-3. Likewise in Décision 22362, 5/5/93, the applicant was able to rely on the earlier decisions of the Commission to forward the interpretation of the law which supported his own.

[260]In Décision no. 21976, 3/3/93, the extent to which article 7(4) of the law, which excluded minors from 'l'aide de dernier récours' as an individual alone, applied to minors emancipated by the court, needed to considered. Only on appeal to the Revision Committee was legal aid finally granted for this purpose.

[261]See Hoehne, *supra no.* 13 at p. 310.

within.[262] The rules adopted concerning legal aid in the immigration and social welfare contexts in particular entrench past decisions and discriminations and build upon them.[263]

Judicial fora are not conducive to the development of a social consensus.[264] On the other hand, alternative modus operandi,[265] without more, remain unsatisfactory, because they do not provide a real tool with which to question existing structures and fail to address the extent to which

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[262]As Iglesias writes, "the structures erected through legal interpretation organize our social, political and economic alternatives in ways that systematically exclude our transformative agency from the realm of the lawful, then exploitation is institutionalized and violence is structural" - Iglesias *supra no.* 183 at p. 398. Whether the system would respond to these different needs should they be voiced remains dubious, but this can not deter us from insisting that these voices be heard and their existence acknowledged.

[263]Schauer *supra no.* 187 at p. 175. It is significant that no real attempt has been made to reconcile the way in which immigrants are excluded with our democratic theories of individual rights. Power to admit and to exclude is seen 'as the core of communal independence' under a communitarian approach to social structure - but this power can only be exercised by the community as a whole - see further M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, at p. 62 (Oxford, 1983) and W. Kymlicka, *Liberalism, Community and Culture*, (Clarendon, 1989) at p. 227. See further M. Walzer "Pluralism in Political Perspective" in the *Politics of Ethnicity* (ed. Walzer) (Harvard, 1982).

[264]M. Seidenfeld, "A Civic Republican Justification for the Bureaucratic State", (1992) 105 *Harvard Law Rev.* 1512, 1537.

[265]Webber, "Adjudicating Contested Social Values" *supra no.* 177. Macdonald's preliminary findings in his study of the mediation services of the Montréal Small Claims Court, where some mediators proved disposed to ignoring the confines of the Code and statist law, shows a pattern in court use that suggests that the weaker party generally comes out with lower settlements than would have ensued from a court hearing. While there is merit to the view that the relational, flexible approach taken is preferable to 'adjudication', nevertheless, little can be done to readdress power imbalances in situations where the system is used to reduce the liability of the stronger party.

we are 'acculturated to domination'. If we wish to make justice accessible, we need to address the nature of power's influence in our lives and attempt to distinguish between what is real and what those in power wish us to perceive as real.

Chapter 4 Socialization and the Structure of Knowledge

"If we are to understand human power, we must first understand human beings"...[266]

I. Knowledge - Creator of Reality

The legal aid system operates to buttress the existing order of things and contributes to the maintainance of the hierarchical and dominant interests of past and present power distributions. Facilitating access to a predetermined justice, legal aid becomes an instrument of socialization by legitimating this vision of justice, substituting its supposedly objective knowledge for the exercise of bare-faced power.[267] Law and social reality have a symbiotic relationship;[268] law influencing, sometimes by its very

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[266]From James and Marguerite Craig, *Synergic Power: Beyond Domination, Beyond Permissiveness, Power to Use with People - not over them of Against them* (Berkeley, 1979).

[267]By socialization we mean the creation of a body of beliefs and values which we consider to be true and real, and through a process of internalization, they in fact produce a social reality. See Katherine de Jong, "On Equality and Language", (1985) 1 *Canadian Journal of Women and the Law* 119, "Human beings cannot impartially describe the universe because in order to describe it they must first have a classification system. But, paradoxically, once they have that classification system, once they have a language, they can only see arbitrary things". She continues that, "like language, law is not neutral. Laws both reflect and shape legal relationships in society. The power of the law to shape social realities gives additional force to the effect that the particular words of a law already have in shaping social realities."

[268]Many critics of liberal democracy and its construction of the equal and autonomous individual, point to the fact that liberal ideology has never purported to aspire to a classless society. It is argued that universal suffrage was only accepted because the more elite groups in society *knew* that liberal democracy, with its reliance on the rule of law and the creation of institutions of order could not pose a threat to

unresponsiveness, our ability to participate actively in the social sphere.[269]

Formal law knows three moments which have a decisive bearing on how effective it is as an instrument for change or a protection from power imbalances: 1.) The moment of creation/ the legislative process; 2.) The moment of invocation and by whom i.e. the identity and social position of the claimant; and, 3.) The moment of interpretation.[270] At each of these moments there are social imbalances which must be addressed if the legal system can hope to respond to the needs of those disadvantaged by traditional patterns of power and domination. Legal Aid officially comes in at the second level, but it can really only play its part in the access to justice movement if it operates in tandem with the other two. This explains why it is necessary to examine the structure of the personality of social actors and their

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property of prejudice their interests. See further, C.B. MacPherson, *Principes et Limites de la Democratie Liberale*, (Montréal, 1985).

[269]See Hyde, "The Concept of Legitimation in the Sociology of Law", (1983) *Wisconsin Law Rev.* 379, cited by Delgado *supra no.* 84 at p. 310. Delgado speaks of 'false consciousness' as the concept used by ClSers to describe the systemic rationalization of the lowly status of certain individuals and groups in society - see generally p. 310 *et seq.* See also S. Goyard-Fabre, "De la Légitimité du Pouvoir", (1989) 35 *McGill Law Journal* 1.

[270]But see Arthur Jacobson, "The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences", (1990) 11 *Cardozo Law Rev.* 1079, 1126 where Jacobson writes that there are but 'two writings' in positivism - 1. the enactment of the procedure 2. the marking of certain norms as law according to this procedure. In positivism the application of the law to individual cases is straightforward - which is why positivists see a generally available legal aid scheme as guaranteeing justice for all.

patterns of participation.[271]

A.) The Moment of Creation

Modern democracies favour notions of majoritarian rule but, as Rawls writes:

> universal suffrage is an insufficient counterpoise; for when parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented.[272]

The legislature in itself is a minority comprised of the more vocal and, generally, the least 'oppressed' in society.[273] To have a voice in Parliament one needs to be articulate. To be articulate for political purposes one needs to have had a particular type of cultural upbringing and a sense of purpose that is nurtured by a strong sense of

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[271]The real problem might not be one of knowledge of the law or of one's rights but rather a distrust of the system and a lack of faith in one's ability to make it work for you. These are preconceptions which result from socialization and inferior self perception. It is only by addressing the process of socialization that legal aid, no matter how well serviced, can hope to tackle the problems of the excluded.

[272]*ibid.*, p. 226. T.F. Schrecker is quoted in the environmental context, as saying that the political power of large commercial interests results in law texts of symbolic significance - strict provisions to satisfy interest groups, but lax enforcement in the interests of the commercial powers - see N.Roy, "Interets economiques corporatifs", *supra no.* 54, 426.

[273]Leubsdorf describes the American Constitution as an immense system of ventriloquism in which the courts speak for the Constitution and Statutes and the Constitution and Statutes speak for the Convention, which in turn speaks for the voters - see J. Leubsdorf, "Deconstructing the Constitution", (1987) 40 *Stanford Law Rev.* 181, 189 - "Each speakers authority comes from those for whom he speaks. Yet his own voice will modify the message".

identity and of "I have a right to be here".[274] Social contractarians, want us to pretend we're all the same at the starting line - but the only 'sameness' that they can conceptualize is that which is personal to them.[275] So we're all white, male, middle class, Anglo-American? Any *Statistics Canada Census Report* serves to highlight the injustice of this theory in the Canadian context. On the other hand research carried out by Macdonald in the *Montreal Small Claims Court* would suggest that the typical user of the court conforms to this likeness.[276] The results of this study appear to support the view that even this court remains more accessible to those dominant parties whose interests are best represented by majoritarian politics.

In a study examining non-voting patterns which highlighted notable lacunae in the voter population, Michael Marsh distinguishes between long-term and short-term non-voters.[277] Marsh found that while short-term non voters

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[274]See Charles Taylor, *Sources of Self: the Making of the Modern Identity* (Harvard University Press, 1992). See also N. Chomsky, *Deterring Democracy* (Vintage, 1992) "Articulate expression is shaped by the same private powers that control the economy.... The ability to articulate and communicate one's views, concerns and interests or even to discover them is thus narrowly constrained as well", at p. 372-373.

