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What price civil justice?

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I. Introduction

The costs of justice to both the taxpayer and the litigant appear to have risen faster than GDP in recent years, and it is scarcely surprising that both Conservative and Labour Governments, concerned about public expenditure trends, have brought expenditure on the courts and on legal aid under close scrutiny. In England and Wales escalating spending on legal aid in civil actions has led to the introduction of a franchising system and a significant move towards no-win-no-fee arrangements in cases where personal injury damages¹ are involved. In Scotland, the passage of the Crime and Punishment (Scotland) Act 1997 allows for the introduction of state-employed public defenders for criminal legal aid work -- widely seen as a cost curtailing measure.

A general explanation of this relative rise in expenditure suggests that it is inevitable. It is claimed that the judicial process is inherently highly labour intensive so that productivity gains which follow from the substitution of capital for labour, as found in manufacturing industry, cannot be achieved. This disadvantage cannot be offset by a fall in relative rates of remuneration of judges, lawyers and administrators which will depend on comparable opportunities in professional employment elsewhere in the economy, where labour's productivity and hence real wage is generally increasing. Thus, while growth in manufacturing costs will be offset by increases in productivity per head, costs to secure judicial 'output' will rise even if no extra inputs are required (see Baumol, 1996). There are some doubts about formulation of this hypothesis and the evidence supplied to substantiate it (see Peacock, 1998) but even if it were true, this would not preclude the strong possibility that, in an imperfect market for judicial services, better resource use could be achieved by more efficient management and, indeed, by removing the imperfections themselves.

This paper concentrates on the efficiency issue and, while concerned primarily with civil justice, many of the points made here carry over into the criminal field. Despite the substantial differences between England and Wales and Scotland in respect of the content of civil law and procedure, efficiency is a common problem and methods for improving it have been 'traded' between the two systems. Differences in legal terminology are explained in a glossary.

¹ From July 1995 in England and Wales, conditional fees can be agreed in personal injury cases, applications to the European Court of Human Rights, and insolvency cases. To date, it has been personal injury cases that have dominated this business (See Yarrow, 1998). The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 made similar provisions for solicitors and advocates in Scotland, using the term 'speculative basis' as a reflection of the long standing practice at the Scottish Bar.

The legal profession itself has recognised the need for reform. In both the Woolf Report (1995, 1996) and the Cullen Report (1995), fairly major recommendations for change in current procedural arrangements are made. Indeed, some reforming action has already been taken, and reform is certainly not a novelty to any of the legal systems in the UK. For example, in England and Wales recent reform is evidenced by the Courts and Legal Services Act 1990 (permitting licensed conveyancers and implementing many of the recommendations of the 1988 Civil Justice Review under Sir Maurice Hodgson), and by Lord Mackay's ending in 1995 of the Bar's monopoly regarding rights of audience in the higher courts. In Scotland, the sheriff court ordinary cause rules have recently been revised, thereby introducing simplified procedures and allowing Sheriffs a much greater degree of discretion in case management. Also in Scotland, an optional procedure for personal injury cases has been introduced in the Court of Session. In a similar vein, an optional commercial cause procedure, involving a judge (initially Lord Penrose) dedicated to specific cases and empowered to intervene managerially in procedure, has successfully reached the end of an extensive pilot stage.

There is some concern, however, that, at least in Scotland, the process is currently stalled (see Wadia, 1998). And in England and Wales, where reform is moving ahead, it is generally in the face of stiff resistance. In part, this may be ascribed to a confusion over objectives. A prime focus of discussion has been the perceived lengthy delay in the dispensation of civil justice (see below). Does this imply we require speedy justice? If so, accuracy may well suffer if speedier court decisions become more error prone. There has also been an outcry regarding the expense of civil justice -- both in terms of the civil legal aid bill and in terms of the prohibitive bills that can face a private litigant who lacks either legal aid, trade union backing or legal expenses insurance. In this context, considerable attention has been given to the legal aid earnings of solicitors and counsel². Could the same amount of 'justice' be obtained more cheaply, or could more 'justice' be on offer for the same expenditure? Any answer raises a further question concerning the costs and benefits to those who supply and demand justice, and to those called upon to finance it -- the taxpayers (representing the community at large) or those paying directly for legal services.

² The House of Lords were recently asked to consider an appeal from a group of advocates whose fees in certain murder appeal cases were reduced on taxation. This included Mr Michael Mansfield, QC, whose request for fees had been reduced from £22,300 to £12,200 on taxation (Sunday Times 18 June 1998). Part of the argument made on behalf of the Bar counsel was that the Law Society references to appropriate legal aid rates in terms of the £120,000 per year earnings of NHS consultants were inappropriate. The appeal was denied on 15 October when the Law Lords declared that in the case of one bill, cut from a claimed £35,000 to a taxed £14,000, even the reduced figure was in our view

Costs and delay.

In the statistical annex to the Woolf Report (1996) a survey based on a sample of the taxed costs of the winning side in over 2,000 High Court cases reveals surprisingly high costs. Across 9 distinct categories of case (medical negligence, personal injury etc.) where the claim value is under £2,500 the average or median costs of the winning side are invariably in excess of 100% of the claim value. This proportion drops markedly, however, as the size of the claim rises. Thus for personal injury cases the median percentage falls to 41% for claims between £2,500 and £5,000. It then drops to 28% for those between £5,000 and £10,000 and eventually reaches 11% for claims in excess of £50,000. This same survey also reveals delay, another cost consideration, to be a problem. The median duration from the date of instruction to conclusion for personal injury cases is 54 months. Medical negligence cases move even more slowly with a median duration of 61 months, while across the sample of cases as a whole the median duration is 29 months.

Regulation.

Part of the problem is that justice is a complex product. It is a professional service which for many infrequent users of the court system has to be bought as a matter of faith or trust (as a 'credence' good) rather than being, as most commodities, purchased frequently and repeatedly (an 'experience' or 'search' good). Many professional services (e.g., accountancy, law, medicine) share such a characteristic and for this and other reasons the legal profession, as most others, is regulated (self-regulated, in fact) with respect to entry, personal behaviour and business conduct.

Precedent and externality.

A further complication arises from the fact that civil justice, as dispensed daily between rival parties in the courts, affects the interests of many others who may only be contemplating litigation. This spillover produces what economists term an 'externality' which, for the individual, may be positive or negative, depending on the effect on a particular party or interest. The effect is readily understood in the case of precedents, or new rules, established by judges in novel cases. Unless subsequently overturned in a higher court, a precedent favouring a plaintiff may increase the probability of success for other plaintiffs and lower their costs, and *mutatis mutandis* raise the costs of defending such actions (but see section III below).

But there is also a wider and empirically more important spillover impact that relates to the notion of what Mnookin and Kornhauser (1979) label 'bargaining in the shadow of the law'. In addition to those caught up in the formal legal system, the behaviour of parties engaged in disputes and indeed of those for whom no dispute is in hand but whose behaviour might engender a dispute -- all of these -- are affected by the civil justice system. The prospect of ending up in a court room with the generally accepted prospect of liability, damages, and costs leads all individuals and enterprises to take a higher level of care, thereby avoiding many disputes. The knowledge of what might happen if a dispute ends up in court also facilitates entry into voluntary (or at least non-judicial) resolution of many disputes that do arise. It is worth remembering that even among the cases set down or filed in court, only around 5% ever come

before a judge for final judgement or proof. The remainder settle by mutual agreement -- but with the settlement parameters defined by expectations of what would happen in court³.

