THE DAVID HUME INSTITUTE

THE COSTS OF JUSTICE

Proceedings of a Conference
Sponsored By
THE FACULTY OF ADVOCATES

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Edited by Hector L McQueen

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The Centre for Dispute Resolution is a non-profit making body launched with the backing of the CBI and over 260 major European firms to promote mediation and other cost-effective approaches to European business disputes. It is the leading body of its kind in Europe.

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Foreword

The David Hume Institute aims to examine questions of public policy with special reference to their legal and economic aspects. Thus nothing could have been a more appropriate subject for an Institute conference than the "Costs of Justice"; that is to say, an examination of how much the legal systems of the United Kingdom cost to run, of whether they give value for money, and of whether there is room for improvement. It was largely a matter of chance that in the months before the Conference, which was held in Edinburgh on 9 May 1994, these issues came into increasing prominence in a number of different ways. In Scotland, the passage into law of the Sheriff Court Fees Amendment (No 2) Order 1993 (SI 1993 No 2957), setting new and higher levels of fees to be paid for court time, led to an outcry from the legal profession and others that an unacceptable price was being set upon access to the courts. In England and Wales there has been considerable discussion over a number of years, culminating in the appointment of a committee currently sitting under the chairmanship of Lord Woolf to look into the reform of court procedures with a view to creating more efficient, speedier and less costly systems.

The Institute was fortunate in obtaining a number of distinguished speakers willing to address some of the central issues raised by consideration of the costs of justice. They were invited to discuss two major concerns. The first was the internal question of the efficiency of the courts themselves, given that they are largely paid for out of public funds. To what extent can or should the courts become self-funding? How can their performance be measured so as to ensure value for money? What are the alternatives to the court system? Private arbitration is already a familiar phenomenon in the commercial world, and "alternative dispute resolution" plays an increasingly significant role in that and other contexts. The question thus arises: to what extent is the provision of justice - or, of dispute resolution - properly the concern of the state alone? Is there room here for further "privatisation" of the type which has been seen in other public services in recent years?

The second major concern is that of the costs of access to justice - the viewpoint, in other words, of the litigant and consumer of legal services, for whom the costs of obtaining justice often seem prohibitive. It may not be a comfort for such persons to reflect on Adam Smith's view that the level of fees of lawyers was justified by their need to get back the expenses of their education - and in any event much of the cost of that

today is borne, appropriately or otherwise, by the state. Amelioration of this concern has to date been through further public expenditure (the legal aid systems); but this has run into difficulties, because the cost can no longer be afforded by the public purse and also, just as important, because denial of legal aid may effectively shut out otherwise worthy claimants. Again, therefore, the issues include consideration of what alternatives to legal aid there may be, and of how best to ensure the effective use of public funds.

Such was the success of the conference that it seemed right to publish the proceedings as quickly as possible after the event, and this work embodies all but one of the papers presented. The missing contribution is that of Professor Alan Paterson, who spoke on legal aid, showing the varying regional pattern of legal aid demand in Scotland and providing a critical account of the measures of performance used to assess the quality of service to be given by English and Welsh law firms with a legal aid franchise. Much of Professor Paterson's paper will shortly be published elsewhere.

The Institute was fortunate to receive support from both the Lord Chancellor and the Lord Advocate, who both set out very clearly the current position in England and Scotland respectively, each touching on legal aid, procedural reform and ADR. One of the questions which emerged from the Lord Chancellor's paper was the search for appropriate performance indicators by which the success of initiatives relating to legal aid and court efficiency might be measured, a theme which is developed further in the contributions of Sir Alan Peacock (offering the perspective of an economist) and David Dewar (drawing on his experience within the National Audit Office). Sir Alan sets out a methodology which requires taking account of the attitudes of the consumers of the country's systems of justice, while Mr Dewar makes the important point that, whatever attitude one takes to the use of performance indicators in measuring the intangible quality of justice, it is necessary to come to grips with the languages in which they are couched if one is to play any role in shaping the development of the legal system. This observation was picked up by a number of the lawyers present at the Conference, and the Institute hopes to play some part in the future in enabling lawyers to come to grips with economic and auditing analyses of their work.

The Lord Advocate also drew attention to a number of other interesting points, stressing in particular the need for a supreme court in which not

only might disputes be settled but also the law, through the laying down of precedents. Professor Karl Mackie's paper on Alternative (or, as he preferred to put it, "Appropriate") Dispute Resolution made clear that the processes with which he was dealing should not be seen as necessarily an attack on the process of litigation, which has its place. The need in his view is to reconsider ways of dealing with disputes so that they are indeed appropriate to the matters at stake. In that sense the courts' procedural reforms, to which the Lord Chancellor and the Lord Advocate draw attention, can be seen as part of the same movement which has given rise to ADR in the first place.

What seemed clear at the end of the day is that lawyers should not feel threatened by the developments and prospects which lay behind the institution of the Conference. Indeed, at least in Scotland, that appears to be not wholly the case, despite some of the rhetoric which flamed in the controversy over the rise in sheriff court fees. Both the Law Society of Scotland and the Faculty of Advocates have announced ADR schemes in recent months, and the Faculty generously sponsored and supported the Conference itself. The David Hume Institute is grateful to the Faculty for this support and in particular to John Sturrock, Advocate, from whose good offices much of that support flowed. As already indicated, the Institute hopes to play a future role in the education of the legal profession on these economic and auditing matters, and to be a forum in which healthy and constructive debate on them and their meaning may take place.

The David Hume Institute is grateful to the speakers who ensured the success of the Conference and promptly provided copies of their papers for the present publication. It is as always necessary to say that the Institute's charitable status forbids it from espousing any position on the matters ventilated on the following pages; but it is a pleasure to be able to contribute to public knowledge and discussion of these important issues.

Hector L MacQueen
Executive Director
June 1994

THE COSTS OF JUSTICE IN ENGLAND AND WALES

The Lord Chancellor, Lord Mackay of Clashfern

It gives me great pleasure to join you all here this morning. The cost of justice is a theme of great concern to us all - both in terms of ensuring access to justice for all and in terms of spending as a whole for the Government and hence the taxpayer. In view of my present responsibilities, although I am Lord High Chancellor of Great Britain, my day to day concerns have to concentrate on the legal systems of England and Wales, I shall look at the issues primarily from that point of view.

Looking at the introductory material for this conference, two main areas are quite rightly highlighted:

a firstly the cost to the litigants; and

b secondly, the cost to Government and hence the taxpayer.

The issues are broad, covering courts administration, legal aid, the remuneration of the legal profession and whether the court system always offers the best method of dispute resolution. I hope you will forgive me if, in giving the first address of this conference, I touch on a wide range of issues: explaining my approach and outlining some of the initiatives I and my Department hope to develop in order to meet the challenges of providing an efficient and effective court system. I hope this will give you some food for thought, as later on in the day you will have the opportunity to develop some of these issues in more detail, and I am only sorry that I cannot stay longer to participate in these sessions which I am sure will be both interesting and useful.

The fundamental aim of my Department's work, as set out in this year's Strategic Plan, is to ensure the efficient and effective administration of justice at an affordable cost. This gives us the task of balancing the needs of the litigant with the demands on the taxpayer. In order to meet this aim we have a number of key

challenges and I thought it might be useful to focus on some of these this morning.

There are three main challenges it might be helpful to consider:

- to ensure access to justice while reducing its cost, both to the parties and the taxpayer;

- to gain control of the overall cost of legal aid, while ensuring an adequate level of publicly funded legal services; and

- to sustain improvements in the quality, efficiency and effectiveness of court services.

Let us look first at access to justice. My Department is currently engaged on a fundamental review of expenditure, the purpose of which is to go back to the essential principles underlying those parts of the justice system which fall within my areas of Departmental responsibility to see if there are better or more cost effective ways of providing these services.

In this I am concentrating on a number of areas where the expenditure not only forms an essential part of my Department's outlay, but also where the system comes into most direct contact with the litigant. In particular, we are looking at access to publicly funded legal services and the conduct of civil litigation.

I expect the first report on this initiative in June this year, but in the meantime my Department is developing a number of initiatives to tackle the issue of access to justice at an affordable cost.

I should acknowledge at the outset that some litigants may fear commencing legal proceedings. This may be because of fear of the experience itself, the outcome or the fear of what the costs involved may be.

In my view there are a number of areas where we need to consider what we can do to relieve this fear and thus, in a very real sense, improve access to justice. These initiatives will also impact on the costs of justice to central Government. In my view the main areas are:

- the provision of state funded legal aid;

- having straightforward and simple procedures which will enable litigants to undertake their own action where this is appropriate, for example in small claims;

- encouraging people to seek alternative means of resolving disputes where court procedures may be less appropriate.