[275]It is easy to disparage Rawl's 'justice as fairness' as being a 'subtle rationalization of the status quo' as Dworkin does - see R. Dworkin, "Justice and Rights", *Taking Rights Seriously*, (Rev, ed., 1978) p. 182.

[276]See the preliminary findings of the Macdonald Project in the Montréal Small Claims Court, unpublished.

[277]See Michael Marsh, "Accident or Design: non-voting in the Irish general election of 1989", Paper presented to the *European Science*

appeared to be better educated, more wealthy and more middle class than voters as a whole, long-term non-voters were substantially more working class, worse off and less well educated.[278] Discontent with the political system reflects a belief that it will not respond to the individual's vote, things will not change, and that political parties do not represent certain interests. Although there is little available information to show the psychological, social or political background of those who participate actively in politics, it is clear from those figures that are available that they are not representative of society at large.[279]

All the available data points to the glaring disparity between men and women with respect to active participation in politics.[280] Nor are women who are elected representative of women in general.[281] There is a notable absence of

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Foundation, Economic and Social Research Council Conference on Political Participation in Europe, Manchester, Jan. 1990.

[278]The reasons given for non-participation reflected their sense of alienation and apathy e.g. "Not interested", "no party had solutions".

[279]See M. Gallagher, M. Laver and P. Mair, *Representative Government in Western Europe* (New York, 1992) p. 86-87 for a breakdown of the proportion of women in politics and their social connections, and at p. 163, for the proportional percentage of women active in politics at parliamentary level in Ireland compared with other E.C. countries. Irish women showed themselves to be marginally more politically active than their peers in France, Greece, Portugal and the U.K. where participation rates were even less than the Irish figure of 7.8%.

[280]Despite the fact that the Irish woman has had the vote since 1921, it was 1978 before the first woman was appointed a minister of state and a full member of government.

[281]A survey of the occupational background of elected politicians in 1989 showed that the vast majority were professional and business men. See M. Gallagher, *How Ireland Voted 1989*, (Galway, 1990) at p. 85 and 93, cited by Basil Chubb, *The Government and the Politics of Ireland*, (3rd ed. London: Longman, 1992) at p. 86.

manual labourers and working class people as a whole. The tendency of a particular socio-economic class to come to ascendancy in politics is even more striking if one has regard to those people who form government.[282] Irish experience confirms what Putnam refers to as "the law of increasing disproportion",[283] the higher one reaches in the political echelon the greater proportion of professional and educated males one finds. It is perhaps not surprising that the Irish Legal Aid Scheme remains inadequate - afterall it is significantly women of a lower socio-economic class who suffer its inadequacies and these women have no political voice. Likewise the treatment of the immigrant body in Québec is meaningful - participation in democracy is exercised by the use of the vote and the one body of society that is singularly excluded from exercise of the vote, is the immigrant body.[284] Little attention is paid to the number of occasions one is given to vote, considering the importance attributed to it in democratic theory.[285] In

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[282]See J. Coakley and B. Farrell in *Pathways to Power: Selecting Rulers in Pluralist Democracies*, M. Dogan *ed.*, (Boulder, 1989).

[283]Quoted by J. Coakley and B. Farrell in *Pathways to Power: Selecting Rulers in Pluralist Democracies*, *supra no.* 282 at p 204 - 5.

[284]The ultimate sanction of electoral accountability is of little utility where laws are directed against a vulnerable and electorally insignificant minority. As Macdonald points out there are few votes to be won by conceding administrative justice to immigrants. See the Preface to I. Macdonald & N.J. Blackie, *Macdonald's Immigration Law and Practice in the U.K.*, (3rd ed.,) (London: Butterworths, 1991).

[285]Art 6 of Bunreacht na h-Eireann refers to the right of the people 'to designate the rulers of the state and, in final appeal, to decide all questions of national policy'. See generally B. Chubb *supra no.* 282

Ireland, the opportunities are few and far between.[286] Nevertheless, it is perhaps more important that we ask if more numerous opportunities to vote would make any difference. When voting we may only chose between the candidates that stand. In the case of party politics the candidates that stand are already selected by the officials and active members of the political party.[287]

No society is homogeneous. Even within each minority group there exist further minorities.[288] When Judge O'Hanlon spoke recently of a 'moral majority', he seemed to believe that such an entity actually exists.[289] We need to ask ourselves what makes one moral consensus superior to any other moral view and why and when it is necessary to impose

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[286]Irish electors have just three opportunities to exercise their right to select their political representatives i. Elections for member of Dail Eireann, the Irish parliament, are held at least once every five years. This process produces a government as well as a popular assembly because that party who wins a majority of the seats are entitled to form a government usually. ii. Local Authority elections 'are provided for by law' once every five years, but they can and have been postponed by ministerial order. iii. An election for President may be held every 7 years but again the parties often produce an agreed upon candidate (five out of the ten candidates between 1937 and 1970). See further Chubb *supra no.* 282 at p. 77.

[287]Thus, as Chubb writes, "most of the more important political office-holders and the politically influential are chosen by quite small 'selectorates'" *ibid* at p. 78.

[288]This is not something that we in Ireland like to acknowledge. See K. Asmal, "The Protection of Minorities in Ireland: The Role of National and International Law", in *Law and Social Policy* (ed. Duncan, Dublin: DULJ, 1987) at p. 107 where he describes minority protection as a "sensitive area" in Ireland.

[289]Speaking at a Bar College Debate on the motion, "The Moral Majority should Dictate the Moral Environment", (Address to the Honourable Society of the King's Inns, November 1993) [unpublished].

those views on others.[290] Ours is a society deeply divided on many issues. Ideological concepts, like freedom of religion, are constructed in each social setting, to mean very different things.[291] This adaptation of universal principles to community settings can operate to threaten social minorities - the smaller the social group becomes the more homogeneous it is and the less tolerant of difference.[292] A firm concept of the individual as a rights

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[290]See J.M. Halstead, "To What Extent is the Call for Separate Schools in the UK Justifiable?", (1986) 5 *Muslim Studies Quarterly* 5

[291]Northern Ireland and the Republic both have equivalent provisions to that of the First Amendment restricting the power of parliament - para. 16 of the Schedule to the Irish Free State Agreement and s. 5 of the Government of Ireland Act. Had s. 5 been applied in Northern Ireland in the way in which its equivalent is applied in the US, the whole educational system of the province would have been declared unconstitutional. Northern Ireland's system provides for major direct state aid to church schools and provides for religious education in all schools, whether church or state. The churches are closely involved in the management of schools and have direct access to the school premises to provide religious instruction. That the educational system may be unconstitutional as constituting an establishment or endowment has never been considered. In the Republic religion is directly supported by the government and is taught within the school curriculum. To counteract the possible discriminatory impact of such a policy in a Republic with a 95% Catholic population (where the Parish Priest is usually part of the School Board and the clergy has traditionally been influential), the Government is held under an obligation to favourably endow minority religions. For this reason Protestant schools in the Republic are accorded a disproportionate levels of funding. This is the recognition that individual freedom does not exist in isolation. For a comprehensive analysis of constitutional litigation in Northern Ireland and in the US see further G. Edgar, "Religion and Education", (1982) 33 *Northern Ireland Legal Quarterly* 20.

[292]See Minow "Tolerance Reconsidered", (1990) 28 *Osgoode Hall Law Journal*. See also J. Dignam, "Democratic Centralism and the Reform of Local Government", (1985) 36 *Northern Ireland Law Quarterly* 67. Inevitably local communities want to inculcate religious values into their children. The liberal neutrality principle does not demand a total separation between church and state; rather it requires that on church matters the state is neutral - neutral as between one church and another church, and neutral as between religion and secularism - See Everson v. the Board of Education, 330 US 1 (1947). This neutrality principle is not so evenhanded as it does not factor in considerations

holder therefore remains an important instrument to protect against the oppression of minorities within minorities.[293]

II. Knowledge and Identity - A Personal Reflection on Local Knowledge

The law,[294] language[295] and, arguably, experience provide us with a classification system which allows us to substantiate our universe, but this universe then becomes real, imposing arbitrary restrictions on our ability to interact. Human beings remain more, however, than the particular identity that society imposes upon us.[296] Our

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which include the role that religion plays in the life of the citizen and how religious education or lack of it shall effect the social fabric of particular groups, particularly from the perspective of the child. As Kymlicka points out in *Liberty, Culture and Community, supra no.* 263. liberal values require not only individual freedom of choice but also a secure cultural context from which individuals can make their choices. Creating a secure cultural context for a cultural minority necessitates not just 'equal treatment', but also an interventionist approach, including disproportionate spending measures that allow real personal autonomy. Equality requires something more active than 'neutrality' to be protect against oppression.