Thus in evaluating the civil justice system or in recommending change, it is, therefore, important to bear in mind that it is part of a large dispute resolution process, and changes here will have potentially significant knock-on effects elsewhere. In this sense, looking at court-room procedure in isolation is not at all appropriate. As the externality example demonstrates, a further complication is that there are very obvious and potentially serious distributional questions involved. If poor people are to be allowed to have their grievances addressed in court, then they must be provided with resources. Where to draw the line, in terms of which people are to be deemed in need of support and the extent of the support to provide any one person in a particular case, then becomes a value judgement. These distributional questions tend to distract policy makers from focusing on the efficiency aspect, and, indeed, often threaten to derail reform. Our analysis here focuses first on efficiency before turning to the distributional issue, which we treat as an important but distinct problem. Our conclusion is that there is scope in the system for substantial experimentation with procedural reform, and that as much as possible should be done to encourage the development of a cafeteria-style of civil justice system with improved information flows and provision for innovations such as cost capping and risk sharing between legal representatives and clients.

In section II of the paper, we look at the general market characteristics of the supply and demand for civil justice by examining the product specification. Then, in section III, we take up the notion of externality and examine its implications for reform. In section IV we address the various possible remedies for the market imperfection arising out of the externality, while in section V we turn to the vexed issue of distribution. The paper concludes in section VI with some suggestions regarding reform strategies that may guide policy makers in this area.

II. Product specification

As has been discussed in the introduction, civil justice is a service, and that service is dispute resolution. The formal civil justice system is just part of a spectrum of dispute resolution mechanisms that are at work throughout the economy. But in many ways it is the cogwheel that drives the whole system. It represents the court of last resort -- when all other forms of dispute resolution fail to bring the parties together in a mutually satisfactory way, it stands ready to bring closure to any competent dispute. In addition it possesses enforcement power to ensure compliance with its ruling (diligence), and it possesses a rule-setting attribute in the form of precedents and procedural rules.

³ This is in marked contrast with the experience in the continental inquisitorial system where pre-trial settlement is much lower. In France, for example, the figure is typically around 25% (Doriat and Deffains, 1998).

All the other commonly used forms of dispute resolution depend in some way on this formal element. These alternatives work only because the courts operate in a particular way in allocating and enforcing liability, damages, and costs according to well understood rules. This influence on the operation of each of these particular alternatives is not generally afforded explicit acknowledgement. Furthermore, whether it is breach of contract, tort-based harm, or marital dissolution, behaviour that is likely to result in a dispute will be influenced by the parameters set in the civil courts. For example, given the prospect of an injured party being able to seek redress, with recourse if need be to the courts, individuals and enterprises are induced to behave in a more considerate manner. The rules set explicitly and implicitly by the courts also remove the uncertainty about which party is to bear any risk, and thereby allows appropriate action to be taken to mitigate that risk.

Demand.

As mentioned in the introduction, there are, in general, two types of purchaser of civil legal services. The first is the one-time buyer for whom the costs of obtaining and evaluating information on the range and quality of legal services available can be high. Purchases are, therefore, typically made on faith, and for this type of buyer legal service is a credence good, where it can be argued that some form of third-party regulation is beneficial. The second type is the professional or repeat buyer, who may be a business enterprise. Here there is ample opportunity to gain information on the nature of suppliers and to make informed purchases based on experience. To these buyers, legal services are an experience good, where the normal stricture of *caveat emptor* leads to an efficient outcome. Thus the Automobile Association (AA), with a high volume of members' cases requiring legal representation but with these cases being of a fairly standard and well specified nature, can enter into block contracts with solicitors around the country whereby a set price can be agreed for a given standard of service in a set number of cases.

It can be argued that, even among the one-time buyers, social networks and reputation (not to mention brand labelling) can overcome the information asymmetry that exists between lawyer and client, thereby improving the client's prospect of obtaining good service⁴. But, be that as it may, it is for this credence-good group that the legal professions justify regulations regarding entry and conduct. Regulation comes from the relevant Law Society in the case of solicitors, from the Bar Council for barristers, and from the Faculty of Advocates for advocates.

Regulation.

The market for legal services is an imperfectly competitive market. As explained above, lawyers -- advocates, barristers and solicitors -- are regulated (self-regulated) private suppliers of services. Entry to the professions is not open to all, but carefully controlled by stipulation of educational and professional qualifications as well

⁴ In economists' jargon, labelling or reputation helps avoid what has come to be known as the 'market for lemons' problem that tends to arise in such situations whereby poor quality products drive out better quality, so spoiling the market.

as defined practical experience. Thus, Baldwin (1997) explains how in England and Wales aspiring solicitors require to secure a recognised law degree or to pass the Common Professional Examination/Diploma (CPE) in law before taking the Legal Practice Course (LPC) and on successful completion of this securing a training contract with a qualified solicitor, during which time a Professional Skills Course (PSC) must be completed. The Bar Council administers a similar set of admission procedures for aspiring barristers (qualifying law degree or CPE, Bar Vocational Course (BVC) and a twelve month period of pupillage after which a position in a Chambers (tenancy) may be sought.

Once accepted by the profession, each type of practitioner is subject to a code of professional conduct. In addition, both the capacity (number of courtrooms and judges) and admission charges (court fees) to their most formal operating arena, the courts, are determined in an administrative procedure -- either directly by the government or through some quasi-governmental agency such as the Lord Chancellor's Department or the Scottish Courts Administration.

Supplier-induced demand and collusion.

For the uninformed buyer, there remains the problem of supplier-induced demand⁵, whereby the legal practitioner is in the position of both recommending the quantity and quality of product to be purchased and simultaneously supplying it (and thereby possibly engaging in the practice of "fee-building"). There are clear principal-agent problems here. This is one reason that can be advanced for accepting a substantial regulation of the profession in order that behaviour can be policed effectively. Regulation, however, brings its own problems owing to the potential it creates for collusive behaviour and restrictive practices. Collusive behaviour would arise, for example, were all solicitors agree to refrain from competing on price by using standard fee schedules to price their services. In conveyancing, the use of such mandatory fee schedules or fixed fee scales was in operation in Scotland until 1985 (in England and Wales until 1974). Self-imposed restrictions on recruitment of new trainees⁶, or on price and non-price competition through advertising, or on organisational form (e.g. multi-disciplinary practices) could all result from collusive behaviour.

Deregulation.

In many ways there has been a remarkable deregulation of the profession over recent years (see Stephen and Love (1998)). For example, following a 1976 investigation by the Monopolies and Mergers Commission (MMC) and subsequent government pressure, by the mid-1980s advertising by solicitors was permitted -- although within certain bounds and generally stopping short of anything approaching the unthinkable "touting for business". Since 1985 solicitors have been permitted to

⁵ Sometimes less contentiously labelled 'provider moral hazard'. See Bevan (1996).