Probably the highest profile of these areas and one which is not without controversy is expenditure on legal aid and, as I have said, controlling the overall cost of legal aid while ensuring an adequate level of publicly funded legal services is also one of my Department's key challenges.

The annual cost of legal aid in England and Wales is now over £1.2 billion, well over double what it was five years ago. To some extent this is a reflection of the increase in the number of people helped by the scheme. Almost half the households in this country are eligible for legal aid. In criminal cases the coverage is, in practical terms, even higher. Virtually everyone facing a criminal charge in the Crown Court receives legal aid, and the same is true of the more serious cases in the magistrates' courts.

But although the number of people receiving help from the legal aid scheme for civil matters in England and Wales has almost doubled over the last 10 years, during this same period the cost of providing this help has risen nearly sixfold. Legal aid is an expanding industry.

Value for money is important, in my view, however large or small the amounts involved. But the rapid growth of the funds committed to legal aid in recent years provides an additional spur to the need to ensure that every pound of the money spent in this area is well spent. I therefore asked the Legal Aid Board to consider whether the resources for which it is responsible were being spent in the most effective way; that is, in the way which delivers a sufficient quality of service to the assisted person while giving an assurance of value for money to the taxpayer, who foots a large part of the bill.

The Board's answer to this is its franchising initiative. The aim of the scheme is to move towards simpler, more certain and speedier

payment, and greater delegation of decision-making powers, in return for an assurance of the quality of service. Before achieving a franchise in a certain area of work an organisation must be able to show that it can provide an acceptable quality of service to its clients. Firms must meet the standards laid down by the Board, in consultation with the Law Society, including case management; training and supervision of staff; and client care. Standards designed to measure the quality of advice to the client are also being introduced.

I have no doubt that most practitioners can and will be able to meet the requirements of the proposals, but in some cases this may require a little effort. This will be rewarded by improvements in the firm's efficiency and control. The Board will not be interfering in firms' management systems since that would not be appropriate. I believe that it is for the suppliers of legal services to decide what system of management they wish to adopt. However, an effective quality assurance system is needed for work done under legal aid and the Board as purchaser has a right to require certain minimum standards, both in respect of management systems and the quality of advice given. This will serve to reassure potential clients that firms which have achieved a franchise have demonstrated that their competence has been assessed against objective criteria, and this should give franchised firms a competitive edge in attracting clients.

It must be noted, however, that a solicitor may not be the only one providing advice in all these areas of the law. Advice agencies and law centres provide valuable advice often at no charge to the litigant and have built up great areas of expertise, particularly in the social welfare areas of the law. My aim is to provide choice and quality to the litigant while ensuring value for money for the taxpayer.

Franchising is one substantial part of my strategy for securing an assurance of quality and value for money on legal aid. But this objective is being approached from more than one direction. I believe that the payment systems for lawyers acting through the legal aid scheme should encourage the achievement of defined levels of quality and efficiency. This is the philosophy behind the introduction of standard fees for the great majority of magistrates' courts cases last year. Those solicitors who operate most efficiently will reap the greatest benefits from standard fees. It is my intention

that remuneration through standard fees and payments should be extended to cover the majority of cases. The rates are, and will continue to be, set at levels which attract sufficient barristers and solicitors of appropriate level quality to undertake legal aid work. Of course, those who can demonstrate that they are achieving defined levels of quality ought to be better rewarded than those who cannot and I will be examining how I can demonstrate my commitment to quality work in general and in franchising in particular over the coming months.

There is clearly a long way to go in ensuring that the various factors affecting the cost of legal aid together produce the best combination of price and acceptable quality, but those initiatives which I have mentioned are important steps in achieving this goal. I hope to be developing other initiatives designed to achieve the same objective.

In looking to the future in this area, I am thus concerned to involve the range of agencies providing services to litigants so that the client has choice, but also safeguarded levels of service, while the taxpayer can be assured that all available avenues are being considered with regard to value for money.

The next area I wish to touch upon is that of simplifying court procedures, which links our first key challenge of ensuring access to justice with that of improving the quality, efficiency and effectiveness of court services. Some of you here may know that Lord Woolf is currently chairing a working group which is reviewing civil procedure with the ultimate aim of producing a single set of rules for the handling of general business in the High Court and the County Court. This must be of assistance, both in ensuring greater accessibility to the civil court process, but also in reducing the number of different processes and hence paperwork and training which will be required.

The 1988 Civil Justice Review has also led to the expansion of the small claims and county court jurisdictions so that cases can be dealt with at the lowest level of court commensurate with the complexity of the case. Expanding these jurisdictions is not only a way of reducing cost to the administration, but also of increasing accessibility to the court process; cases will be cheaper for those legally represented and litigants in person will have the opportunity

to take their own actions or, in a small claims arbitration, be assisted by the lay representative of their choice. This process is now continuing with the proposals for the introduction of a new, more straightforward procedure for personal injury claims in the early part of 1995. We must be careful in undertaking such initiatives that speed or promised simplicity do not prejudice the litigant's right to a just disposal of his or her case.

There is also scope within the civil court process for greater use of computerisation. For staff in the county courts, the process of civil litigation is very much a paper-orientated one. This is in many cases a necessity as the applications and evidence submitted are vital to the judge concerned in his or her deliberation of the issues at hand. However, for some of the more routine processes, computerisation can offer us a fast and efficient means of moving forwards. The Summons Production Centre now issues well over a million summonses a year with a staff of 10, while the County Court Bulk Centre at Northampton aims to handle 40% of all debt cases during this financial year. I am looking forward to further developments in the County Court to build on the valuable progress we have seen in the Crown Court with the integrated computer system CREST.

A further development I am sure most of you will have heard of is the establishment of the Court Service as an Agency in April 1995. I hope this will enable the court service to focus on its role as a service provider. Agency status should give the Chief Executive the flexibility he needs to deploy his resources to best effect to ensure that cases are dealt with as efficiently as possible and that court users get the best possible service.

But how do we measure whether these initiatives are successful? For example, how do we know if court fees are set at a level which may discourage litigants from taking action to enforce their rights when they feel these have been breached? One of the tasks we have thus set ourselves is the need to have very clear indicators, not only of what we want to achieve, but how we measure whether we have in fact achieved this. This, I think, is one of the major challenges facing the court service. I could, for example, quote you figures on waiting times for hearing or the number of cases disposed of within a given time, but the reasons underlying these figures may be more difficult to establish. For example, a case may not be heard quickly for a

number of reasons: there may be problems regarding the availability of witnesses, counsel for either party may not be ready, an urgent case may suddenly come into the list or a previous case may overrun. Listing is an imprecise science with many players.

It is, I think, very important when looking at the exact costs of justice to any party to make sure our management information systems are as accurate as possible, so that we can determine more precisely where our problems lie. At present our targets are set by measures such as costs per case, waiting times for cases to be heard, and the number of cases disposed of. But it is difficult to be sure whether these figures provide a reliable indicator of performance. For example, do they adequately take into account the relative complexity of cases and contain the necessary indication of how efficiently a case has been dealt with? I am concerned, for example, that the court fee for a civil case is the same whether a trial lasts two hours or four days. Although the costs of the case may be accurate in terms of the lawyer time involved, no account is currently taken of the cost to the court administration and hence ultimately to the tax payer. I am currently considering how this balance can be addressed, particularly in the light of the Heilbron Report recommendations on this issue. However, the balance that needs to be struck is ensuring that an appropriate contribution is made to the costs of the courts administration while ensuring that these are not prohibitive to those who would seek to take action.

But what of methods of dispute resolution which lie outside the court process? Alternative dispute resolution promises a solution which is quick, cheap and user friendly. Utopian indeed, but does this not raise a question as to *how* these decisions should be made, given the complexities which may be inherent in individual cases, and how a completely user-friendly process can result in decisions which are ultimately binding on the parties. I do not mean to suggest by this that I am opposed to the principle of ADR; as I said in my Hamlyn lecture last year, I believe that early settlement by informal means is in most instances far more satisfactory for the parties than pursuing their dispute through the courts, however user-friendly and cost effective these court procedures may be.

The court system already uses arbitration in its small claims procedure and this largely achieves the aims we all have in terms of

an efficient, informal, quick and cost effective service. But in my view, arbitration could cover a wider area. For example, commercial disputes, one of the most expensive types of litigation, would, I feel, be ideally suited to the arbitration system, particularly as this may offer more varied outcomes than the win or lose scenario offered by the court process. I am sure this topic will be developed more fully by Professor Sir Alan Peacock after coffee.