[293]An example in the aboriginal rights context is the extent to which women's equality rights will be effected within the general framework of aboriginal rights.

[294]Geertz writes that 'law is part of a distinctive manner of imagining the real', and he continues that legal decisions, 'engrave upon our culture the stories that we tell about ourselves, the meanings that constitute the traditions we invent' - C. Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology (Basic Books, 1983)*

[295]See J.S. Bruner, "Early Social Interaction and Language Acquisition", *Studies in Mother Infant Interaction*, H.R. Schaffer *ed.*, (London: AC. Press, 1977), where he describes language acquisition as a means of getting things done in a culture. Judges are appointed when they have displayed a mastery of the procedures that the language of the law empowers and in order to get things done in a legal culture, individuals integrate language as a filter for knowledge.

[296]See Naom Chomsky, "Human Nature: Justice versus Power", *Reflexive Water: The Basic Concepts of Mankind, ed.* Fon Elders (London, 1974) at

courts tell us stories of individual entitlement and autonomous spheres,[297] deeming the individual to be equal and free, thus undermining our ability to understand our relations with others. Whether law and legal aid can play a part beyond the socializing role that the 'Master' gives them may be determined by our ability to make experience feature in the creation of our classification mechanisms.

I am not Irish because I speak Irish.[298] Language is not determinative of our identities as a people. It provides us with a means of structuring our immediate environment so that the lessons we learn in school have a special significance, a shared meaning that transcends mere words.[299] Born the daughter of a Roman Catholic farmer in

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p. 136, 140. For Chomsky, political action should be guided by an appreciation of humanity. Foucault unsatisfactorily avoids the question of human nature as an entity throughout his works, preferring to analyse how it is used conceptually in society.

[297]See A.C. Hutchinson et A. Petter, "Private Rights; Public Wrongs; The Liberal Lie of the Charter", (1988) *38 Univ. of Toronto Law Journal* 278, where they say that what liberalism calls 'private power' is in reality public power that has been delegated to certain individuals.

[298]Indeed it's the brand of English I speak and not my Gaelic which allows me to be welcomed to the fold. Bruner writes that language acquisition is a by-product of "the need to get on with the demands of the culture", see further J.S. Bruner, "Early Social Interaction and Language Acquisition", *Studies in Mother-Child Interaction*, (London: Academic Press, 1977). Heller writes that shared language is basic to shared identity but more than that, identity rests on shared ways of using language that reflect common patterns of thinking or behaving. See Heller in *Children's Ethnic Socialization: Pluralism and Development*, ed. Phinney & Rotheram (London: Newbury Park, 1987)

[299]See J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal and Kingston: McGill-Queen's Press, 1994) for a commentary on identity and allegiance within a democracy. He argues that even those countries who have the strongest sense of self identity do not share "a single set of values" at p. 173 *infra*. This is not to detract from a willingness to engage in a "public discussion

rural Ireland, my sense of identity, belonging and personal potential were nurtured by my apparent ressemblance to all those around me. I felt superior to some, for example the itinerants[300] - they stole, had gaudy funerals and ostentatious weddings, sporting white high heels on their purple legs. They drove from County to County on dole day and that's why they could afford to buy big vans with this years registration plate[301]- they were different and to be avoided with a charitable disdain.

It was a long time before I learned what 'xenophobia' meant, it was longer still before I believed my college friend who declared Ireland to be Europe's most 'racist' country. How could we be, we were all Irish weren't we?[302]

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through time" which discussion gives rise, through a developed mutual understanding, to a set of common values. He writes at p. 180 that we value our particular countries because we value the "particular character of our public debate". Cultural roots form part of our inner selves and are made up of a mixture of family memories, experiences, symbols commitments and values and this becomes a map which helps us to make sense of our lives. As we grow older new memories and experiences are grafted on and our personal culture becomes a mixture of all that we have experienced and thought about that makes life meaningful to us.

[300]Term used to refer to an ethnic minority of travelling/gypsy peoples in Ireland - derogatorily abbreviated to 'tinker'.

[301]In fact, in Dublin, all members of the travelling community must collect their social welfare payments at one central office - no other community is thus restrained, and on no other community would its impact be so oppressive. What education groups working with the Travelling Community are at pains to point out to the Settled Community is that a Traveller's home is his vehicle and, while a "settler" may invest all his/her resources in the family home and mortgage repayments, Travellers invest substantially in their vans.

[302]According to the Report of the Committee of Inquiry on Racism to the European Parliament in 1991, Ireland has a non-EC population of only 18,000. The Report recognized that the travellers were the most discriminated against ethnic group. Many would of course dispute that they constitute an ethnic minority at all. One of the major problems in

Before ever 'bias' existed in my vocabulary or as an entity in my social world, it had become part of it, so much so that, even with a title, it sometimes remains unrecognised by me as being an artificial perception of social reality.

A child's concept of self develops from a complex interaction of elements in its social environment. Young children try to construct their ideas and integrate new information in ways that will make the world meaningful and predictable.[303] They try to adapt and simplify this information in a manner consistent with their beliefs and self-image.[304] While external information and experience will influence these developing concepts, research shows that early socialization experiences remain critical to a determination of ethnic and cultural attitudes.[305] This

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Europe in combating growing discrimination against minority groups is the widespread disagreement as to what constitutes a minority, never mind an 'ethnic' minority. In France and Germany, for example, where right wing nationalist groups are gaining an ever strengthening foothold, what constitutes a minority is more a question of law than of fact, and to constitute a minority one has to be a member of a group of citizens living together.

[303]See J.S. Phinney & M.J. Rotheram, *supra no.* 298 *infra* p. 72.

[304]J. Piaget, *The Moral Judgment of the Child*, (N.Y.: Free Press, 1965)

[305]See Brand, Ruiz, & Padella (1974). See further K. Clark, *Prejudice and Your Child* (1963), Snyder, "On the Self Perpetuating Nature of Social Stereotypes", in *Cognitive Processes in Stereotyping and Intergroup Behaviour* 183 (Ed. D. Hamilton, 1981). The child is socialized not just by his/her own 'historical memory' but by a collective history in which the patterns of domination and oppression persist. A person who learns a certain perception of self, will interpret the world so as to confirm the veracity of these perceptions. The underlying message in A. Davey, *Learning to be Prejudiced: Growing Up in Multi-Ethnic Britain*, (Arnold, 1983) is that children are socialized into a concept of themselves and the social group to which they belong at an early age, in the context of the preferences and biases that exist in their society, and their later learning, "mediated

cultural layer develops in conjunction with perceptions of difference which are permeated through our language,[306] traditions, religion, the media and the law. We conform to others expectations of us, believing these expectations to be true and the world as we know it to be natural, normal and inevitable.[307]

When I went to University I discovered that the Dubs in my class were separated along geographic lines. The Northsiders wouldn't speak to the Southsiders and they had different accents. They were very willing to explain the difference when questioned and they all talked to me. In a foreign environment I had no identifiable class origin and posed no threat. This social stratifiction forms part of our culture and how we identify ourselves as a race. We cultivate this image and are satisfied that it is the truth and is acceptable - that's just the way things are. The Alan Parker film, "The Commitments" portrays this efectively when in a thick northside Dublin accent, Jimmy says

- The Irish are the niggers of Europe, lads.

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through the shared assumptions and practices of their groups, is likely to be congruent with early learning....they will cite them as the realities which confirm their independent evaluations and judgements", *infra* at p. 5.

[306]See M. Heller, "The Role of Language in the Formation of Ethnic Identity", in Phinney & Rotheram *supra no.* 298

[307]Mary Jo Deegan writes that everyday life is like the theatre - like actors on a theatrical stage we fit into the dramatic expectations of others and thereby construct our lives and actions - M.J. Deegan, *American Ritual Dramas: Social Rules and Cultural Meanings, supra no.* 171 at p. 6.

They nearly gasped: it was so true.