⁶ Baldwin (1997, p.23) relates how in 1995 the Law Society investigated the possibility of regulating the number of places on Legal Practice Courses (LPC) and, hence, entry to the profession. Unsurprisingly, they were advised that this would be illegal (a restraint of trade).

operate in a corporate form, and since 1990 they may form partnerships with non-solicitors in England. Since 1977, Queen's Counsel have been permitted, under the Scottish system, to revise pleadings directly rather than through a junior, and to appear without junior counsel. Furthermore, the idea that any junior counsel (whose involvement the senior continues to have a right to insist upon should this be felt necessary) should automatically be paid a fee at a rate of two-thirds that of the senior has also been swept away. However, advocates in Scotland retain the legal right to conduct a case without any regard to the wishes of the client, and, on the grounds of public policy, the advocate is deemed not liable for any wrong advice in law, negligence, mistakes etc. While barristers in England and Wales retain considerable immunity from negligence suits, their position is now less strong in the area of non-litigious and pre-trial work. In contrast, solicitors are liable for losses consequent on breach of duty, although it is interesting to note that taking the opinion of counsel substantially protects a solicitor. But, as the recent paper by Reeves (1998) on the system of Queen's Counsel in England and Wales argues, the professions are still subject to criticism regarding restrictive practices. Reeves' arguments include claims regarding the closed nature of the procedure of appointment to silk, that becoming a silk is the main route into the ranks of the higher judiciary, and that the elevation to silk facilitates both the restrictive practice of using juniors and the charging of higher fees.

Apart from the directly involved parties, right of audience in court by any other than an advocate, barrister or solicitor is severely restricted. There is provision in Scotland for cases under the Debtors (Scotland) Act 1987 and other summary cause procedures in the sheriff courts to allow representation by a layman friend of the party. But here the court has to be satisfied that the person is qualified, and the practice seems mostly to be used as a device for allowing trainees to appear. As of 1991, it is possible for solicitors in both England and Wales and in Scotland, after satisfying certain training courses and other hurdles set by their respective Law Societies, to gain right of audience in the higher courts⁷, previously the exclusive domains of barristers and advocates who had to be briefed by solicitors, thereby, it is alleged, adding to costs.

Perhaps the greatest step forward in England and Wales regarding alternative representation has been the provision under the Courts and Legal Services Act 1990 for non-solicitors to provide conveyancing services (through licensed conveyancers). While there has been substantial entry to this new profession, Stephen and Love (1996) find little evidence of downward pressure on prices, although Domberg and Sherr (1996) are more positive in their appraisal. Although, in 1990, a Scottish Conveyancing and Executory Services Board was set up under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, by 1992 it had been suspended in the face of the housing market collapse, having made no impact. By and large, therefore, conveyancing in Scotland is left to the solicitors. Indeed, the very Scottish cartel-like exclusive arrangements among solicitors to advertise and sell properties (e.g., the

⁷ These higher courts being the Crown Court and the High Court in England and Wales, and the Court of Session and the High Court in Scotland.

Edinburgh Solicitors Property Centre) were recently investigated by the Office of Fair Trading for restricted practices and exonerated.

Judges and court fees.

While, in most markets, market forces ensure that any upturn in demand brings forth an increase in supply, in the area of legal services the determination of overall judicial capacity (a key feature of the system) is an administrative decision of the government. In England and Wales there are 96 High Court Judges (up from 78 in 1985), 539 Circuit Judges (371 in 1985), 1207 Recorders and Assistant Recorders (992 in 1985), and 337 District Judges (189 in 1985). In Scotland, the Court of Session currently has 26 full-time judges (up from 23 in 1985), known as Senators of the College of Justice and also responsible for criminal business in the High Court, and the sheriff courts have six Sheriff Principals, 109 Sheriffs⁸, and 119 temporary sheriffs (up from 6 sheriff principals, 88 sheriffs, and 61 temporary sheriffs in 1985). Growth in judicial capacity is, therefore, clearly a reality, but it is difficult to describe the process by which it occurs as market-responsive.

Court fees are levied for all court business and there has been a marked move over recent years to ensure that fees are set at a level that covers court operating costs (including judges' salaries). For example, in the Scottish higher courts, targets of covering at least 80 per cent of all costs in 1996-97 and 90 per cent in 1997-98 were both successfully attained⁹. One major scheduling consideration peculiar to Scotland is that civil justice, in general, is placed as a residual claimant in the system owing to the priority given to criminal cases in allocating judicial resources. This priority is due to the 80-day and 110-day rules in Scots Law whereby detained suspects¹⁰ must be tried or released within that period (1-year for those at freedom but charged).

Lawyers.

In terms of the supply of lawyers, there is a widely held view on both sides of the Atlantic that the market is kept artificially in short supply, so ensuring practitioners unusually high earnings. In fact, careful scrutiny of the data for the USA by Rosen (1992) shows that lawyers on average earn a reasonable level of pay that is commensurate with the longer training period that is necessary for qualification and the usually longer hours per week that lawyers work. Figures on entry to the professions also show that there has been remarkably easy entry to the profession over recent

⁸ These statistics are taken from **The Lord Chancellor's Department Judicial Statistics for England and Wales, Scottish Court Service, Annual report and Accounts 1996-7**, and **Civil Judicial Statistics Scotland**. Thanks are also due to Mrs Hardie and Mr Ritchie of the Scottish Court Service for help with some of these statistics.

⁹ These facts are revealed in the 1996-7 and the 1997-98 Annual Accounts of the Scottish Court Service. The higher courts are the sheriff courts and the Court of Session.

¹⁰ The 80-day rule pertains to the time limit for an indictment on a person in custody under petition (solemn procedure).

decades -- notwithstanding the fear that supply could be constrained by manipulation or control over training places¹¹.

Recent figures¹² on the profitability of legal practices among solicitors in Scotland show that for profit-sharing partners the median level of profit per partner was £4,934 with an interquartile range from £0,683 to £2,113. Of course not everyone reaches the level of partner. Recent figures from the Law Society¹³ reveal that average annual earnings among male (female) solicitors are: assistant solicitors £4,000 (£3,000); salaried partner £0,200 (£3,000); and equity partners £0,520 (£0,180). What often catches the headlines is the earnings, or putative earnings, of "superstars". It is true that there is a remarkably wide variation in earnings within the legal profession. This is, as Rosen (1981) explains, simply a manifestation of talent commanding its market rate. If there is one outstanding barrister (say) who can deliver a 10% higher chance of winning than any alternative barrister, and if there is a net £ million at stake, then it is easy to see how that barrister could command a premium fee of some £00,000.

Judges salaries¹⁴ (usually taken to represent the high end of the salary range for the non-"superstars") do not suggest unusually high remuneration when compared with other senior responsible jobs. In 1998 a High Court Judge or one of the less senior (Outer House) Court of Session Judges earns £17,752 per year. The more numerous sheriffs earn £8,077, and district judges earn £0,820. But judges' positions offer a substantially more secure stream of earnings (not to mention pension) than that enjoyed by most barristers or advocates.