However, what we must bear in mind in considering the development of ADR is the difficulty of retaining the benefits it has over the court system. The Chartered Institute of Arbitrators has itself acknowledged the difficulty of avoiding court style procedures in ADR. If we are merely setting up a new form of tribunal alongside the Court Service, which in some cases may still allow some form of appeal to the courts, I think we will be in danger of increasing the cost of justice not only literally but also in terms of the provision of accessible straightforward remedies to those who require them.

I have covered a very broad area in my address today but I hope that in doing this I have highlighted not only the range of issues which need to be considered and the range of problems which we face in delivering a cost effective system of justice, but also my positive commitment to making the changes necessary not only for the benefits of the public purse but also to the provision of legal services to all in our community.

A CIVIL JUSTICE SYSTEM IN MOTION

The Lord Advocate, Lord Rodger of Earlsferry

Like the Lord Chancellor whom I have the honour to follow this morning, I was very interested when I first heard that the Institute was organising a conference on the costs of justice, for it is self-evidently an important subject. The fact that you choose to concentrate on the civil justice system also seemed to me to be commendable since all too often the focus is turned exclusively on the problems of the criminal justice system.

What I had not realised when I accepted the invitation to speak was that by now the topic would have achieved a certain prominence in public debate, especially in Scotland. This came about largely because of the changes in the sheriff court fees introduced earlier this year. I do not intend to be drawn into debate upon the detail of these fees, since that is not part of my ministerial responsibility. None the less, as the Lord Chancellor has pointed out, there are certain general issues which arise.

The basic issue perhaps is who is to meet the costs of our civil justice system. No question arises on the criminal side. But our judges do both criminal and civil work and so the first thing is to try to calculate the cost of the civil courts as such. As the Lord Chancellor has remarked, the task of identifying the various elements of cost is not altogether straightforward. It is also a task which was long neglected.

When the history of our times comes to be written, I have little doubt that one of the enduring changes brought about by the governments since 1979 will be the recognition of the need to identify the costs of what is done by the various public services. It was all too easy to avoid this in the case of the courts, particularly before the 1971 legislation when court buildings were the responsibility of local court commissioners. They were local government representatives and, not surprisingly perhaps, they did not put the refurbishment of our courts at the top of their list of priorities. There are no votes in court buildings. So the buildings decayed and the Scottish Courts Administration inherited an estate which was crying out for

replacement, repair and refurbishment. The Government has spent large sums on the provision of suitable court accommodation and the new sheriff court to be opened here in Edinburgh later this year will be a further testimony to our commitment to the Scottish justice system. The fact that we identify precisely how much taxpayers' money such schemes cost and consider carefully what options provide the best value for money is not a criticism of the system, especially since it provides a ready way of assessing the cost of neglecting this aspect of our system of justice. The financing of justice is not an area where ignorance is bliss.

So the first need in any discussion is to identify the various costs. I realise that this is a most complicated problem in which the economists here today will have much to contribute. But it may be helpful to those of you who are to debate the issues later today if I give some of the figures with which we are operating.

So for instance what is the cost of a court day, excluding professional fees? The answer is roughly £1500 in the Court of Session and £1200 in the sheriff court. Of those figures judicial costs account for about 30%, staff costs for another 30% and accommodation also for about 30%. The remaining 10% covers miscellaneous costs. Interestingly enough the proportions are similar in the Supreme Courts and the sheriff courts. The total cost of running the Court of Session is about £3.6 million and the equivalent figure for the sheriff courts is about £15.1 million.

The annual salary of an Outer House judge is £95,051, while the annual salary of a sheriff is £69,497. When someone who is not a sheriff sits as a Temporary Judge he receives £432, while a Temporary Sheriff receives £259 plus travel and subsistence.

These then are the kinds of costs which have to be covered. The money has to be found from somewhere. Until recently the policy was to set fees at a level which would cover 70% of the costs of running the courts - the 30% which was not covered was the cost of the judiciary. The Government has announced its intention of moving to a position when civil court fees will cover 100% of court costs, including the costs of the judiciary. This year in Scotland the aim is to move to 80%, with the 100% target being achieved in the years to come.

It was the first stages in these moves which caused an outcry at the beginning of the year. In fact the outcry was exacerbated by the need to introduce a new table of fees to take account of the changes brought about by the new Ordinary Cause rules in the sheriff courts. What the exercise revealed, however, was an interesting phenomenon. Under the previous scales commissary fees were charged on an *ad valorem* basis. So the fees bore no relation to the actual work involved by the courts in processing the executry. The result was that a widow would find that she was paying a fee which depended largely on the size of the estate which her husband left. This was in practice nothing other than an undeclared form of taxation - of estate duty, if you like. But it was a peculiar kind of taxation since the income was directly offset as an "appropriation-in-aid" against the sums which Parliament had to vote, under the Appropriation Acts, for the running of the Scottish courts. This meant that a widow might find herself contributing disproportionately to the running costs of the courts and so reducing the sums paid by Shell or Esso or some other wealthy litigant. Not only does this seem very difficult to justify in principle, but it is also difficult, I believe, to see what the practical justification was. It had really continued so long only because people had not realised what was going on. So part of the reason for the particular rises in the sheriff court fees was the need to eliminate this anomaly. I do not raise the matter in order to discuss the particular details of the fees, but rather in order to highlight what I believe is a general issue well worthy of your attention: To what extent is cross-subsidisation of court fees legitimate?

The more general issue is the funding of the courts. It has been said that the state should provide the judges and that it is wrong that litigants should have to meet the cost of providing someone to judge their disputes. But that simply means that the costs have to be met out of general taxation. Even the National Health Service is not entirely free - people pay prescription charges and certain opticians' charges for instance. Exceptions are made for those who cannot afford the payments. Why *exactly* should the position with the courts be different? Would taxpayers, most of whom will never participate in a contested civil case, wish to spend their money on these costs or would they prefer to see it spent on health or education? No one

seems to question the idea that it is all right for litigants to have to meet, say, the cost of heating the court in which they litigate. If in that way they already meet 70% of the costs, why should the other 30% be sacrosanct? Indeed it can be argued that if court fees cover all the costs of the civil courts, the courts are thereby made more independent from the Government against whom they may need to decide important issues. If the courts are in effect self-financing, the scope for Government interference with their independence is reduced.

The comparision of particular costs may also cause us to reflect upon other fairly basic issues. A day in the Court of Session costs about 25% more than the same day in the sheriff court. Since the Court of Session has exclusive jurisdiction in only a very limited range of cases, the fact that people bring ordinary actions there suggests that they perceive that the Court of Session has particular qualities which they value and which do not show up simply in the cost of the service. That in turn provokes one to consider precisely what these qualities are. For instance, the optional procedure in the Court of Session has made for the speedy disposal of reparation actions in that court and this has undoubtedly led to the raising of many actions there. But one suspects that some at least of those who raise actions there do so because they consider that they will be handled better and that the ultimate decision will be better. This will be particularly important in cases where large sums of money are at stake. Understandably enough perhaps, lawyers do not always feel comfortable discussing and comparing in public the respective roles of the Court of Session and the sheriff courts. Yet the topic is important, because the system of Scots law cannot survive unless it has a strong supreme court in which new issues can be discussed and guidance given to the profession. A clear and authoritative precedent from the Court of Session may avoid many litigations in the sheriff courts. There may, of course, be a limit to what individual litigants will be prepared to pay in order to support such a supreme court. But equally clearly the need for a supreme court which performs this function will affect the extent to which a narrow accountant's approach can properly be applied in comparing the two parallel systems of courts.

The Lord Chancellor mentioned the importance of procedure and the review which he has established under Lord Woolf. In Scotland a lot of work has been done in recent years to improve our procedures and so make the courts more efficient. I particularly welcome this opportunity to acknowledge the efforts of so many people in this connexion. The optional procedure in reparation actions made an enormous difference when it was introduced in the Court of Session in 1988. Equally important were the rules which established the system of petitions for judicial review. The sheriff courts are at present coming to grips with the new Ordinary Cause rules which came into operation in January and which give the sheriffs more power to keep cases moving. Later this year we shall see the new Rules of Court in the Court of Session and also the new and improved system for operating commercial causes there. I am especially pleased that the Lord President has been able in this way to improve the service offered by the Court to all those who do business in Scotland.