- An' Dubliners are the niggers of Ireland. The culchies have fuckin' everythin'. An' the northside Dubliners are the niggers o' Dublin.

- Say it loud, I'm black an' I'm proud.[308]

Our perceptions are generally not unique to us but result cumulatively from group and societal attitudes.[309] Our socialization, which taught us to be discriminatory or to suffer the discrimination of social stereotyping, constrains our ability to challenge the norm.[310] We are not born unequal because of our sex or race, but society makes us unequal by artificially constructing what sex and race mean in the way we live our lives and the type of people we are or could be.

An understanding of the process of socialization, the

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[308]Roddy Doyle, *The Commitments*, (Minerva, 1987) p. 9. It's strange that he should think that the 'culchies' had everything, because as a culchie (person from the country), I was glad when people were surprised I was a country girl. That meant that my accent or clothes were not different, would not be laughed at. I hadn't realised that anyone might envy me my origins, because my socialization had taught me that I would have to struggle to survive in Dublin, in a dangerous big city, where everything would be foreign, alien.

[309]Mary Jo Deegan *supra no.* 171, writes at p. 20 that in modern societies, individuals are socialized into patterns that link community experience with inequality. Rituals maintain their power to incorporate individuals into social life in this context, but the process of incorporation simultaneously requires the reinforcement of discrimination, alienation and inauthenticity. Deegan continues to highlight the role that laws play in maintaining these social constructs saying that they are the rules that organize our existence and they "enable the individual to guide and interpret experience in a fluid and socially created reality" - *infra* at p. 7.

[310]A particularly poignant example of this in action can be seen in the film Malcolm X, where the young Malcolm asks why he can't be a lawyer as he has "the best brains in the class". He's told that this is not a job for a black person. People wouldn't like him. Instead he should try to be a respectable carpenter, afterall, he is "good" with his hands.

way in which we internalize bias and notions of superiority and inferiority, willingness to participate and feelings of exclusion, can help us to create different experiences for children.[311] Sociological research shows that children, from a very young age, have a practical grasp of some of the causes of anger, distress and happiness of other family members, particularly where their own interests are at stake.[312] This demonstrates the relational dependence of the child, which is an integral part of its cognitive development.[313] From their second year it seems clear that children develop an understanding of rules and roles and how they can manipulate both to their advantage.[314] Children everywhere are concerned by the feelings and goals of those who share their social world and a relational approach to

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[311]There was a Protestant boy in my class in primary school. He was the only one in the whole school. The teacher said we should be nice to him. I tried because nobody else would - but not for long. My brothers still tease me about my "boyfriend". Why should the teacher ask us to be 'nice to him', immediately putting him in the inferior position of the excluded person who did not belong? Would it not have been better to use our feelings of hurt and wanting to belong to create in us an appreciation of others feelings and needs.

[312]See further J. Dunn, *The Beginnings of Social Understanding*, (Blackwell, 1988).

[313]There are conflicting views as to the relative importance of socialization and relationships during our formative years, and here we choose to favour the related impact of both. Hoffman and Kagan see the development of empathy in young children as being linked to their emotions of anxiety, guilt and fear of not living up to parental expectations, while Dunn, *supra no.* 312, emphasizes the of the relationships between child and parent. See Hoffman, *Social Cognitive Development: Frontiers and Possible Futures*,(Cambridge, 1981) *eds.*, J.H. Flavell & L. Ross.

[314]In Western society research shows that children exhibit knowledge not only of family politics but also of certain principles of a wider cultural knowledge. Principles such as possession, positive justice, excuses on grounds of incapacity or lack of intention, and even gender role division of labour.

the social order allows us to harness this shared ability to empathize with others.

The tools of the socially dominant group - mass communication, theatre and the arts, law and rights theories - provide images of equality and democracy. They shape the needs of the people while advancing the vested interests of the élite, whose position is protected by an interlocking system of discriminations which undermine the coalesced power of other social groups.[315] The experiences of three Catholic friends from Northern Ireland identify recurring patterns and illustrate the impact of the particular environment on the developing ability of the individual to participate in social institutions.

A Catholic girl who had lived in a predominantly Protestant town, had all Protestant friends and had been to a Protestant grammar school, felt no bitterness towards the

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[315]As Deegan writes "Different discriminated groups are generated by a series of similar steps and legitimations in any given society. This pattern arises from the elaboration of a cultural set of symbols and rituals that maintain and legitimate everyday reality", *supra no.* 171 *infra* at p. 22. On the role of the media see further D. Miller, "The Media and Human Rights Abuses", (Paper presented to the Northern Ireland Human Rights Conference, McGill University, March 1993), L. Curtis, *Ireland: The Propaganda War*, (London, Pluto; 1984), D. Miller, "The Northern Ireland Information Service and the Media: Aims, Strategy, Tactics", *Getting the Message: News, Truth and Power, ed.*, Eldridge J.E. (London: Routledge, 1993), "Official Sources and Primary Definition: The Case of Northern Ireland", (1993) 15 *Media, Culture and Society* 385, P. Schlesinger, *Putting 'Reality' Together: B.B.C. News*, (London: Metheuen; 1987). See also "Liberation Scenes", *Yearning,: Race, Gender and Politics* (Between the Lines, 1990) where bell hooks writes of the power of representations in the formation of social identity.

"system" and was not very aware of cultural difference.[316] Another friend had been to an élitist Catholic school in Belfast and he amused us with stories of the army helicopters hovering at the class room window for hours daily so that they could never hear the teacher. His sense of worth was reaffirmed by an inherent belief in his own superiority, fostered by his contact with children of similar social and class backgrounds which left him less vulnerable to external coercive powers. Meanwhile a Derry friend, son of a schoolteacher, told stories of the police coming to question his parents in the middle of the night and taking them away for days on end for questioning.[317] The

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[316]Research shows that children's awareness of ethnicity and its salience in describing themselves or others depends largely on the proportion of their own group and other group members in the environment - see Phinney and Rotheram *supra no.* 298 at p. 276.

[317]The experience of settler states and minorities world wide attest to the view that discrimination officially condoned or ignored can lead to increasingly violent attacks against the official system - see further Weitzer, *Transforming Settler States*, (Univ. of California Press, 1990), where he analyses the breakdown of settler states in Northern Ireland and in Rhodesia\Zimbabwe. The Manitoba Justice Inquiry recently reported that "In order for a society to accept a justice system as part of its life and its community, it must see the system and experience it as being a positive influence working for that community" - The Manitoba Aboriginal Justice Inquiry at p. 252. In Rose, *Governing Without Consensus; An Irish Perspective*, (Beacon Press, 1971) the author writes that "In a regime that lacks full legitimacy .. the institutions of law may encourage disorder, civil administration can be ignored in the absence of coercive threats, and coercion may fail to coerce" at p. 113. Empirical research conducted in Northern Ireland speaks of "psychological genocide" and evidences generations of children who have grown up believing that "there is no objective justice out there but that each must act to right the wrongs" - see R. Fields, *Society Under Siege: A Psychology of Northern Ireland*, (Temple Univ. Press, 1976) at p. 55 and further K. Heskin, *Northern Ireland: A Psychological Analysis*, (Columbia Univ. Press, 1980). The Northern Ireland experience is echoed in the experiences of the Canadian Aboriginal peoples before the courts. Relying on the Canadian Bar Association's Report, Locking Up Natives in Canada, Michael Jackson uses their figures, which show the

sister of his first girlfriend had been invited to a party while visiting in Belfast, and was murdered by nine young people following a gang rape, because she hadn't realized that she had been lured to a 'prod party'. Police reports insinuated that she had in some way contributed to her fate and only two weeks later was an investigation finally opened.

In a violently divided régime the law operates to alienate whole sectors of the community, causing them to react against the system that subjugates them. In societies where subjugation is more subtle or the dominated social groups are weaker, the law excludes by creating a body of objective knowledge that the subject adopts. But these are not the only alternatives open to us.

While many of our experiences are socially controlled,[318] and therefore only narrowly formative, on another level our experiences teach us that relationships cannot be simplified to bundles of needs and rights. Through experience we are empowered to see the limitations of our ability to speak what we feel and to understand our

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higher rate of criminality among aboriginal peoples, to show the discriminatory impact of a foreign regime - see M. Jackson, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", (1992) 26 *Univ. of British Columbia law Rev.* 148.