Other participants in the legal process.

The court system also depends on other actors, not least among whom are witnesses and juries. In England and Wales, jury trials in civil cases have been severely limited since the Administration of Justice Act 1933. They number less than 400 or so cases per year, and are generally restricted to defamation and fraud cases. In Scotland, where jury trials were re-introduced in 1815 to come into line with the then English practice, juries¹⁵ may still be used in the Court of Session in claims for personal

¹¹ See Baldwin 1997, for a comprehensive discussion of regulation of the legal profession in England and Wales. In one example (p. 68) he quotes the 2400 applicants for places on the Bar Vocational Course at the Inns of Court School of Law (one of 8 such providers), where some 883 completed the course in 1994, of whom only 657 secured a pupillage by October 1994. Set against the 500 or so tenancies that are expected to be available in any year, then professional entry is certainly no unchecked. That said, some of what is going on here is undoubtedly quality screening (e.g., acceptance on courses and admission to training places), and some may reflect market demand (e.g., available tenancies in Chambers).

¹² See McCutcheon (1998).

¹³ As reported in the *Times* on 19 October 1998, page 10.

¹⁴ Judicial salaries can be found at the LCD web site <http://www.open.gov.uk/lcd>.

¹⁵ Civil juries in Scotland comprise 12 persons as opposed to the 15 used in criminal trials under solemn procedure. Jury trial have been abolished in the sheriff courts (since 1980), and in the Outer House of the Court of Session they number only some 4 or 5 per year.

injuries, libel and defamation. While juries sometimes sit in certain personal injury cases, they are extremely rare as most judges disallow them if there is any complexity, e.g. a pension issue, involved. Juries do not represent a serious expense in most civil cases.

Witnesses in civil cases tend to be of the expert kind and are, consequently remunerated at market rates for their service. So while the time of witnesses and juries represents an important social cost in terms of criminal justice, it creates less of a problem in civil justice (save to the extent that the use of rival experts may permit a prolongation of the procedure as a consequence of strategic manoeuvring by one or both sides).

Alternative sources of supply.

Thus the state has a monopoly on court rooms and judges, and the legal professions through their regulatory bodies have scope for restrictive practices concerning admission to the professions, membership of the professions, and the way in which the court system works. As with all monopolies, however, competition may be stimulated by the provision of near substitutes in the product market. In this case, private negotiation between parties or their agents may suffice to resolve any dispute -- no formality is needed. A half way house between this unstructured atmosphere and the regulated procedure-bound court room can be found in Alternative Dispute Resolution (ADR). Under this arrangement it is possible to choose a quasi-judicial mode of arbitration by a third party under mutually agreed procedural rules, or, alternatively, to have much more open ended and party-driven form of mediation where the third party appears as a facilitator rather than an adjudicator.

Mediation is favoured in some US jurisdictions as a compulsory step prior to formal court proceedings. Although the idea of mediation finds much support in the UK, with various groupings such as ACCORD (under the Law Society of Scotland), CALM (Comprehensive Accredited Lawyer Mediators), CEDR (Centre for Dispute Resolution), the Mediation Bureau, and many other agencies all offering mediation services, there is empirically only a small part of court business that is diverted to mediation. Family law is the major exception here, as mediation is set to play an increasingly important role in preventing marital breakups and in easing any child custody decisions that do have to be made. The reparation type business may be more likely to involve mediation as a first step after a recent decision in England and Wales that will allow Legal Aid expenditures to be used to support mediation. Hitherto legal aid could only be used to pay for the more formal court related procedures.

In general, the submission of a dispute to arbitration has the effect of excluding the courts. Subsequent appeal by one party to the court will have no effect if the matter is judged to be contractual (either in the *ex-ante* sense of a contract clause or in the *ex-post* sense of a post-dispute private agreement between the parties). The arbitrator's award is generally final and cannot be appealed to a court, being open to challenge only on procedural grounds. The courts will, however, assist with the enforcement of arbitrator's awards.

The legal professions have not been slow to move into these areas and, indeed, it could be argued that such activity has always comprised an important part of their work, albeit not always formally labelled as “alternative dispute resolution”. The important point is that the finding of a solution in all of these alternative situations presupposes the existence of the formal court mechanism. Much as the central bank, The Bank of England, stands behind the UK monetary system guaranteeing its probity as banker-of-last-resort, so the court system stands as an arbiter-of-last-resort.

Choice of procedure.

The resolution of many disputes can be achieved in a way that leaves both sides better off. Failure to agree can, in the jargon of the negotiation literature, “leave money on the table”. This is particularly true when the dispute or prospect of dispute inhibits a mutually beneficial trade or commercial or other relationship. Each mode of dispute resolution has its own value-added. Value-added arises from procedures that allow new facts to emerge or different appraisals of solutions to be made. Any value added will, of course, be net of such transaction costs as are introduced by the dispute resolution mechanism. Indeed, in choosing among the various modes of dispute resolution, lower costs will prove a prime attraction in many cases. It can be argued that the emergence of ADR in recent years is an indication of competitive forces in the system. A major dimension of this competition is the determination of the nature of the procedural rules under which cases progress through the system.

From this perspective, Lord Woolf’s (1996) proposal that cases be allocated to one of three tracks (small claims, fast track, and multi-track) based on the value of claim involved¹⁶ can be seen as product innovation. These proposals are set to come into force in April 1999 when active managerial intervention by judges will be encouraged in an effort to move cases more expeditiously through the system. As time, or delay, can be expensive this must be applauded. But there are non-trivial resource implications owing to the substantial “up-front” input of judicial time that is required. A higher level of judge, Designated Civil Judges, has been created to oversee this new aspect of the system. In addition, it should be remembered that, in any case, around 95% of all civil reparation cases settle before they reach trial or proof. As the extra and early judicial input will be reflected in court fees, it might be best if an element of choice was allowed in any “fast track”/“multi track” system of case management. If the two parties disagree, then there could be a judge-led process of determining the appropriate procedural track¹⁷.

Lord Cullen (1995) made related case-management proposals for the Outer House of the Court of Session, but suggesting that track allocation be based on the complexity of the case rather than the damages involved. The reaction to the Cullen report has been one of great caution. In fact, it is tempting to recall Hume’s words

¹⁶ With this division will come procedural restrictions, e.g., no cost shifting in small claims, and substantial judicial involvement in case management for fast-track and multi-track.

¹⁷ A suggestion made by Zuckerman (1995, p. 171).

when he described the disappointing public reaction¹⁸ to the publication of his *Treatise of Human Nature*, namely that “It fell dead-born from the press, without reaching such distinction, as even to excite a murmur from the zealots”. A kinder interpretation might be that the legal establishment in Scotland has had time to benefit from the results of a study of case management in the USA by the Rand Corporation’s Institute of Civil Justice (see Lord Gill, 1997). This study suggests that case management is extremely demanding on judicial time and effort, particularly in the early stages of litigation (after which many cases settle out of court).