It may be that experience will show that other changes can be made. Speaking purely for myself, I always hope that the arcane mysteries of multiplepoindings will be swept away, for I suspect that only the Lord President has ever understood the rules and certainly they are a formidable obstacle to people who wish our courts to carry out the very basic function of settling a dispute about ownership of property. Others will doubtless have their own particular *bêtes noires*. More generally there must be room for further consideration of our system of written pleadings. They can, of course, serve a most useful purpose in certain cases. But they absorb an enormous amount of the time of counsel and solicitors and it is not always clear that so much effort and resulting expense are justified. If major constitutional questions such as the right of the United Kingdom to pay its post-Maastricht contributions to the Community budget under Section 2(3) of the European Communities Act 1972 can be settled without elaborate pleadings (see *Monckton v Lord Advocate*, The Times, 12 May 1994), one is surely justified in wondering whether a rather less complex issue of contractual interpretation requires pleadings refined over weeks and months. Moreover, if the optional procedure, judicial review petitions and commercial causes can operate without full pleadings, the exceptions may begin to eat into

the rule. It must also be remembered that the vast majority of cases settle on a basis which has little or nothing to do with the kind of comparatively minor issue which often absorbs both time and attention in the process of adjustment.

Technology can, of course, speed up the work of the courts, as we heard from the Lord Chancellor. But there can be disadvantages also. Anyone who picks up a case from the days before photocopiers arrived on the scene will see that the process was small and the number of documentary productions very small because they all had to be copied manually. Hence the high copying fees. When photocopying came in, the fees remained much the same and the Xerox operator became one of the highest earners of income for many court firms. The result was that the number of sheets of productions increased enormously and counsel and judges had to spend hours wading through them - often to little or no purpose. The effect lingers on and it means that cases take longer and so are more expensive to try. There might indeed be something to be said for a rule restricting the number of sheets of productions which could normally be introduced into a process. This would force lawyers to consider more carefully which documents really needed to be lodged as productions.

There is no disguising the fact that litigation in our courts is expensive and it is not surprising that few individuals contemplate it unless they are legally aided or have funding from a union or some similar body. I believe that certain rather limited research going on at present would suggest that in Scotland about one-third of personal injury cases are funded by legal aid and just over 40% by trade unions. Legal aid is a vast topic upon which the Lord Chancellor has touched this morning. The role of the trade unions in assisting their members with litigation, especially in the unions' changed circumstances with fewer members and more competition for those members, would also be worth exploring. The same survey suggests that only about 6% of cases were funded by legal expenses insurance. Of course the private individual who appears as a defender in a reparation action resulting from a motor accident will almost always be covered by the insurance which statute requires. But for the most part individuals do not seem as yet to feel that legal expenses insurance is something which they wish to purchase. Is this

because they do not think about litigation as a possible event in their lives, or is it because they are prepared to take the risk that it will not happen?

The fact that most people do not take out insurance against legal expenses is particularly interesting since perhaps the clearest message which has been conveyed to members of the public about litigation in the courts is that it is expensive. One traditional response was to point to arbitration as a cheaper and faster alternative, but especially in more modern times arbitration often seemed to have all the disadvantages of Court of Session litigation with the additional nightmare of settling a deed of submission and the honour of paying for the arbiter and his clerk. One consequence of the full funding of judicial costs in our court system will be to level this particular playing-field. But the truth seems to be that the disadvantages of the system have meant that it remains relatively unpopular and more recently we have heard more of the advantages of ADR which the Lord Chancellor mentioned. The Faculty of Advocates has several members who are qualified in this new art and it will be interesting to see to what extent it catches on. But it certainly can never provide a complete answer, if only because we need the courts to give guidance on the law which underpins all our actings.

In certain spheres an administrative system and tribunals may provide an alternative to proceedings in court. There is no doubt that the social security tribunals, for instance, dispose of numberless disputes in a way which generally meets with approval. Particular problems with the operation of the Child Support Agency in its first year have perhaps tended to obscure the importance of its work and of the work of the associated tribunals. It is none the less significant, I believe, that, while fierce criticism has been made of certain aspects of its work, there is very broad agreement that the system is right in principle. It may yet prove the forerunner of other developments.

Finally I mention the legal profession. Even after the increases in court fees, lawyers' professional fees will still be by far the largest component of the costs of most disputed litigations. There is no doubt that in the past at least lawyers were very bad at spelling out their charges. There are signs that this is changing and not so long ago I was most pleasantly surprised to find that the first step in a

particular house purchase was for the solicitor to send me a letter explaining exactly what her fees would be. While it may be very hard for lawyers to do the same in a litigation, I suspect that quoting an inclusive fee in advance would often be reassuring to clients and so productive of business. Of course, our system of expenses following success puts a severe penalty on failure in litigation and means that no system of speculative actions is ever likely to work in the same way as the contingent fee system does in the United States. There it has helped to create a society where litigation is more readily resorted to than in this country where it has been calculated that you have about a 1 in 10 chance of being involved in a contested civil action at some point during your life. Which is the healthier model of society is perhaps an even more profound question than those which have been posed for your consideration today.

Finally in drawing the various threads together one may perhaps just wonder to what extent the existence of so many different components makes it difficult for a truly "efficient" legal system to emerge. Judges have security of tenure and are paid from the Consolidated Fund so that they at least have no financial interest in the way in which litigation is conducted. Judicial independence, which is rightly so jealously guarded, can of course make it difficult to ensure that everything is done as expeditiously as possible. A bored sheriff, say, may occasionally be tempted to allow an adjournment which will mean that he finishes early. It is hard to see what can be done to prevent this, though the sheriffs principal undoubtedly keep a watchful eye on the working of the courts in their districts. The recent experiments with intermediate diets in criminal cases to identify the issues and spot the trials which will not proceed appear to be paying dividends in making for a better use of court time. That will undoubtedly have beneficial knock-on effects on the disposal of civil business. But human nature does have a nasty habit of breaking in. There will be few among those of us who are practitioners here today who will not admit - if only in private - that they have found certain adjournments or discharges more than welcome, if only because it allows them to catch up on some other work or appear in some other case. A case which spills over into another day may be a curse to the litigant, but can be not entirely a disaster for the lawyer. It should also not be forgotten that it will usually be in one party's favour not to reach the end of a litigation

quickly and this may well be reflected in the tactics adopted by the lawyers representing the interests of that party. So it would be naïve to pretend that everyone always agrees that litigations should be disposed of in as short a time as possible.

Even specific reforms of our justice system may work in different ways. For instance, the case for solicitor advocates was argued in part on the basis that they would provide a different kind of service for clients from the first interview right through to the end of the litigation. In criminal cases at least quite a lot of the solicitor advocates appear to be doing work for other solicitors and so to be replicating the kind of service already provided by advocates rather than providing a new distinctive service. The position in civil cases may on the other hand turn out to be different, with solicitors preparing the cases which they will eventually present themselves. Only time will tell.

But the fact that reform may be not altogether an exact science does not mean that it should not be practised. On the contrary, the changes in technology and in the way that people do business and organise their affairs mean that court procedures must be constantly kept under review. Doubtless this conference will identify many problems which still remain in our system despite the work which so many in the courts have done to bring their procedures up to date. I am sure that, like me, the Lord President would be only too grateful if, as well as pinpointing the problems, you were also able to give us some help in finding solutions.

THE COSTS OF JUSTICE : AN ECONOMIST'S APPROACH

Alan Peacock

I Introduction

The background to this contribution is found in the Departmental Report of the Lord Chancellor's and Law Officers' Department (Cm 2509, 1994), which lays out the Government's expenditure plans to 1996-97 regarding the financial costs of the criminal and civil courts for England and Wales. Although reference is made primarily to the unusually comprehensive information contained in that document, it may be assumed that similar financial trends apply over the whole of Great Britain.

The matter of general concern in this document is the expectation that the growth in cases set down and writs issued will not be accompanied by concomitant increase in cases disposed of, with the inevitable result that there will be, at least in general terms, further increases in the average waiting time for both criminal and civil proceedings. The implication is that, given the Government's overall expenditure plans, the Chancellor's Department cannot expect to claim resources which would allow waiting time to be reduced by the appointment of more staff from High Court judges to clerical staff. Waiting time can only be substantially reduced, other than by 'cases going away', through some increase in the efficiency in the uses of available resources. The position is more acute than so far suggested because even the anticipated increase in waiting times will require meeting improved targets designed to bring cases to court more quickly than hitherto.

It should be noted that 'cases going away' is one method which has the general approval of the Lord Chancellor's Department, for one of the key objectives of the Court Service is that of "removing from the judicial process and the courts, business which does not require a judicial decision" (Cm 2509: 7). Certainly delays have a time cost to companies anxious to settle disputes, and raising of court fees might likewise make their legal advisers consider Alternative Dispute

Resolution (ADR) as a solution. In short, rationing of supply may induce the further development of a separate, growing market for 'justice' - an induced form of 'privatization of justice'.