[318]As Gabel writes the law is "a denial, at the level of social interpretation, of our collective experience of illegitimacy", - Gabel P., "Reification in Legal Reasoning", *Marxism and the Law* (eds., P. Beirne and R. Quinney; New York, 1982) 262-278 *infra* at p. 265.

reasons. By relating with others we begin to question ourselves and the basis for our moral distinctions - between right and wrong, normal and abnormal and all perceived difference and similarity. Even with our limited perception of self, we are conscious that parts of our identities are so complex that we do not have the structures necessary to talk about them or even think about them.[319]

Minow favours a "social relations" approach to rights analysis because it identifies a set of considerations for an ongoing dialogue that accompanies our "choices about social life", and allows us to question the existing order and the extent to which our conception of justice is formed by our position on a particular power rung in the ladder of life.[320] A social relations approach, similar to Minow's, would allow us to develop a theory for social change which builds from our commonalities and our basic humanity.[321]

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[319]These parts of us are pushed to the fringe, buried in the subconcious.

[320]In their analysis of the social structure of immigrant populations in Western Europe as a whole, Castles and Kossack examined occupational segregation and found that immigrants tended to be concentrated at the lower end. In the Federal Republic of Germany in 1978 by far the greatest percentage (81%) of the immigrant population were manually employed and as any civil service employment required that you be a German National, the entire immigrant population was excluded from government service - in which some 9.4 % of German nationals were employed. See further Castles and Kossack, *Here to Stay - Analysis of Immigration in Western Europe as a Whole* (1985).

[321]See M. Minow, *supra no.* 11. Our present legal constructs for treating difference mask the, "relationships marked by power and hierarchy", between the 'different' and the 'norm'. See M. Minow, "When Difference has its Home: Equal Protection and Legal Treatment of Difference", (1987) 22 *Harvard Civil Rights - Civil Liberties Rev.* 111. Even Rawls' 'difference principle' fails to grapple with the

My experiences in Germany will always remain particularly instructive for me because I felt my 'commonality' very keenly during a summer there, working as a cleaner in a Munich hospital. Most of my fellow cleaners were from Eastern Europe and Turkey and were, quite literally, treated like second class citizens who had no feelings. I learnt the shame of fighting and loosing the battle of not distinguishing myself from them by saying I was Irish. The change in attitude was electric. If you were Irish you spoke English, if you spoke English you were excused for having broken German, but not if you were Turkish. If you were Turkish and couldn't speak perfect German then you were below contempt, you were stupid and lazy and one could talk about you in your presence as though you wouldn't understand. I encountered racist attitudes among Irish acquaintances who had found factory jobs and refused to use the provided accommodation because they

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significance of sex in the creation of a just society and the legacy of the socially constructed significance of sex, colour and race. As Minow herself points out, many people would not respond to the possibility that they might be in the worst off position by adopting the difference principle. "To assume otherwise, as Rawls does, is to posit a particular kind of person in the role of the decision maker. Many people might instead assess the chance of being the worst off person and base a calculation of the benefits for that person on such a probability" - *Making All the Difference, infra* at p. 154. Okin criticises the absence of the express treatment of sex throughout *A Theory of Justice*, writing that, "Since the parties also 'know the general facts about human society', presumably also the fact that it is structured along the lines of gender both by custom and law, one might think that whether or not they knew their sex might matter enough to be mentioned" - see Okin, "Justice and Gender", (1987) 16 *Philosophy and Public Affairs* 42.

couldn't live with 'filthy Turks'.[322] A 17 year old co-worker had been married by proxy, had never seen her husband, whose education she was paying for, and thought it was very sad that I was an old spinster. I hastily informed her that people were generally older when they got married in Ireland. It occurred to me to wonder how I would feel if I had to do that back-breaking job, in such undignified circumstances, for the rest of my life or for a second longer than those four miserable months.

Relational experiences arm us with an insight into the role that knowledge plays in the workings of the social world we live in. We can use this insight to programme the cognitive process to recognize power and its social products. While the idea of 'reprogramming' social consciousness is unsettling,[323] the greatest tool we have against social oppression and alienation is the knowledge that enables us to destruct them.[324] It is one thing to identify the agencies of power and capital in our lives and

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[322] They found nothing morally reprehensible in imposing upon us instead, in our cramped living conditions, and eating our food, creating serious problems for us with our landlords.

[323] Lukes refers to this as the 'extreme exercise of power' - getting others to have the desires you want them to have. It is unsettling because its possible abuse in what could be termed a form of cultural absolutism is evident - See D. W. Livingstone et al, *Critical Pedagogy & Cultural Power* (1987) and further, Alicia Ely-Yamin, "Empowering Visions: Towards a Dialectical Pedagogy of Human Rights", (1993) 15 *Human Rights Law Quarterly* 640

[324] Foucault describes the will to knowledge as being part of the danger and also the tool to combat that danger - see *Power/ Knowledge*, *supra no.* 76. See also R. Williams, *Towards 2000* (Penguin, 1985).

quite another to create a dynamic for change that grows from a confidence in our own capacities.

II. The Role of Legal Aid in a Political Strategy for Change

Our inability to use the law to challenge social classifications and determinations of power is compounded by our belief that these classifications are representative of something real and indisputable in our lives. To gain access to a more just conception of society, we need to distinguish between what is real and what is merely constructed. This is no simple task - afterall, long before we ever knew what ethnicity was as children, we knew that the travellers were 'different'.[325] Given that our first encounters with bias occur, not through our experiences of the law and the court system, we need to use legal aid to create experiences that challenge understandings sustained by informal 'rituals'. These rituals construct the moral

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[325]They did not live in houses like everybody else. Why couldn't they go to school - maybe that was no wonder, they were so stupid when they did come. Catherine Joyce, a member of the Irish Travelling Community, in a recent interview, spoke of her experiences at school. She recalled the day somebody from Zaire came to the school and the class spent a week learning about the cultures and customs of Zaire. Not once in her few years of schooling did anyone mention the travelling culture or the history of the Irish Travelling Community or their language. See further, *The Irish Times*, Tuesday, Nov. 23rd 1993. As G. Fitzgerald points out in *Repulsing Racism supra no.* 24 at p. 16, less than 20% of Traveller children attend secondary school. Research in the United States shows that minority group children show significantly poorer school achievement and have substantially higher drop out rates than other children (Scarr, Capruto, Ferdman, Tower & Caplan, 1983).

rights and wrongs that we see legislated for in our laws.[326] Thus a 'lone parent' cannot be a man,[327] and s. 60 of the *Housing Act (Ireland) 1966* imposes a duty on housing authorities to make a scheme of priorities for letting housing accommodation but did not, "encompass a duty to provide serviced halting sites as s. 60 referred exclusively to the letting of dwellings".[328] To make the law more socially responsive therefore, we have to become more responsive and interactive. It is not by accident that those areas of social regulation that affect the lives of our 'marginalised',[329] are carried out through a number of

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[326]See Legal Instruments to Combat Racism in Ireland - FLAC seminar (publication forthcoming, 1994). See further *Repulsing Racism: Reflections on Racism in Ireland*, p. 14-15 *infra*.

[327]s. 197 of the *Social Welfare Act*, 1981 (Ireland) provided for an unmarried mother's allowance which was later replaced by the Lone Parents Allowance introduced in s. 12-16 of the Social Welfare Act (1990), see also the Social Welfare (Lone Parent's Allowance and Other Analogous Payments) Regulations, 1990, S.I. 272 of 1990. For a description of the new measure see M. Cousins, "Social Welfare Payments and Maintenance", [1991] 11 Family Law Journal 7. Demographic statistics show that the predominance of female headed single parent families is not an Irish phenomenon. In fact, while females are heads of single parented families in 86% of families in the Republic, this compares with 90% in the Netherlands and 88% in Canada during the 1980s - see further J. Millar, S. Leeper and C. Davies, *Lone Parents, Poverty and Public Policy in Ireland: A Comparative Study*, (Combat Poverty Agency, 1992)

[328]See G. Whyte, "Welfare Law - Travellers and the Law", (1988) 8 *Dublin University Law Journal* 189. In a recent report, Niall Crowley of the Dublin Travellers Education and Development Group (DTEDG) argued that as all Government policy on travellers to date has been concerned with assimilating the travellers into the settled community. Until the 1988 *Housing Act* the special needs of travellers have been consistently ignored in legislation - an omission which is a further example of institutional racism.