While advocating a liberalisation of procedure, we end this subsection with a cautionary note. Procedural reform can affect the relative costs of the various modes, but lowering transaction costs, e.g., through reducing delay, is not always synonymous with increased value for money. Peacock (1994) makes the analogy with a symphony orchestra striving for efficiency by playing its pieces at twice the appropriate speed, thereby destroying the product! Efficiency gains can be illusory in cheaper channels of dispute resolution if what is produced leaves the parties worse off.

Risk and uncertainty.

Although we have emphasised the state’s monopoly in the provision of judicial capacity and the regulated nature of other legal services, there is, as we have indicated above, always a choice. In terms of resolving a grievance a party can variously: forget it (allow the grievance to lapse); resolve matters privately; use an agent but not the court (ADR, etc.); or go to court. Only in this last is the consumer directly exposed to the impact of the regulated court system. Indeed, the extent of demand for less formal channels will depend in part on the degree of congestion, delay and expense involved in utilising the formal sector. The knowledge that any dispute, should one arise, can end up in a formal court-room colours the way that all “upstream” negotiations are handled.

One problem in taking formal legal action is that the costs are not known at the outset. It is like buying a product in a shop with little or no idea of what the final bill will be. Legal costs come in various forms: court fees; expert witness fees; lawyers’ fees; the possibility of being held liable for other party’s costs; delay; and strategic behaviour of other party (including opportunistic use of discovery provisions, extravagant case preparation, and so on). Many of these costs are not exogenous, or pre-set, but depend on the development of the case, the decisions taken by one’s own legal representatives, and the decisions taken by the opponent’s legal representatives. Thus, the other side in the dispute can increase the resource allocated to case preparation or use of expert witnesses, or quality (expense) of legal counsel, and this will call for similar if not matching expenditures. That response in itself might then

¹⁸ Hume’s disappointed reaction was premature, as history was to reveal -- but not in his lifetime.

induce a further escalation, and so on in an upward spiral that brings no real advantage to either side¹⁹.

At the moment, the typical legal contract that exists between clients and their lawyers looks very like the cost-plus style of contract that has traditionally produced huge cost overruns in the defence industry. The client is exposed to the expenditure of his or her own legal representatives (while these expenses may be reported as they arise, they are generally only roughly estimated in advance). But, the client is also exposed to the rival's legal bill should the verdict go the wrong way, or at least the audited part of it (*inter-partes* costs, those judged absolutely necessary for conducting the case and awarded against the loser). Given that for at least one class of consumer the experience is relatively rare, then one can expect some risk aversion. By contrast the legal representatives, this being their work day in and day out, can spread any risk over a large number of cases. It might consequently appear that there is scope here for a mutually advantageous form of contracting that shifts the risk to the party best able to bear it. The Lord Chancellor, encouraged by Sir Peter Middleton's (1997) report, is currently considering the use of fixed fee contracts in England and Wales. Consultation on the principles regarding civil court fees ended on May 1 1998, and concrete proposals are expected soon.

At present, negotiating with one's legal representative over price or method of remuneration to apply in each case is difficult. Indeed, certain fee contracts are currently not allowed, and competing aggressively on the basis of price is explicitly discouraged by the Law Society. It has long been possible in Scotland for an advocate to agree to operate on a speculative basis, whereby no fee is charged in the event of defeat but a proportionately higher fee (e.g., a 50% premium on the fee computed on hours of work) is charged if successful. To date, this has not been commonly used, although, as discussed above, the green light given by recent legislation to the use of a similar type of "conditional fee" in England and Wales and to allow solicitors in Scotland to operate on a speculative basis may well change this²⁰. The conditional fee (no-win/ no-fee) has now been in operation since July 1995 and is generally judged a success (Yarrow, 1998). Insurance against having to pay the legal expenses of the defence, in the eventuality of the plaintiff's case being lost is now available from Accident Line Protect (set up by the Law Society) and Litigation Protection (a private company) in England and Wales, and from Compensure (set up by the Law Society of Scotland) in Scotland.

The more full-blooded risk-shifting variant used in the USA, namely the contingent fee, is not allowed in the UK. That said, some commentators, e.g. Walker (1997: 381), are of the view that nothing exists in law to prevent this arrangement in Scotland, and Middleton (1997) has recommended active reconsideration of its introduction in England and Wales. In Scotland, at least one individual, acting in a corporate rather than a personal or professional capacity, has exploited the fact that a

¹⁹ See Main (1997, p. 6) for more detail.

²⁰ The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 makes the arrangement explicit for solicitors in Scotland. In a similar fashion so does the July 4 1995 changes made by the Lord Chancellor, Lord Mackay, under the Courts and Legal Services Act 1990.

non-professional person may advance funds to carry out litigation in return for receiving a share of the recovery or damages if successful. Assuming an interest of this kind in a case is defined as champerty (see Painter, 1995, and Tan, 1990) and was traditionally debarred to professional lawyers in the UK owing to the bias it may impart to professional judgement. Contingency fees are explicitly excepted from champerty doctrine in the USA (where the exemption was ratified by the Supreme Court as long ago as 1877).

Third-party sources of costs.

Self-funding aside, demand is strongly affected by the prospect of someone else picking up the tab. Usually this prospect (other than courtesy of the judicially imposed consequence of the British loser-pays rule) comes about through legal aid, trade union backing, or legal expenses insurance. In the last two, the person can be regarded as making an efficient allocation of resources in the sense that the agent pays the expected cost of the expense beforehand, in a risk pooling mechanism common to most insurance schemes. There are obvious self-selection problems and moral hazard problems of the type that arise in any insurance situation, but given that both the insurance company and the trade union are professional organisations then contract design arrangements such as screening programs and co-insurance should minimise these difficulties²¹.

With legal aid, however, there is a more serious allocation problem. In its original form, legal aid placed qualified (means tested) individuals in a free or zero-price situation. Strict means testing and recently instituted reforms involving moves toward co-payments eliminate some of this difficulty, but legal aid clients are undoubtedly presented with stronger incentives to litigate than other citizens (particularly those in the middle-income range). The position of a legal aid litigant is further strengthened by the deviation from the English rule in the event of such a plaintiff losing -- they are not generally held liable for the other side's costs. This advantage gives the plaintiff with legal aid a substantial advantage in pre-trial bargaining. Recognised as an "oppressive effect" in a recent Lord Chancellor's Department report²², the intention is that lawyers will share risks with clients under conditional fee arrangements. Moves in England and Wales to divert all Legal Aid Board personal injury cases (with the exception of medical malpractice) to a conditional fee arrangement, plus the encouragement given to the franchising or block purchase of legal aid, and the possible development of more broadly based Community Legal Service should counter some of these incentive problems. There is also a current recommendation that the costs of insurance (Accident Line Protect, Compensure etc.) be recoverable from the other side by the successful plaintiff as a disbursement. The success fee component of the conditional fee will also be recoverable along with other taxed costs.

²¹ In the past, insurance companies have found themselves constrained in this field by EU law guaranteeing individual freedom of choice of solicitor, and by certain aspects of champerty and the related concept of maintenance, see Rickman and Fenn, 1998, p. 217.