Because justice requires the use of resources including not only court services but also those of legal representation of prosecutors, defendants and litigants, it is a legitimate area of investigation for economists, who consider how resources are allocated between competing uses. Put very generally, the 'costs of justice' to the economist are represented by the alternatives foregone - the other ways in which government, private citizens and business could use those resources. Of course, an economist would immediately recognize that the production of resources itself requires a 'bed rock' of legal protection of property rights, without which a modern economy could simply not operate.

In what follows, the characteristics of justice as an 'economic activity' are outlined as a prelude to identify costs and considering whether or not they can be substantially reduced either within the state system or through 'privatization'.

II Justice as an Economic Activity

The provision (or 'output') of justice has several distinctive features which differentiate it from other forms of economic activity:

(a) The 'output' is an intangible, indivisible service. Units of output to compare with units of 'inputs' of resources are difficult to identify. This makes measurement of performance an unenviable task. (Cf section III below).

(b) If output is difficult to define, then so must 'quality' of the output be a matter for debate. Of course, the problem of defining and also measuring quality changes applies in the case of many forms of professional service. A crude measure of quality changes might be found, as with professional services, in fluctuations in the number of 'complaints' from customers. The nearest analogue with justice might be sought in the proportion of cases which result in appeals to higher courts - but this measure only illustrates the difficulty of measurement. There has been at least one attempt to measure

differences in quality between judges by estimating the proportion of their decisions which are overturned in higher courts.

(c) In many forms of economic activity the 'period of production' can be determined with a high degree of probability. In contrast, where justice is manifested in trials and court actions, the period of production may be highly uncertain and the dispersion in the length of trials and actions may be large. "The process of civil litigation lies very much in the hands of parties to an action and so no targets are set for the time it takes for cases to reach a hearing" (Cm 2509: para 40). The difficulties of controlling the period of production are further exacerbated by the fact that delay in both proceedings and length of trial is a *strategy* employed by lawyers in the expectation that this will help those that they defend, as well as themselves if they are paid on a time and court attendance basis (See National Audit Office, *Review of the Crown Prosecution Service*, House of Commons Paper No 345 (1989) para 3.25).

(d) The costs of 'inputs' to the justice system are usually associated with financial costs - government expenditure on court services, clients' payments for services of lawyers, etc. However, financial costs do not always adequately reflect 'opportunity costs'. A large proportion of the inputs are compulsorily acquired and are not purchased in the market. But even if we consider that judges and court officials are paid broadly speaking what they would otherwise be able to earn in the market, producing justice entails the calling of witnesses and jurors who are obliged to appear. Their time spent in court has an opportunity cost which may not be fully reflected in any expenses paid them. As with other forms of economic activity, not all the costs of production may be reflected in the payments for inputs and not all the benefits may accrue only to those for whom the service is available. Thus a court decision or a decision by a 'privatized' service such as ADR may affect parties other than those involved in trial or litigation process.

(e) In the course of time, firms producing goods and services under competitive conditions have a strong incentive to introduce process and product innovations. Such innovations increase their productivity and help them to retain and, they hope, expand business. It is frequently claimed that services not subject to the 'bracing air of competition' do not have the incentive to innovate and other pressures must be brought to bear on them in order to minimize costs. However, even if the financial pressures on our Law Officers made it incumbent on them to seek ways of increasing the 'through-put' of cases without any lowering in the quality of justice, the question still remains whether the innovations used by private companies are available to them.

'Process' innovations are generally associated with changes in the 'input-mix', usually requiring the substitution of capital for labour. A well-known hypothesis of William Baumol suggests that in the case of 'service trades', substitution of capital for labour is highly restricted. In broad terms, Baumol has argued that in the case of 'service trades', the substitution of capital for labour is highly restricted. (Judgments cannot sensibly be delivered by computers on the basis of evidence fed into them.) At the same time, the price of the labour services depend on the value of these services in the economy as a whole and will reflect the economic growth of the economy. (Judges have to receive emoluments and status which are comparable to those which they would otherwise obtain as professional lawyers or as businessmen.) It follows that if substitution of capital (and associated innovations in capital inputs) is restricted, increasing the output of judicial services always requires the input of more resources and, what is more important, relatively more resources, if that output is expected to increase as the economy grows and becomes more 'complex'. That 'complexity', by some stretch of the imagination, can extend beyond the demand for resolution of disputes to the growth in recorded crime and the associated demand for criminal proceedings. In short, Baumol's disease could be reflected in an inevitable growth in government services necessary to underpin the economy, including judicial services, at a rate faster than the growth in the economy itself. (For an exposition and critique of Baumol's analysis, see Peacock 1979.)

'Product innovation' through improvements in quality would depend on alterations in the law as much as in its interpretation. To that extent, such innovations are normally beyond the control of those administering justice. However, if we are primarily interested in the costs of justice, it is process innovation which commands attention.

A provisional conclusion from this survey of justice as an economic activity would appear to be that any attempt to solve the problem of how to reduce delays in the provision of justice without reducing its quality requires the one thing that cannot be guaranteed, *viz* an increase in the resources available. However, this presupposes that existing resources cannot be re-organised in some way so as to improve efficiency, for example by better management of the courts. It also ignores the aforementioned possibility of encouraging ADR. The thrust of official thinking is that efficiency can be improved and that ADR could be a welcome supplement to the official judicial system. Such thinking presupposes that we have suitable measures of existing performance of the system of justice, even when, as already emphasised, defining and measuring output is circumscribed by the nature of the 'product'.

III The Measurement of Performance

The measurement of performance entails identifying units of output and the associated inputs which determine both the level and growth in output, but taking account of changes in quality. Additionally, any measure of 'value for money' entails putting a price tag on outputs and inputs. As already indicated, the output and quality of judicial services are difficult to define and output is not priced. A commitment to improve the service offered by the judiciary entails looking for 'surrogate' measures which may offer guidance on performance and efficiency. Such measures are bound to excite controversy.

The official task of designing 'performance indicators' which might be used in measuring efficiency falls to the National Audit Office in association with the Lord Chancellor's Department. An example is provided by the NAO *Review of the Crown Prosecution Service* (1989), which is being followed up by further studies as yet unpublished.

This review raises a number of interesting points about measurement of efficiency:

(a) The service was set up to improve the quality of justice by the takeover of police prosecution by government lawyers. The implication is that one could make some broad assessment of both quantity and quality changes in the 'output' of justice. For reasons given above, this would be very difficult. The best one could do would be to find 'surrogates' which broadly reflected the effectiveness of the service.

(b) The two 'performance indicators' chosen were case discontinuance/prosecution rates, and conviction, acquittal and case dismissal rates; but any comparison with the previous system was rendered impossible because data were not available. The debate starts already. Would not one element in performance be the reduction in delay between summons and appearance in court? As it is, this is an area in which comparisons with previous practice were available, and, at the time of the review, the delay for indictable offences had risen over three years from 63 to 76 days. Yet here again, the reasons for delay might be beyond the control of the service, *e.g.* the incentive to delay by defendants' lawyers paid on a time and court attendance basis by legal aid. What about the question of the relative importance of these indicators? Is reduction in delay more important than conviction rates in promoting justice? A purely subjective (but, I suppose, informed) judgment is involved.

(c) I shall not catalogue the results but there are two interesting features about them. The first is that there was an enormous variation in performance by region. For example, the percentage of finalised cases (by defendant) discontinued in 1987-88 varied from 13.4% in West Yorkshire to 2.4% in Nottinghamshire. The second was the enormous variation in cost per defendant. In Magistrates' Courts, the cost (of CPS services) averaged £45.10, varying from £32.00 to £65.10. In Crown Courts the cost averaged £392.00 per defendant, varying from £659.68 in Inner London to £223.59 in Northumbria/Durham. Whether cost per defendant is a good

measure of productivity as distinct from performance is once again an open question.

Clearly investigations of this kind cannot resolve the debate about the relative efficiency of alternative ways of producing justice - and we have only looked at a small corner of the whole picture. However, they reveal very important information which is surely a pre-condition to the making of an informed judgment about the allocation of resources. (See further David Dewar's paper in this collection.)

IV Improving Efficiency

Economists identify two meanings of efficiency relevant to our analysis. The first is allocative efficiency which assumes that the 'consumer' is the ultimate judge of the product, justice. Allocative efficiency is achieved when consumer welfare cannot be increased at the margin by some alternative use of resources.