[329]In a study of Europe's marginal groups conducted by the "Marginals" group of the European Programme to Combat Poverty the results of which were published in "Programme Européene pour la lutte contre la pauvreté: Results and Prospects, Action involving marginalized populations and groups". These projects (12 different research groups in 12 different

'anonymous institutions'.[330] In this way the system is not forced to confront the humanity of the social actors whose lives they control.

In developing a political strategy for social change,

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places) grew up against a background of social realities and political contexts that differed from one country to another - nevertheless beyond this diversity, the project was able to show that on the whole the types of marginality encountered could be traced to the loss of access to legitimate activities available to socially disadvantaged populations; a correlating loss of social role and cultural identity among the individuals or groups affected; marginalisation of the areas these people inhabit (or areas they have been pushed into), entailing the devaluation of these areas; lastly, in the most acute cases of desocialization, these people lose or lack the possibility or capacity to even find housing; they are more or less forced or led to resort to means of "survival" that are illegitimate and/or illegal.

[330]Study of the legal system in the overall structure of this ritualistic scenario suggests that the formal and informal rituals that control our social institutions have an increasingly common source as traditional and local forms of social control are replaced by anonymous institutions. A recent book by Breen and Ors, *Understanding Contemporary Ireland; State, Class and Development in the Republic of Ireland*, (Dublin: Gill and MacMillan, 1990) the authors argue

a) that the state plays an inordinate role in determining the structure of Irish society

b) the results of state policies and in particular, patterns of public expenditure in the 1960s and 1970s, have been a reconstruction of the class structure which today allows for little social mobility and reproduces a marginalised underclass. Such social exclusion as exists in Ireland is, then, according to this analysis, to an extraordinary extent due to the operation of state policies. The authors stress that what is striking about the Irish case is the very direct nature of the link between public expenditure and the viability of class positions. See further Seamus O' Cinnéide, *Social Exclusion in Ireland*, 1st Annual Report for the EC Observatory on Policies for Combating Social Exclusion, June 1991 where the author details the pervasiveness of public expenditure in Irish society. Similarly, although European bureaucratic norms may seem more enlightened to us because they are softened by better economic prospects, they too support a certain vision of the world we live in and this world view is, unfortunately, too often formed by the minimalist politics of its members and benefactors. Gerry Whyte argues that the State purposely uses social welfare law as a means of social control - see G. Whyte, "Enforcing Maintenance Obligations through the Welfare System", (1990) *Gazette* 5 where he relies on Cranston, *Legal Foundations of the Welfare State*, (Weidenfeld & Nicholson, 1985)

it is important to identify where the major pressure points for change are within specific institutions. While legal aid has proven itself the Master's tool by operating to reinforce established values, it is also particularly well placed within the legal system to play a role in a theory of social change. It is through legal aid that the system itself can acknowledge 'difference', and realize that difference has never meant equality. If we use what could be a disempowering realization of the nature of the legal construct, to inform the way we structure legal aid services and allow them to be used, then legal aid could become a vehicle for social change. A legal aid service could act on the basis that we cannot rely on established conventions and that a decision ought not be rationalized by an appeal to what 'is', for what 'is' is exactly what is being overturned.[331] Legal aid policy so informed may be more effectively used by the 'marginalised' poor to challenge the existing order.

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[331]As Minow points out throughout her book, *Making all the Difference, supra no.* 11.

Chapter 5 - The Master's House

I. Challenging Our Conceptions

There is little point telling legal aid staff that they operate a biased system. In most cases we are unable to identify our own bias - it is part of our inner map that can only be changed by experience and relations with others. Instead, it is essential that we teach people to perceive the potency of their previous education and upbringing, to question why they hold certain views and why things are the way they seem. Change comes about through individuals consciously adapting their practice, and this consciousness is born in an informed view of why we are the way we are. This in turn will help us to better understand and accept that others may see things from a different perspective. Identification with others and a more open and questioning approach to human relations is necessary if the legal system is to become more responsive to diverse needs.[332]

Many of the legal system's failings, as argued in this

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[332] As A. Davey points out in *Learning to be Prejudiced, supra no.* 305 at p. 178 the intergroup relations of children has been fashioned by history and the relative economic, political and social advantages which have accrued to their membership groups and these inequalities will only be narrowed if action taken in one field is mirrored across social institutions. Thus, although the attitudes of teachers, and an education which socializes in a different way, are of fundamental importance, it is vital that for teaching a new way about seeing each other, and questioning a constructed reality, we also create a social climate which mirrors this in its institutional behaviour patterns.

thesis, result from its treatment of the human person. Unable to objectify humanity and the individual, modern legal theory flounders. This failing can be addressed. We have an innate ability to relate and to respond to the presence of others. If our knowledge structures are formatted with relationships and humanity as central principles, rather than in their more limited role as ingredients that determine the cognitive patterns we should develop, then we will be in a better position to judge what is real and what is constructed.

Oppression and our common ability to empathize with oppression facilitates us in our quest for equality.[333] We need to accept, furthermore, that we too have a role in oppressing others.[334] We need to empower those who feel oppressed to recognize it for what it is, a constructed externality of power, and to talk openly about it. Human experience goes beyond the bounds of the structures we have to understand it. It can teach us to reinterpret our knowledge and to realise that others have a story to tell also.

There are many pitfalls in addressing what is a complex

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[333]Matsuda speaks of a transformed liberalism that strives to protect liberty as 'viewed from the bottom'.

[334]Often the first instinct is to do something for the victim yet, as Niall Crowley points out, this can often be paternalistic, a further expression of the power of the 'institution' - See N. Crowley, *Racism in Ireland* (unpublished paper, FLAC, Dublin)

and insidious form of oppression. We need to learn to communicate across a cultural/social divide and to do so in a way which acknowledges racism and social exclusion and their potential infiltration into the communication process. Anti racist and anti exclusionary strategy must focus on the dominant community. "We are the problem - we are the ones who have to change".[335]

II. Rights and Legal Aid

What does the concept of rights have to add to this strategy for change? The necessity for rights theories only arises in a democracy because of the real injustices of majority rule. In an ideal world we wouldn't need a Charter of Rights at all - but no-one has ever said that this is an ideal world[336] and no-one has yet proposed an effective way of turning it into one overnight.[337] The history of the

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[335]Niall Crowley *supra no.* 334.

[336]Civil Libertarians in Northern Ireland wouldn't need to advocate the right to silence, or the right to counsel upon arrest, if we lived in a society where the authorities do not abuse their powers. Certainly it would be far preferable to educate these same authorities in the proper exercise of their powers and to develop a justice system that operates on trust and respect alone - but try telling that to those who are arrested under the *Prevention of Terrorism (U.K.) Act* which gives powers of internment for 7 days without charge. It is true that words or so called 'rights' alone may not change outcomes. Perhaps the Guildford Fours and Birmingham Sixes of this world would be convicted nevertheless - such is the true nature of the power game - this does not entitle us to give up the fight and to stop trying to ensure that if respect for humanity is not freely given then, to some extent, it may be demanded. See G. Conlon, *Proved Innocent* (London: Penguin, 1991)(now a major screenplay "In the Name of the Father", 1993).

[337]See Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want nor What You Need", (1991) 70 *Canadian*

Access to Justice Movement shows that liberal thought has internalized those reforms that have been necessary for the promotion of an image of equality and fairness.[338] Thus, to the extent that legal aid was necessitated by a need to create an illusion of equality and fairness, it can be termed 'the Master's tool'. What Lorde says is probably true - we cannot use the Master's tools to dismantle the Master's house. The law, rights or legal aid programmes are not meant to self destruct.

But Lorde didn't stop there.....

She continued that it is only within that interdependency of different strengths, acknowledged and equal, that the power to seek new ways of being in the world can generate.[339] We need more than a dream, an idyll of justice, we need a programme that can generate political support. By seeing a need for representation within the structure as it operates at the moment, we reinforce the legitimacy of its operation

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Bar Rev. 326 where he says that the difficulty with those who reinterpret the concept of rights and those who reconceptualise the judicial review is the "absence of any analysis concerning the historical and political conditions that would be necessary for currently dominant conceptions of rights and judicial review to be replaced by new ones...it does not follow that reinterpretation will change anything".

[338]It adopted legal aid, public interest law mechanisms, class actions, in that order, in response to highlighted inadequacies, in an effort to maintain the legal fiction of the equality of unequals.