²² See Access to Justice with Conditional Fees. A Lord Chancellor's Department Consultation Paper, March 1998, para. 3.4.

In Scotland, the recent government position paper on civil legal aid, *Access To Justice. Beyond the Year 2000*, suggests that more lawyers may be employed directly by the Scottish Legal Aid Board (SLAB), to work in advice centres providing a first layer of legal advice that might go some way to separating the agency function (of prescribing the possible cure to the problem) from the service function (of delivering that cure) -- the principal-agent problem that is often cited as leading to supplier-induced demand in medicine, the law, and other professions. Moves on funding and fixed fees are less well advanced in civil legal aid in Scotland, as the argument regarding inefficiency is rebutted with statistics showing that the Scottish Legal Aid Board recovers (out of damages awards, fee awards, and client contributions) over 80% of all expenses relating to reparation cases. This is taken as evidence that the "merits test" is already working. Under the merits test, solicitors are meant to estimate the chances of the case prevailing if it were to go to trial or proof as being reasonable, before applying for legal aid on behalf of their client. Lord Irvine has suggested²³ that the merit test should be strengthened to stipulate a 75% likelihood of success as a funding condition. Clearly, the civil aid system is in for further substantial reform. Rather than rationing access, it might be better to try to think of ways that can encourage as many people as possible to have access to dispute-resolution facilities of the courts. Innovative procedure, funding mechanisms and fee charging can all play a part here.

Other sources of demand.

There are other more macro causes of demand for civil justice. These are primarily societal in nature, and include the rise of so-called dysfunctional families, and the increased prevalence of employment rights that have accompanied the extensive passage of statute law covering the labour market. This last development includes trade union law, as, while there are now fewer trade union rights, somewhat paradoxically there are many more trade union laws on the statute book. There has also been a marked social change that has encouraged civil litigation. In general, we now live in a more assertive and rights-conscious society. The general attitude among the public has changed and people are much more likely to sue for their rights.

Product specification.

We, therefore, have a complex product whose quality and characteristics are difficult to ascertain before purchase and, partly in consequence, whose supply is heavily regulated. Demand for this product is a "derived demand", resting on the demand for dispute resolution. Changing social mores and the increased complexity of modern life seem set to drive this demand upwards. It is at the interface between supply and demand where the price is set and the quantity/quality agreed hat seems to offer most scope for product innovation. In both England and Wales and in Scotland, there are initiatives being taken by the government to change the legal aid system. These changes will have a direct influence on the way all civil cases are dealt with. In

²³ See Lord Irvine's address to the Solicitors' Annual Conference at Cardiff (18 October 1997). This change would require legislation and will be unnecessary if there is a major move to conditional fees, although it will still have a bearing on family work.

addition, there are general procedural changes being made -- particularly, but not exclusively, in case management. These are likely to have a significant impact. They demonstrate that change is possible. Change and innovation could also be encouraged in a more general sense, e.g., between client and lawyer in contracting for service, or between lawyer and lawyer in agreeing procedure. But this would require much more information and much more attention to freedom to contract than appears to exist at the moment.

III. Externality

If the volume of litigation were the sole measure of the benefit to society of the resolution of disputes, then there would be little to distinguish judicial services from the provision of other goods and services in the market. Those unwilling to pay for the services could be denied them (exclusion) and the benefits arising from the resolution of a dispute would be confined to that particular individual case (rival consumption). Even if the courts were endowed with a monopoly, it is possible to devise schemes which would simulate competitive pricing, a matter which has received some attention from economists²⁴. But the claim that there are benefits other than those accruing to litigants using court services must lead one to look more closely at the process of dispute resolution and the case for government intervention.

A common argument for supporting the case for the existence of benefits which accrue to those other than litigants in court is that of the creation of certain precedents (Fiss, 1984). In principle, the establishment of precedent in disputes may reduce uncertainty in the minds of subsequent litigants and their advisers about how to proceed with a case. Precedents are constantly evolving as a result of new situations which arise from often rapid changes in economic and social conditions. However, whether precedents have the power to reduce transaction costs to litigants to any major extent has yet to be empirically tested and is often disputed in principle. Measurement would require the calculation of the amount of dispute expenses (lawyers fees being an obvious one) that are avoided when a precedent clarifies what had until then been a disputed area of the law. One would also have to add the efficiency gains obtained through operating the economy under the new rule. It is necessary to bear in mind, however, that only a tiny proportion of judgements ever lead to anything approaching a precedent. The small number of cases that are appealed, and the even smaller number that result in a judgement of material significance to the interpretation of the law, bears witness to this fact. The vast proportion of judgements resolve purely private disputes whereby no third party is any the wiser or better off.

²⁴ Gravelle (1996) has considered this particular point. Smith (1776, Book V (i) 6) was aware of the need to provide judges with a financial incentive to expedite justice. Other writers such as Benson (1997), Bernstein (1992), Friedman (1979), and Landes and Posner (1979) have examined the possibility of private systems of law enforcement and adjudication.

In any case, a more empirically robust argument can be made for the manner in which the courts influence the process by which all disputes are resolved. The fact that the courts operate in a more or less recognisable and predictable way and with a known standard of accuracy is likely to encourage out-of-court settlement, which is clearly less expensive. As it happens, a large proportion of cases in Scotland, England and Wales, North America, and elsewhere, perhaps exceeding 95 per cent in most years, are settled between filing and a court appearance for judgement or proof, although admittedly the settlement often occurs only at the door of the court itself. The influence of the courts extends back into encouragement to disputing parties to settle grievances without going near a lawyer's office. The influence of the role of the courts extends even to increasing the confidence of individuals to enter contracts that offer mutually advantageous gains, but clarifying what is likely to happen in the event of one party or other not complying with all details of the agreement. The courts through their actions and decisions also persuade all actors in the economy to behave with due regard to the necessity to exercise a reasonable amount of care, bearing in mind the costs of litigation that will ensue in the event of harm being caused. In short, a socially efficient (but not zero) level of litigation encourages beneficial economic activity.

While we argue above that ADR and the like provide a competitive source of dispute resolution that tends to undermine any attempt by the formal system to exploit its monopoly power, at the same time there are disadvantages to private-channel dispute resolution. The public is deprived of information, the deterrence of negative behaviour is made less likely, there is no information gained as would be from a public trial, and there is no public exposure of either party. In addition, the very secrecy of ADR procedures opens up the possibility that settlements that are contrary to the public interest may be allowed to be made (e.g., involving monopolistic exploitation of third parties or a restraint of trade). Of course, the public is not concerned (or not primarily so) with the social purpose of litigation. The decision to proceed to law or ADR is based primarily on private preference and private calculus as to the costs and benefits. But a court system with lower transaction costs will place downward pressure on dispute resolution costs throughout the system. As long as accuracy is not disproportionately weakened, then there should be an increase in value added, both in terms of disposing with court cases and in terms of expanding the margin of disputes that are resolved in one venue or another) and an extension of the margin of harm that is redressed or avoided. This then allows more mutually advantageous contracts and exchanges to be effected.