It would take us beyond the scope of this contribution to determine the exact conditions which would fulfil the condition of allocative efficiency. What one can say is that consumers can influence both the content and the form of the provision of justice. So far as content is concerned, Judge David Edward (1994: 13) reminds us that "determined litigants ....are the true instigators of judicial activism". (He had in mind the case of the persistent Miss Marshall, amongst others, who spent 13 years fighting the cause of equal retirement ages for men and women in the Health Service.) His observations on the importance of the litigant as a motive force in keeping the Rule of Law in repair deserve quoting in full (Edward 1994: 13):

> It is the litigant who identifies the abuse of power and calls for it to be restrained. It is the litigant dissatisfied with the lame bureaucratic excuse who calls for a proper explanation. It is the litigant, refusing to lie down under political pressure or administrative highhandedness, who makes a nuisance of himself and goads his lawyer into action - often unwillingly, it must be said, for such litigants are not always the nicest clients. It is the maddening, perverse, unreasonable litigant who disrupts the smooth progress of public business and calls upon the judge to intervene.

> If and insofar as the Rule of Law is the Rule of Judges, it is the rule of judges prompted and incited by those who believe, however wrongheadedly, that they have a cause to try. For our part, as judges, it behoves us to be modest about the extent to which we do more than respond to the democratic demand of the citizen to be heard. We are the guardians of rights and the arbiters of power only so far and for so long, as the citizen, by legal process, invites us to be so.

So far as the form of justice is concerned, it is the dissatisfaction of consumers with the delays in the hearing of actions by the judiciary that has been the driving force in the growth in recourse to ADR, the procedure followed in mediation and arbitration as discussed in Karl Mackie's contribution to this collection. Here let me note, first of all, that arbitration is deeply ingrained in the Scots legal system (see Hunter, 1987). Under mediaeval Scots law a person known by the felicitous title of 'amicable compositor' could settle not only civil actions but even cases of kidnapping, assault and homicide. Scots law incorporates the Model Law agreed by the UN Commission on International Trade Law (UNCITRAL), and proposals have been put forward to allow Scots judges to accept positions (in vacations!) as commercial arbiters.

One can reasonably interpret the growth in ADR as a way by which consumers reduce the costs which would otherwise be incurred through delay in litigation through the courts. However, as pointed out above, the economist's definition of costs requires consideration of how far the economic interests of those who are not party to legal proceedings may be affected.

In considering the public interest in private arbitration, I must first of all contract out of discussion of some important questions which, although of interest and concern to economists, are not within his professional compass. These questions cover such issues as whether or not ADR produces a 'two-tier' system of justice creating a division between rich and poor, whether confidentiality of proceedings conflicts with the public's 'right to know' (whatever that means), and whether the freedom granted to arbiters may result in decisions which conflict with the rule of law. I shall confine attention to the

question of how preference for arbitration over litigation will affect the economic interests of those other than the parties to disputes.

The main claim made by ADR enthusiasts in regard to the public interest is the decrease in demand for litigation services as a consequence of a greater preference, at the margin, for ADR would benefit the taxpayer or result in increased benefits from other ways in which the released tax receipts could be used. In principle this is correct, though it requires some judgment to be made about the political decision-making process which determines how the public budget is allocated and financed, and offers no guidance as to the measurement of benefits. No doubt any judiciary would be in a strong position to argue that the public interest would best be served by leaving their budget untouched, for this would allow them to transfer resources to reduce the delay in criminal court proceedings.

Externalities might not be confined to benefits which might be conferred on taxpayers-cum-voters. Much would depend on whether the increased demand for private arbitration services would increase the volume or the price of such services. Judges and court officials do not have to be paid directly by litigants, but arbiters and their clerks or aides have to be paid by those in dispute. The hidden assumption is being made that the reduction of costs as a consequence of the presumption of less delay will compensate for any additional costs incurred in paying arbiters. This is an empirical question and I have no data to go on to say whether or not such an assumption is sound. If the assumption does not hold then additional transaction costs resulting from arbitration proceedings may raise the price of the products and services of those supplying them, with the result that the final consumer is the loser. That might not happen if there were sufficient competition amongst arbiters to ensure that the price of their services did not rise *pari passu* with an increase in demand for their services.

A further reflection brings together the two strands in economists' thinking about the legal framework of the market economy. I suppose that there could be instances where the resolution of important disputes, e.g. between international companies, could produce a situation where the agreement reached would be in conflict with competition law. The interest displayed by the EC/EU in this matter is indicated by the provisions of Article 85(3) by which

arbitration provisions are approved subject to the overriding condition that competition will not be restricted. Robert Hunter (1987) also draws attention to a judgment of the European Court of Justice which assumes that arbitral awards can always be reviewed by an ordinary court, which would ensure that awards in conflict with European Treaties would be revealed. I had better not get myself into the deep waters of legal debate and would simply state that, as an economist, albeit far from satisfied with the way in which the EC/EU has set about preserving competition, it would be paradoxical if the process of reducing transaction costs through simple and efficient arbitration procedures could produce situations where the degree of competition in international trade were to be substantially reduced.

The more familiar definition of efficiency requires that the maximum value of output is produced with a given value of input. Thus, if there is not much that can be done about substitution of capital for labour, then the throughput of criminal or civil cases can only be increased by some re-arrangement of court business, but subject to the constraints of limited availability of extra resources and the need to maintain the quality of justice.

Cm 2509 contains examples of how 'increases in productivity' might be increased. These are intriguing, for they attempt to counteract 'Baumol's Law'. That 'law' might suggest that the only way in which productivity could be increased is by increasing the working time of judges, primarily by shorter vacations. Immediately this would be subject to the challenge that 'quality of justice' would be at risk, if judges did not have sufficient time both to gather their strength on holiday and to familiarize themselves with changes in law when courts are not sitting. In contrast, the Lord Chancellor's Department draws attention to measures designed to increase the throughput of cases within the time constraints imposed on length of court sittings. Examples are as follows:

(a) Transfer of resources to the Criminal Courts in order to reduce the backlog of appeals while simultaneously 'filtering out' cases that have a low probability of success on appeal.

(b) In conformity with (a), reducing the pressure on High Court civil actions by transferring cases where 'low value' awards

are at issue to the County Courts where procedures are simpler and speedier.

(c) Counteracting the growth in the number of 'cracked trials' (*i.e.* cases where defendants plead guilty just before a trial), which interrupts the throughput of cases, by 'floating trials' which are listed to fill courtrooms that unexpectedly fall vacant.

(d) Managerial arrangements which speed up the flow of information and documentation for trials, for example by computerisation. (Strictly speaking this is denial of the contention that the 'factor-mix' cannot be changed!)

(e) Relating all these changes to the setting of performance targets for all court services.

(f) Most controversial of all, putting pressure on the legal profession to supply the same quality and quantity of services to clients by controlling the charges made for services financed by State legal aid and by more 'freedom of entry' into advocacy by allowing solicitors to plead in the High Court.

To predict whether these measures will become permanent features of the judicial system and will succeed in their intentions would be hazardous. Our previous discussion of justice as an economic activity (Section II above) does at least suggest what an economist might say about them.

The main problem is clearly that of the maintenance of quality, and the very difficulty of defining quality gives a handle to those who have to bear the costs of change in the form of improving their performance. There is a neat and amusing parallel here with those who have invoked Baumol's Law to argue for progressively more expenditure on the performing arts. A symphony orchestra trying to increase its productivity by playing famous and familiar works at double the speed would destroy the product! Thus judges may object to any pressure put on them to expedite business on the grounds that considered judgments cannot be subjected to time constraints. Crown Court judges could reasonably point out that the introduction of pre-sentence reports demonstrates that they do not have full control over the time taken between commencement of a

trial and passing of sentence. Lawyers faced with the recommendation (not in Cm 2509!) that there should be a time limit for opening and closing speeches in court could rationalize any effect that this might have on their remuneration by arguing that a time constraint is a disservice to their clients seeking justice. The parallel with the performing arts goes further, for worries about the cost of change have been a major factor in organized attempts to resist it and, in the process, to politicize the discussion. (See, for example, *New Law Journal*, 29 April 1994, p 558.)

V Conclusion

The first conclusion to be drawn is that our legal system cannot expect to be immune from the kind of enquiry about the use of resources, largely compulsorily acquired, which is applied to all government services. This contribution only offers a methodology and it certainly does not imply that, in comparative terms at least, our system is necessarily inefficient and that resource costs should be reduced as a proportion of GDP.

The second conclusion follows from the first: the raising of the public profile of the legal system must entail taking account of the attitudes to our legal systems of the 'consumers of justice', namely the tax-paying public. The National Audit Office has so far confined study of the opinions of the various agencies in the criminal justice system of the operation of the Crown Prosecution Services, but the extension of attitude surveys to the public is already under way (See Cm 2509: paras 26-28). It will be interesting in the years to come, if questionnaires are regularly issued and their contents revealed, how far public understanding of the judicial process will have changed. While there is much to be said for preserving the majesty of the law, a civilised society need not accept that its procedures have to remain an arcane mystery.