[339]Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House", *Sister Outsider* (N.Y., 1984) at p. 110 - the title of this thesis is taken from Lorde.

and 'patch up the trousers of the established order'.[340] By failing to act on this perceived need, we contribute to the alienation and powerlessness of fringe groups.

Recalling why human rights, a right to legal aid among them, are so important, may provide us with the means to reconceptualize them for future benefit, rather than down tools.[341] Notions of rights and the assertion of self have been empowering and helpful in breaking social castes.[342] A concept of rights sometimes gives pause to oppressors and creates a barrier between the weak and the strong.[343] Legal aid not only produces an illusion of equality, but can also

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[340]See Milan Kundera, *The Book of Laughter and Forgetting* (Faber 1992 - translated from Czech by Heim), "Yes, say what you will - the Communists were more intelligent. They had a grandiose program, a plan for a new world in which everyone would find his place. The Communists' opponents had no great dream; all they had were a few moral principles, stale and lifeless, to patch up the tattered trousers of the established order."

[341]See Hilary Charleworth's comments on radical feminism which seeks to transform the world and comments that our communities seem ready 'at most for evolutionary change', quoted by R. Cook, "Women's International Human Rights: The Way Forward", (1993) *15 Human Rights Quarterly* 230-261

[342]See P. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights", (1987) *22 Harvard Civil Rights - Civil Liberties Law Review* 401, where she writes that "For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: Rights implies a respect which places one within the referential range of self and others, which elevates one's status from human body to social being". See also Cover, "Foreword: Nomos and Narratives, (1983) 97 *Harvard Law Rev.* 4 and Sparer, "Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement", (1984) 36 *Stanford Law Rev.* 509. See further as an illustration the long painstaking history of the American Civil Rights Movement - A. Freeman, *supra no.* 85

[343]See. R. Delgado, *supra no.* 84 at p. 306 where he relies specifically on P. William's account of an apartment lease. Despite his criticism of the CLS movement and his expressed doubts about the CLS concept of 'false consciousness', Delgado nevertheless incorporates the positive lessons of this movement into a rights application for minorities which he calls a 'radical social reform programme'.

be used to remove certain inequalities.

If we wish to influence the exercise of power in this society, we need to generate power and use it. Law has proven itself a strong instrument in the exercise of power and the reason that it fails to undermine social injustice is partly due to extensive alienation from the system which is rooted in our own perceived inability to have an impact on society. If we learn to challenge our own precepts, we can use the instruments of power, including the law and especially legal aid. Indeed we are obliged to remain within power's realm because it is only through the exercise of power that society can change. Power may be all pervasive but it can also be channelled.

We now have a new generation of theorists reconceptualizing judicial neutrality, culture and community as a social good, and fostering diversity as a prerequisite for neutrality in efforts to save social democratic institutions from attacks from the left. In the past when the right has hijacked the language of the left to cloak the rule of law in legitimacy, they have not been successful. Now that the right are showing an 'unhealthy interest' in the concept of community and seem ready to appropriate its language of self-reliance,[344] efforts should be made to

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[344]See John Waters, *The Irish Times*, November 23rd 1993.

ensure that this does not just become an effort to prop up existing failed political models, but instead is transformative of these models.

The only way to build a momentum for change is to confront the system and its actors with a wide range of social realities. For this to happen we need to have increased participation by all members of the community in the social world. Increased participation will only be won by a system which shows itself prepared to listen and learn. The existence of legal aid may help some of us to speak in one of the languages of power - through the law.

Legal aid presents the legal system with the opportunity to challenge our conceptions of what is 'right' and 'just' and why it is 'legal'.[345] It also gives us the opportunity to respond to the needs of those who are marginalised and involve them in the social structure using that which traditionally has kept it in place - the law. In this way we can use the Master's tools to build alternative structures and to shape future development. Just as earlier responses to the access to justice dilemma have fuelled greater change, so too can a continued support of legal aid

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[345]In other words we need to confront the rationalist trap that Simone de Beauvoir describes in terms of "Representation of the World, like the World itself, is the work of men; they describe it from their own point of view, which they confuse for the absolute truth". Those who are under-represented by government are usually under-represented in the legal system also.

programmes.[346]

Conclusion - Legal Aid as a Tool in the Restructuring of the Master's House

Things are happening in Ireland.[347] Increased funding has enabled the Legal Aid Board to attack its caseload, and symbolizes a renewed political momentum.[348] The legal aid system remains seriously flawed and it would be impossible for it to be used to break social role casting as it exists. In this regard we have still much to learn from the Québec Legal Aid Services, and before we go their route, which it seems we might,[349] we would do well to examine their experiences regarding the ability of an institution to mask

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[346]Trubek shows that various moments in the access to justice movement have been 'critical' - lawyers became aware, only through using the system to represent poor people, that it did not protect necessary rights for their clients and they realized the power of bureaucracy and interpretation to whittle away the scope of particular rights. Trubek sees this perception on the part of lawyers to have led to the 'public interest law' movement and this movement has, in turn, prompted a gradual 'redefinition of law' and a questioning of the meaning and effectiveness of rights and the emergence of the Alternative Dispute Resolution movement. This movement has forced liberals to develop a theoretical defense to communitarian theories of law and gradually the liberal framework itself can evolve to repudiate its own beginnings. See Trubek, *supra no.* 8.

[347]The Minister for Equality and Law Reform confirmed in a press release in early March 1994 that law centres will be opened at ten additional locations around Ireland, and part-time law centres will now operate in every County that does not have its own full time law centre.

[348]It was announced in the Dáil in December 1993 that the government funding would see and unprecedented increase to £4,927,000/annum.

[349]There are intimations that a mixed judicare staff model is being considered - confirmed by the fact that a pilot judicare scheme was operated during the Winter months of 1993 for the first time ever and that this pilot scheme has been extended and will operate 'for the time being', while the Minister assesses the situation.

the needs of those who use it.[350]

If the Québec system highlights the inadequacies of its own structure, it also presents us with an example of how legal aid could be used to further the interests of the excluded. In Québec the tools of power - the law making institutions, the media and language - have, on occasion, been successfully used to challenge the laws, our impressions of the world and our understanding of the law. The *Commission des Services Juridiques* intervenes at parliamentary level when a new law is being discussed and is well placed to mediate between the interests of its clients and the law makers.[351] The Québec Legal Aid Services have had many important victories that have resulted in changes in the law.

In *L'Affaire Vachon c. P.G. du Canada*[352] it was ruled that it was illegal to withhold unemployment insurance payments in the case of a bankrupt. *L'Affaire Noemie Tremblay*[353] helped to clarify the application of the rules

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[350]The Minister has for example given a commitment to examine the question of legal representation before the Employment Appeals Tribunal.

[351]See the Commission's submissions to la Commission des institutions chargée d'étudier l'avant-projet de loi sur la Loi portant réforme au Code Civil du Quebec du droit des obligations, the Commission's submissions concerning les amendements a la Loi sur la protection de la jeunesse, et sur les droits economiques des conjoints, as summarized in the 17th Annual Report of the Commission. Similarly in 1991 the Commission made submissions concerning the mandate of the Ombudsman, see the 19th Annual Report at p. 205.

[352]André Vachon c. Canada Employment and A.G. Canada, (1985) 63 N.R. 81

[353]La Commission des Affaires Sociales c. Noémie Tremblay [1989] AQ NO.

of natural justice in the decision-making process of the *Commission des Affaires Sociales*. Other cases have initiated legislative change - the case of *Gouin-Rolland*[354] was closed when the Government promised to modify Art. 91.1 of *la Loi sur la Régie des Rentes du Québec* so that it would ensure that an annuity be paid to every surviving partner with children.[355]

Further lessons that can be learned from the operation of the Québec Service is the role it plays in informing the public of the law and how it affects them.[356] The

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[354]Gouin-Rolland c. Commission des Affaires Sociales du Québec, C.S. Montréal 500-05-007331-901, le 4 mars 1991 (J.E. 91-540)

[355]In 1985 representations made by the *Legal Aid Commission* highlighting the results of bill 15 which proposed amending ss. 88 and 89 of the Rental Board Act, led the Ministry of Justice to drop these amendments - see further the 13th Annual Report of the Commission des Services Juridiques at p. 17. See also the examples of the case of Tanguay c. P.G. du Québec, Unemployment Insurance Commission (1985) 68 N.R. 154 which brought about the adoption of a reglementary change to the *Loi sur la Sécurité du Revenu* regarding injury compensation and Gosselin c. P.G. du Québec (Mtl) 500-06-000012-860 (1987) challenging s. 29 of the Social Aid Regulations which sparked a change in the Loi sur la Securite du Revenu and its discriminatory impact upon those under 30. In other instances the Commission has actively challenged legislative change which adversely impacts upon their clientèle and such challenges have often resulted in a reversal of the discriminatory policy - see, for example, the situation in August 1980 when welfare payments were cut. One of the Commission's lawyers working in this area proceeded to organize a protest conference and the Commission advised affected clients to appeal the decisions. As a result of these actions, the Minister of Social Affairs reversed his decision - see further the 9th Annual Report *of the Commission de Services Juridiques*, 31 March 1981. Some special interest cases of note are also listed in the 15th Annual Report, 31st March 1987 at p. 18-21.