It is more difficult to judge whether these arguments are sufficiently strong to justify large public subsidy of the civil justice system. Such subsidies in a system that is still quite heavily regulated are always in danger of capture by vested interests within the system. What does seem clear is that increased competitiveness and increased flexibility in contracting offers gains to society that extend well beyond those identified as directly consuming the services of the civil justice system.

IV. Remedies for market imperfection

In addition to the positive externality discussed above, the imperfection in this market concerns its regulated nature. With an administratively determined number of judges and court rooms, and a complex bureaucratic process of determining procedural rules (and hence product specification), it is very easy for this market to underperform. We argue in this subsection that increased information, choice and product diversity should all be used in shaping a way forward. It is clear that a court system that uses resources efficiently is something that is to be desired. But efficient need not mean the lowest unit cost per court case. The system might be very cheap but so hopeless at determining fault as to be little better than a lottery (see Main, 1997, and Peacock 1998). In this case economic activity and private contracting will be discouraged.

At the same time, an extremely high unit cost system could offer an unerring accuracy in determining the truth (although a problem arises in cases where the concept of truth is elusive). Such a system would provide the parties with an incentive to settle out of court and would provide all parties *ex ante* with the confidence to enter into all mutually beneficial contracts and exchanges. Of course, such extremely high costs, if that is the price of accuracy, could deter the risk averse litigant or the individual who has difficulty in funding an action. This latter point is a distributional problem that will be discussed in the next section.

In terms of efficiency, there are two issues. The first is to determine which type of system is the best. The second is to determine how to bring that system about. Current arrangements for reform in the judicial system involve a period of long, sometimes hesitant, but generally careful consideration followed by the imposition of any changes -- possibly after piloting and modification²⁵, but with the expectation that the innovation will be applied uniformly and will last some time. Direct regulation of the system is what happens now, and it is certainly capable of delivering improvements on the *status quo*. Given the externality considerations explored above, it is clear that some public subsidy of the court system can be justified. The main challenge, then, is to devise ways that recognise the regulated (and subsidised) nature of the market while ensuring that transaction costs are kept low and product innovations are encouraged. Low user-costs and allowing the consumer plentiful information and choice promises substantial dividends here.

The structure of costs.

One key parameter in this system is the matter of costs. In England and Wales excessive costs by opposing lawyers can be checked by vigorous use of wasted-costs orders, whereby legal representatives may be ordered to meet certain legal costs personally where that representative has been guilty of gross inefficiency or wilful

²⁵ The Middleton report (1997, 4.14) backs the Law Society view that Woolf's reforms in civil procedure should be implemented in some regions ahead of others, thereby allowing some experimentation although with the aim of a uniform system in the end. In fact, all reform is to occur in a uniform manner. On the other hand, the Public Solicitor Defenders Office (PDSO) was introduced in Scotland in October 1998, initially on a pilot basis.

obstruction. Such awards are currently very rare²⁶. Costs themselves are already recognised in various modes: *inter-partes* costs, solicitor and client basis (somewhat more generous), and solicitor and own client basis (allowing all expenses reasonably incurred for the benefit of the client). More flexibility could be deployed here, with cost orders being imposed even on cases that settle at or before reaching the courtroom door. All legal costs can currently be challenged and subjected to audit or taxation. One suggestion by Middleton (1997, 2.44) is that not only should fixed price fees be agreed in advance but that these be filed with the court so that the award of costs when the case terminates would be based on the *lower* of the two figures. A set percentage of this would be paid by the client depending on the stage reached in proceedings, but any *inter-partes* costs would be computed on the basis of the lower of the fixed costs faced by the two parties. These practices could be incorporated in the efficiency norm for legal services.

Choice of fee structures.

For consumers to be able to choose, there is a requirement for information regarding the service and its accompanying terms and conditions. Zuckerman (1995) draws on recommendations from the Australian Advisory Committee on Access to Justice to suggest that lawyers should ensure that clients have not only details on the method by which the final bill will be computed but also an estimate of the total costs that are likely. This to be accompanied by an estimate of the chances of success and the cost implications of failure. This information might also contain some details regarding alternative approaches to resolving the problem (in a non-litigious manner). We would go further and recommend (echoing Middleton) that there be an expectation that lawyers will be prepared to quote a fixed fee for handling the case (subject to insurance cover regarding the other side's costs, an increasingly common facility, discussed above). In this way, the risk of proceeding to litigation could be spread over many infrequent consumers of legal services -- shifted, if one likes, from the inexperienced client to the lawyer who is in a better position to spread this risk.

Of course, these problems are currently not being faced to nearly the same extent by those (now relatively few) persons who qualify for full legal aid. The subsidised cost of legal services and the general immunity from other side's costs in the event of failure results in a very different incentive structure when it comes to deciding whether or not to proceed to litigation. There is now a check made on a sample of all legal aid claims, although this process is currently seen to be ineffective (see Gray et al., 1996). More vigorous policing of such billings may well be introduced, although the intrinsic problem is not one of fraud but of the incentive structure that is built into the system with the state (or the other party) being left with most of the risk. The planned move to conditional fees for all personal injury cases (except medical malpractice) and a system of tendering for legal aid contracts or franchises on the basis of fixed prices will mitigate this incentive problem (see Middleton, 1997, 3.18). There may also be a move to fixed fee business in civil legal aid (as is emerging in criminal legal aid), although initial work by Goriely (1997) suggests this may be impracticable.

²⁶ See Zuckerman (1995), p.172.

Choice of standard of procedural complexity.

One other possible innovation from an efficiency point of view is to further deregulate the system by allowing the consumer to choose from competing standards of representation and procedural complexity (rules of evidence, rules of discovery etc.). Matters could be arranged that the lowest cost alternative should dominate when the parties disagree, although subject to judicial oversight, see Zuckerman (1995). In this way agents will find the standard of justice that suits them best. What is being suggested here is that the system be made less monolithic, and that individuals be permitted to experiment and innovate by allowing more opportunity for direct expression of consumer choice. Competitive pressure can also be increased in the system, not simply by adjusting the volume of judicial services available but also by introducing innovative court-based procedures that are sensitive to consumer demands -- for example, through the capping of legal expense to be incurred, or agreed limitations regarding the discovery and treatment of evidence (expert or otherwise), or to the design of the fee contract (between client and lawyer), and allowing the cost-shifting rule to be agreed between the parties. Lord Woolf's reforms have led to the establishment of certain pre-action protocols, e.g., in the use of expert witness(es)²⁷.

This leaves the question of the positive externality to be addressed. Our previous argument suggests that cases which are likely to set a precedent and, hence, have a bearing on all subsequent cases of that type should be eligible for public funding. These have been identified as public interest cases by Middleton (1997, 5.17) who recommends a fourth track under the new English system with a special fund administered by the Legal Aid Board to cover their costs. A clear analogy can be drawn here with the Law Commissioners of the Inland Revenue being prepared to bear both parties' costs in cases that are seen to be important in clarifying the interpretation of a piece of tax code.

Subsidy.