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EXAMINING THE COSTS OF JUSTICE

David Dewar

This paper summarises the factors the National Audit Office considers when selecting, planning and carrying out its examinations of administration of justice and related issues. The role and responsibilities of the National Audit Office, and a list of published and current examinations in this area are briefly described in the annex.

The seminar discussions are taking place against the background of an unaffordable and unacceptable rise in the real terms of legal aid and other costs of justice. Dealing with this requires prompt and effective action. It is abundantly clear from what has been said by the Lord Chancellor and others that, in both England and Scotland, a wide-ranging programme of change and reform is firmly under way; that further developments can be expected; and that the pressures and hard choices these bring will have to be squarely faced. The challenge to the legal profession is to play its full part in these changes and to help in finding the right answers.

From an audit perspective there are some obvious factors to be taken into account in controlling the costs of justice and seeking better value for money:

(a) The right balance must be struck between the pressures to reduce or constrain costs and the need to maintain key features and safeguards in the operation of the justice system. These can obviously pull in opposite directions. The difficult questions raised and the conflicts and priorities to be resolved will not yield readily to the professional skills of accountants or auditors alone, nor to those of lawyers alone: they require both to work together. Accountants certainly have a great deal to learn in sharpening up their contribution and, with respect, so probably have lawyers.

(b) There are risks arising from the number of different organisations involved and the potential for fragmentation in responsibilities and control. The courts sit at the centre of the

system but their work and costs are affected by, and in turn affect, the activities and costs of many other bodies whose work precedes or follows theirs. There are similar interplays at other points of the system, for example between the work of the police and that of the Crown Prosecution Service or the Procurator Fiscal. The Legal Aid Boards are directly involved. The Lord Chancellor's Department, the Home Office and the Scottish Office have key powers and responsibilities, and their decisions too can have significant knock-on effects. Furthermore, none of these different elements is monolithic: for example, the work of the courts and the level and incidence of costs are affected by the actions and decisions of the different "players" within the courts system.

(c) A further twist to the above is that the funding and accountability arrangements may encourage compartmentalisation. Each of the bodies mentioned is voted funds for its own specific purposes. Accounting Officers are made personally responsible before Parliament for those specifically allocated funds as set out in their individual accounts. Cash limits may bring pressures to concentrate attention and priorities on minimising those costs falling on your particular share of the budget, with less concern for someone else's. Complications arise because some funding comes from central government and some from local government. Such factors do not add up to a case for suggesting that the present arrangements can and should be changed, since these have their own established accountability strengths; but it is warning that, unless carefully watched, they may get the dynamics wrong or provide perverse incentives.

(d) There are gaps in the costing and accounting systems, which are not yet generally set up to capture all relevant costs. Analysis of available data may be incomplete; for example in identifying which elements of costs are within the control of which of the various bodies involved. Performance measures and indicators are still developing. There is a lot still to be done in tackling qualitative, subjective and other "soft" factors. Available information may measure what is most

readily measurable, rather than what is important. There is a focus on inputs rather than on more difficult outputs and wider impacts. Such factors are not, of course, unique to the justice system; they affect many other areas of public business.

(e) Control priorities themselves have to be carefully watched. Fundamental concerns such as authority and regularity and propriety of expenditure, and safeguards against fraud, must not be lost sight of in the pursuit of economy, efficiency and effectiveness. But it is important to recognise that these two aspects of the spending of public funds are not in conflict: the proper conduct of public business and securing value for money can and must be reconciled.

(f) Many of the current accounting and management information systems do not even attempt to capture the full costs falling on the public - litigants, witnesses, jurors, victims and their advisers. Some of these "externalities" are inherently difficult to identify and analyse - other than in broad terms - and the costs even more difficult to quantify. Delays have an obvious effect on such costs but bring with them other unquantified but important pressures in terms of personal stress or disruption or other impacts affecting - say - the running of someone's business. In the absence of published standards and targets of performance -such as those "customer service" criteria being introduced in other areas of the public sector - those directly affected by the conduct of court business often do not have the information needed to plan their own affairs, or seek redress.

(g) Overall, therefore, an important task is to provide a wider range of reliable information and analysis in these and other areas; inter alia this would help to ensure that when decisions are being taken within the justice system, at different levels and at different stages, these would be better informed as to the financial and other consequences.

So how do examinations by the National Audit Office relate to such factors? How is the work organised and what steps are taken to address the sorts of issues referred to above? What is the

contribution to better public accountability for relevant expenditures and use of resources? These matters are tackled in a number of ways:

(a) The first point is the general one that the National Audit Office is uniquely well placed to examine across-the-board issues, and developments up and down the line in different sectors of the justice system, since it is either the appointed auditor or has rights of independent access to virtually all the areas concerned. This wide remit means that examinations need not be confined or constrained by organisational boundaries. Increasingly the examinations take into account financial and other impacts in adjacent parts of the system, as for example in the reports on the Crown Prosecution Service and on Legal Aid. There are also arrangements for liaison with other auditors such as the Audit Commission for England and Wales and the Accounts Commission for Scotland.

(b) Similarly, the work can compare and contrast costs between different operational units, and draw out variations and relevant causes. Examples include the current examination of the Administration of the Crown Courts which compares costs, listing procedures, delays and other performance factors across courts in the different circuits. Similar comparisons have been made of performance and controls in such areas as police forces, prison building projects, etc. However, it is important to emphasise that the results of comparative work are essentially the starting point for further inquiry and analysis; they seldom provide good enough evidence for final conclusions and recommendations.

(c) Increasingly examinations encompass "quality of service" issues, supported in appropriate cases by evidence gathered directly from members of the public affected by legal and related processes. Information may also be gathered from representative bodies of various kinds. This helps to add a dimension that may not be available from departmental etc. records. For example, a valuable part of the examination of Mental Patients' Assets was an independent survey of the experiences and views of receivers and carers and patients. Supported by detailed case reviews, this identified a number

of concerns and helped to pinpoint areas for action. The results will also be of continuing benefit to the Court of Protection and the Public Trust Office in pursuing improvements. Surveys of police "customers" will also be used in examining emergency response services by the Metropolitan Police; and a survey is planned of the views and experiences of those using the Small Claims Court. Again, however, caution is needed in using the results of what is often subjective information, or can reflect vested interest.

(d) In a number of the areas being reviewed audit and accountancy skills need to be reinforced or supplemented by specialist legal or other advice. Teams are therefore built up to bring in lawyers or to tap into police skills and know-how; or relevant consultancy assignments are arranged. This is always done in consultation with the bodies being examined and with full regard to the need to avoid "my expert versus your expert" debates.

(e) Though examinations are independent, and it would be misleading to portray them as joint ventures, the work is carried out in close co-operation with the bodies concerned to draw on their experience and expertise. Liaison in planning the work and during the fieldwork helps in reaching agreement on an accurate, fair and balanced published report. And consultation with the various parties involved when drawing together findings and reaching practical conclusions and recommendations can also help to break down barriers and foster better understanding, without undermining the distinct executive responsibilities of the different bodies involved.

(f) It is standard practice to revisit areas previously examined to review progress and achievements. This helps to maintain pressure for better systems and supports a process of continuing improvement. In these areas there are few "quick fixes".

(g) As in the rest of the National Audit Office's work, the framework of Parliamentary and public accountability

provides a dynamic for action and implementation. Published reports to Parliament, subsequent oral examination of departmental Accounting Officers by the Committee of Public Accounts, the report and conclusions of the Committee, the requirement for specific Government responses to their recommendations, and the follow up of measures and changes promised all maintain the pressure for improvement. There has, for example, been a steady and continuing introduction of revised procedures following the 1992 report on Legal Aid.

(h) There is one final and crucial caveat. It is not part of the National Audit Office's remit to examine the merits of policy objectives, or to question judicial decisions. The focus is on the implementation of policy and on economical, efficient and effective management and use of court resources. But some of these matters are inevitably intertwined, and care has to be taken, in conjunction with the bodies concerned, to stay on the right side of what can sometimes be a shadowy line.

What are the emerging messages from such examinations? To some extent these are provisional since the position varies in different parts of the system and further developments are in the pipeline. But in other respects the way forward seems reasonably clear - at least in broad summary terms. It is perhaps fairly obvious from what has been said above that areas for continuing attention include:

(a) Better information and analysis on costs of different kinds, at different parts of the justice system, supported by quantified measures and indicators of performance, including "quality of service" factors.