[356]See for example the activities of the Information Service of the Commission which include the broadcast of "La Minute Juridique" on Quebec Radio and further, the television series "Justice for All". In this way the Commission informs the public as to how the law affects them and how they can rely on it.

Government Service in Ireland plays no such role and it falls to voluntary organizations to highlight the need for such information.[357] The Québec Service holds conferences, get-togethers and day-long study sessions on areas of the law that are of importance to their clients. Lawyers from the Service participate in different reform organizations and they represent the interests of their clients at their meetings.[358]

These are examples of how the law, even as a symbol of the order of things, can be used to change that order. Nevertheless, it is not, in itself, enough that we publicize

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[357]Research by the Economic And Social Research Institute in 1987 indicated that many social welfare claimants were not claiming their full entitlements. FLAC followed this up with a 103 household survey in Clondalkin in 1991 to try to find out why. FLAC found that one of the problems was an absence of a sense of entitlement and of rules. See further *Benefit Take-UP - A Report to the Combat Poverty Agency* (Dublin: FLAC, 1991). In the U.S. decision Goldberg v. Kelly, 397 U.S. 254 (1970). Brennan J. rejected the traditional argument that public assistance benefits are a privilege and not a right as a basis for denying the recipient's due process claim. Here we see Brennan using the master's tool to change traditional conceptions, but those who have been brought up in a culture where such entitlements are seen as privileges need information that will help them to see themselves within the social system, rather than as an adjunct.

[358]See the participation of Commission lawyers in the Round Table talks in 1992 on the reform of the Social security legislation which brought together recipients of social aid, la Ligue des droits et libertes, le fonds d'action juridique pour les femmes, la Commission des droits de la personne and others. A lawyer from the Commission also sits on the Comité sur la Formation permanente du Barreau and this representation is important and could be positively used in a time where there is a move away from students taking Law & Poverty type courses - as testified to by Prof. Glenn while speaking at a workshop on Social Diversity at the Canadian Foundation for Human Rights Conference on Access to Justice, at McGill University in June 1993. He highlighted that the profile of academic qualifications that the Barreau preferred that students have, did not encourage the teaching or taking of 'minority' interest subjects.

the law, inform people of their rights or make diverse interests known to the legislators. Unless these methods are used in a constructive way to challenge the law and its authority, the danger is that they will merely serve to make people aware of what the law is rather than of their capacity to initiate change.[359]

An understanding of the legal system which concludes that it is merely a power game and that law, legal aid and legal rights are exclusionary and help to sustain injustices, can be very disempowering. One does not want to feed an unjust system and it is difficult to rationalize efforts to secure extensive legal aid services if this will facilitate what can be termed violence, certainly oppression, through the legitimating power of the 'law'.[360] So do we do nothing? Too many have already been alienated from the power to impact upon the world in which we live.[361]

While power oppresses, it can also initiate change. Matsuda writes of the creative abilities of minorities in

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[359]See R. A. Macdonald, "Access to Justice and Law Reform", (1990) 10 *Windsor Yearbook of Access to Justice* 287, 325.

[360]See D. LaCapra, "Violence, Justice, and the Force of Law", (1990) 11 *Cardozo Law Rev.* 1065 and also, in the same volume, D. Cornell, "The Violence of the Masquerade: Law Dressed Up as Justice" (1990) 11 *Cardoza Law Rev.* at p. 1047

[361]See D. Cornell, *supra no.* 360 at p. 1060-61, "But if justice is only as aporia, if no descriptive set of current conditions for justice can be identified as justice....does that not mean that we have an excuse to skirt our responsibility as political, and ethical participants in our legal culture?".

the past to transform mainstream conciousness to their advantage.[362] Unlike wholesale critiques of rights, such a transformative process does not run the risk of losing previous gains and for this reason it remains incumbent upon us to push at the fringes of legal thought, and to develop the language of rights in all directions, so that they may best serve as tools in the transformative process. The language of rights may not adequately express the relationships of people in a given society with each other and with the legal order, but they have been involved in the 'debate' for so long now that they are part of the framework that structures our ability to understand - even those who find their voices distorted within a rights concept have been influenced to some extent by its dominance, and this alone means that 'rights' remain an important aspect of social interaction. This does not prevent us from shaping from within what rights shall mean in the future. Indeed an understanding of the nature of rights should inform us of how best to manipulate them in challenging injustice. Matsuda questions how anyone can believe simultaneously that they have a right to participate equally in society and that this right is whatever the people in power say it is. If you care for humans then a strong committment to human rights is a necessity.[363]

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[362]See M. Matsuda, Minority Critique of CLS: Looking to the Bottom", (1987) 22 *Harvard Civil Rights - Civil Liberties Law Rev.* 323, 337.
[363]Ibid. 410

We should refuse to sit on the sidelines of a corrupt system, this would be to concede defeat. Using the master's tools we can be more confident that the agents of power themselves will be forced to listen and perhaps one day even adopt a more socially informed world view.[364] Afterall, of our 23 cases examined under the new Income Security legislation, only one was refused legal aid by the Revision Committee, and although we do not know the eventual outcomes in these cases, the fact that they are taken, in itself, will stretch the bounds of systemic experience, culminating in social evolution.

But, of course, our ability to use the law and legal structures as a tool for social change, requires that we first recognise that they are, afterall, the Master's tools.

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[364]See Abdullahi Ahmed An Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives", (1990) 3 *Harvard Human Rights Journal* 13-52 where he writes that human rights violations reflect the lack of cultural legitimacy of international standards in society - *infra* at p. 15. "Insofar as these standards are perceived to be alien to or at variance with the values and institutions of a people they are unlikely to elicit commitment or compliance".

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Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (1980-1981) 416:125

Before ever 'bias' existed in my vocabulary or as an entity in my social world, it had become part of it, so much so that, even with a title, it sometimes remains unrecognised by me as being an artificial perception of social reality.

A child's concept of self develops from a complex interaction of elements in its social environment. Young children try to construct their ideas and integrate new information in ways that will make the world meaningful and predictable.[303] They try to adapt and simplify this information in a manner consistent with their beliefs and self-image.[304] While ›rmation and experience will influence these oncepts, research shows that early socializa ›s remain critical to a determination of et ural attitudes.[305] This

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Europe in combating grow against minority groups is the widespread disagreem onstitutes a minority, never mind an 'ethnic' minorit Germany, for example, where right wing nationalist groups are gaining an ever strengthening foothold, what constitutes a minority is more a question of law than of fact, and to constitute a minority one has to be a member of a group of citizens living together.

[303] See J.S. Phinney & M.J. Rotheram, *supra no.* 298 *infra* p. 72.

[304] J. Piaget, *The Moral Judgment of the Child*, (N.Y.: Free Press, 1965)

[305] See Brand, Ruiz, & Padella (1974). See further K. Clark, *Prejudice and Your Child* (1963), Snyder, "On the Self Perpetuating Nature of Social Stereotypes", in *Cognitive Processes in Stereotyping and Intergroup Behaviour* 183 (Ed. D. Hamilton, 1981). The child is socialized not just by his/her own 'historical memory' but by a collective history in which the patterns of domination and oppression persist. A person who learns a certain perception of self, will interpret the world so as to confirm the veracity of these perceptions. The underlying message in A. Davey, *Learning to be Prejudiced: Growing Up in Multi-Ethnic Britain*, (Arnold, 1983) is that children are socialized into a concept of themselves and the social group to which they belong at an early age, in the context of the preferences and biases that exist in their society, and their later learning, "mediated