(b) Better identification of the interplays and knock-on effects on costs between the different parties involved, including particularly the financial and other consequences of decisions on the wider public.

(c) Improved accountability, within the system and externally, based on better communication/publication of costs and other relevant factors against approved standards and targets of performance.

(d) Perhaps the adoption of relevant citizens/customer charter principles and procedures, including the scope for complaint and redress.

(e) Vigorous pursuit of the right marriage between financial factors and the wider role and interests of the justice system, with openness to new ways of doing things.

These are, of course, an auditor's perspectives and would have to be tempered by other perspectives and priorities. But there is one overall point that it is important for other disciplines to consider: economics and accountancy are only languages but they are languages in which, at least in part, many of the key discussions and decisions being taken, and in prospect, will be conducted. So the legal profession, at all levels, will quickly need to learn and apply relevant parts of those languages, alongside their own, if they are to play their full and proper part in the current shaping of the justice system and its funding.

ALTERNATIVES TO PUBLIC JUSTICE?

Karl J Mackie

The search for alternatives to the traditional litigation system - broadly referred to as Alternative Dispute Resolution or ADR - has taken on a remarkable dynamic within the last decade or so; remarkable in its manifestation across diverse sectors - family, neighbourhood, civil, consumer and commercial disputes; remarkable in the wave of creativity and energy that has fuelled its progress against the background of a potentially unsympathetic soil of vested interests and the inertia of tradition; remarkable in the emergence of organisations and experimentation not only in the most favourable soil of the USA but around the globe.

In the UK the launch of the Centre for Dispute Resolution (CEDR) in 1990 as an industry-led, non-profit making, flagship body for ADR helped stimulate considerable support for ADR in civil and commercial litigation. However, experiments in neighbourhood and family mediation schemes were already under way, work which was recently reflected in official support for the use of mediation in the field of divorce. Even before then, ADR approaches in labour disputes were well established. Since 1990 we have seen further initiatives multiply - in the last month alone the Faculty of Advocates and Law Society of Scotland have both launched ADR schemes, and a London City Disputes Panel has been launched offering panels of arbitrators and experts to resolve financial services disputes.

Most of the ADR activity involves the use of the technique of mediation, but other techniques to bring structure to negotiating processes, or more efficiency to preparation for adjudication, are being canvassed. Such techniques range from early case appraisal in Early Neutral Evaluation, through Executive Tribunals or Mini-Trials, to non-binding adjudication and private sector ombudsman schemes. If we add to these alternatives the continuing development of the classic private alternative to litigation, arbitration, we have a heady brew of innovations to cope with. (Arbitration however is also

often challenged for its imitation of the costs, delays and unsatisfactory outcomes of the litigation process.)

The drive to experiment with alternatives in large part derives from the costs and perceived failings of the public justice system. Normally debate on the problems of the system concentrates on those individuals who cannot afford to bring actions. However, to these we can add businesses who find the costs of using the system significantly outweigh the return. At a recent seminar Richard Weise, US General Counsel of Motorola, stated that his company was effectively denied access to justice in the USA for claims under $250,000. The level of figure would be less in London and probably less again in Edinburgh, but the principle still applies at significant financial levels. At the same time delays and other indirect costs imposed by the litigation system, together with restraints on public spending, make more pressing the search for alternatives.

However, the incentive to develop alternatives is not solely a product of avoiding the perils of the public justice system. Many ADR methods are arguably more appropriate for particular cases than an adjudication, whether that adjudication derives from a judge playing a passive role in adversarial proceedings or a judge actively managing inquisitorial type proceedings. Negotiated settlements in ADR can produce more creative or commercial options which are generally not within the court's remedies or analyses, and the consensual process of mediation can preserve relations often better than litigation.

This aspect is reflected in the recent consultation paper on divorce reform from the Lord Chancellor's Department. The paper stresses not only the cost advantages of mediation but its benefits in sustaining relationships or reducing hostility in this sensitive area, compared with the traditional legal system approach.

The consultation paper also includes a related issue that is important in the ADR field, the idea of an initial case assessor who can direct parties into whatever process might appear most appropriate. This is a low-key version of a concept suggested by Professor Frank Sander in the United States, of the 'Multi-Door Courthouse', where a court officer directs parties through any one of a number of doors into a

procedure most appropriate for their case circumstances, be it case evaluation, mediation, arbitration or full-blown litigation.

What are the implications of these remarkable experiments in alternatives to public justice? I would like to stress four features:

(a) Judging by US developments, we are only at the beginning of an important period of radical experiments with private alternatives to public justice. Several recent US statutes and government orders for example, have mandated the use or consideration of ADR schemes by federal agencies or courts. (Civil Justice Reform Act 1990, Administrative Dispute Resolution Act 1990). The National Center for State Courts estimated that there were 1200 ADR programmes receiving referrals from courts throughout the USA in 1993.

(b) This last statistic also indicates an important aspect of this development of private alternatives. Despite the term 'alternative', most ADR processes can be supplementary to litigation procedures, or even become an integral part of court processes. In the USA 'court-annexed' ADR is becoming commonplace, sometimes voluntary, increasingly mandatory. In London the Commercial Court last autumn issued an ADR Practice Statement requiring solicitors to consult with their clients and the other side in any case on the appropriateness of ADR.

(c) Growth of this field should help us revise and refine our notions of the various terms we use, often very loosely, in this field. We need to 'unpick' what we mean when we talk about 'justice', 'public', and 'alternatives', and in terms of how we weigh up the measurement of costs. If two neighbours agree in private mediation to resolve a problem between them concerning the noise created by one neighbour's aviary of budgerigars, is this a lesser form of public justice? If golfers spend between them £¼m in settling an argument through the courts, should we be proud that there is a Rolls-Royce system available to manage their arguments? Is it appropriate for society to encourage more injured parties to sue more hospitals, doctors, local authorities, relatives and others in

order to prove fault and for the lucky ones to gain compensation to help them care for themselves in the future? Are we improving "access to public justice" or are we improving "lawyers' access to the public"? Perhaps we should remember the words of President Bush in introducing the 1992 Access to Justice Bill: "Costs and delays in our legal system are a hidden tax on every single American consumer and on every business transaction in America".

I do not pretend there are simple answers to these questions but I do believe too much of the debate of the legal system is conducted in terms of too restricted a view of how we manage decision-making in complex social conflicts and transactions. 'Justice' in terms of preservation of life and liberty should not necessarily be a term applied in an equivalent way to an argument between a client and builder over the quality of construction of a conservatory in a back garden.

The essential thrust behind ADR's growth is not so much "Alternative" Dispute Resolution as "Appropriate" Dispute Resolution. I believe we need to find mechanisms to engage with this question, both by rethinking approaches to legal and citizen education, and by restructuring the institutions and procedures by which we deal with social conflicts. Because of this emphasis on 'Appropriate', let me emphasise too that I am not attacking the litigation system. Society needs courts, judges and lawyers and ready means for its citizens to use them. But their use and their business structure should reflect a broader sense of when they are most appropriate rather than be a reflex traditional technique for terminating any argument, conflict or distress. Being used appropriately also should mean encouraging efficiency and improved access to the system for appropriate cases. Equally ADR should not have to rely on court inefficiencies but be able to find its own proper level of application to disputes. (This also means that ADR is not always the cheaper option.)

(d) However, in this context, let me speak out strongly for public funding for alternatives to public justice. Massive public sums are expended on the legal system (not to mention on

consultants' fees for reviewing it). I am tempted to be provocative and call for a 'level playing field', so that vehicles for providing alternatives to public justice receive equivalent support from the taxpayers. However, let me draw back from that and say simply can we please get on the playing field? Nearly all ADR groups are severely underfunded, some in financial crisis. Practical initiatives to reduce costs on the public purse should receive at least pump priming support, and have done so to a much greater extent in other countries where ADR is actively developing.

Massive sums for example are paid out in Legal Aid yet the Legal Aid Board in England suggests that the regulations prevent it paying anything towards mediators achieving early settlement of cases. Similarly the Lord Chancellor's Department has refused to back ADR pilot schemes on the ground that it may cost extra money, then turned round and said ADR groups must prove that the process saves money. Incidentally CEDR from its records can prove these savings in commercial cases.

I do not make these comments in any adversarial spirit, but in a recognition that there are huge issues to tackle in rethinking the question of resolving disputes and how best to develop practical and cost-effective alternatives. The development of ADR allows us at least to begin to formulate a more comprehensive answer to the question of the costs of justice than if we were to work within the assumption of the traditional system alone. This opportunity should be grasped by those who care for 'justice' as well as by those who care for the costs of justice.

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