There is also a case for some public funding of the civil courts because of the way in which the efficient disposition of cases reaching court allows individuals throughout the economy to avoid expensive pre-dispute contracting that would otherwise be necessary to protect their interests. Some commentators, such as Gravelle (1996), regard the prospect of determining when and where such public subsidy to be justified to be so complex that simply following market pricing at all stages of the process may, on balance, be the most effective approach. It is certainly true that market-responsive pricing would represent a marked improvement on the current administrative arrangements. The courts are well placed to take the lead here. Judicial capacity could easily be made more responsive to market pressure. If pricing for access to court adjusts more flexibly to demand, in a way that reduces unwanted waiting time, then the entire system of dispute resolution will benefit from an increase in competition.

²⁷ See Implementing Civil reform - progress report. Lord Chancellor's Department web site: <http://www.open.gov.uk/lcd/civil/progprep2.htm>.

The judicial capacity in the system could be made more responsive to consumer demand by ensuring that court fees not only cover the running costs (including judicial salaries) but are allowed to lead directly to the appointment of additional judges as demand conditions reflect. While we argue above that ADR and the like provide a competitive source of dispute resolution that tends to undermine any attempt by the formal system to exploit its monopoly power. This is because ADR and other mechanisms operate in the shadow of the law and, at the margin, compete with the judicial system for business.

Multi-dimensional approach.

In general, the system should encourage innovation in technique and procedure. By increasing the freedom to experiment with rival systems of procedural arrangements -- whether low-cost, abbreviated proceedings, or case-management, or more inquisitorial based procedures -- then consumers are able to choose, cafeteria style, the level of justice that suits their needs. There is already evidence of change, but, to date, it has all come through a concerted effort with co-ordination across the whole judicial system. There is little room in the present system for experimentation or innovation. For example, the abolition of the notion of inferior courts with their restricted jurisdictions (for example, the sheriff courts in Scotland) would free parties to choose the venue in which to debate their cause²⁸. Sherifffdoms having shorter queues or more attractive procedures would gain business to the detriment of those with a less attractive product range. Multiple of track -- based on financial value of the cause in Woolf, and on legal complexity in Cullen -- is a good idea that could compete in the market place of procedures alongside other innovations, preferably ones that provide consumers with choice.

V. Distributional considerations

If, as is being suggested here, the state sector (courts) increases its reliance on market pricing as a way of determining the allocation of judicial resources, both towards tried and tested products (procedures) and for the more experimental specifications, there may well be an increase in the distributional problem owing to those with lower household income not being able to afford to go to court. Of course many households cannot afford the luxury of a car. Some cannot even afford to take a bus. This does not generally call for market intervention²⁹. But it is widely accepted that there is a communal interest in removing financial barriers to access to the courts. This argument is usually sustained by a wide acceptance of the view that access to justice

²⁸ The current choice is between the relevant sheriff court and the Court of Session. As Lord Gill pointed out at The David Hume Institute conference, 'The Reform of Civil Justice,' on June 1 1998, this results in considerable congestion in the Court of Session with cases that would quite properly and appropriately be heard in the sheriff courts taking up the capacity of the Supreme Court.

²⁹ The use of off-peak subsidised bus travel for senior citizens does offer a counter-example here.

should not be hindered by lack of means. There is also a general interest in having all valid grievances pursued irrespective of the economic circumstances of the litigant. Edward (1993, p.13) argues:

It is the litigant who identifies 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 to action.....

All well and good. But surely not at any cost -- or at least not at any cost on the public purse.

A valid reparation claim going unheard suggests an imperfection in the capital market or extreme risk aversion. An imperfect capital market becomes a problem when the injured party cannot sell the claim or borrow on the strength of the case to pursue the claim. Risk aversion arises when the party, possibly because of reduced personal circumstances, is not prepared to accept the risk of the litigation failing or disappointing. Both circumstances are likely with low income households. The solution to date has been to provide legal aid. This ends up being expensive and exacerbates the supplier-induced demand problem that is present when any non-repeat buyer has to purchase legal services (Bowles 1996). Policing mechanisms for the use and misuse of legal aid are not regarded as having been successful (Gray et al. 1996).

An alternative solution to legal aid is to allow conditional fee arrangements, whereby the risk and the capital outlay falls on the lawyer. For certain classes of grievance this seems to offer a viable solution and its use in all cases involving personal injury damages (excluding medical malpractice) in England and Wales, as was mentioned above, is currently emerging as the norm. But, for other types of dispute, what is often at stake are points of principle involving all-or-nothing outcomes where any pecuniary quantification of the issues is difficult, or inappropriate, and where financial compensation as mitigation is either not practicable (because of wealth constraints) or is not meaningful. Family law, and child custody in particular, is an area where such problems arise. In such situations, it is difficult to see how a person of modest means can enter into a gain-sharing arrangement with a lawyer.

One possible improvement would be to arrange the provision of state funds (through franchises) to be allocated in a contestable way over a variety of cases in a variety of jurisdictions and in a variety of classes of courtroom. Performance could be judged by some weighting (politically determined) given to each type of case and allocated in much the same way as public spending across various medical services is allocated in certain states in the USA (see Dingwall et al., 1997, and Williams, 1995). If such a weighting system of public fund allocation is adopted, it would be important to include in the payment mechanism that the government uses to reward the agency responsible (the Legal Aid Board or the Community Legal Services Agency) a measure of disputes not reaching the formal stage of a summons being issued but which are resolved privately. These too are as much a part of the service delivery of the civil justice system as the cases that reach the courts.

One problem that arises is if the maximisation of the performance criteria *per se* leads to behaviour that is not wholly consistent with the maximisation of the true objective -- the delivery of quality service. This is likely to occur when the defined performance targets are not adequately drawn up. This dysfunctional impact of non-market incentive systems was a common problem in centrally planned economies (where “the plan” might suggest a production target of 1 million washers but omit to specify the diameter, thickness or some other vital aspect, leading to the production of the least-cost version that “complies” with the plan).

Allowing the choice of venue to be contestable would add an element of competition on the supply side. Benchmark competition could also be introduced by the provision of state employed solicitors (along the lines of the Edinburgh pilot of the Public Defenders Solicitors Office for criminal defence in Scotland). The absence of consumer choice of lawyer in such arrangements has been answered by Lord Hardie (1997, p. 483) in terms of expecting to be able to choose the roofer when he hires someone to fix his roof, but not expecting to have a say in the selection of the pilot when he flies down to London. But it is worth remembering, in the context of publicly employed solicitors, that in trying to repair one market imperfection, another may be introduced -- here in the form of organisational failure, namely a nationalised service.

For the middle classes who are among the most vociferous critics regarding their restricted access to justice, the simple fact will remain. You pay your money and you take your choice. Encouraging reform of the system to become a more cafeteria-style of arrangement, by enlarging that choice and possibly putting downward pressure on the money needed to “have one’s day in court”, may extend some more palatable modes of dispute resolution, even to the middle classes.

VI. Conclusions

Reform in England and Wales currently seems to be developing a head of steam (Middleton, 1997), and in Scotland the recent reforms in the sheriff courts (Morris and Headrick (1995), and Samuel and Bell (1997)) reassures us that the idea of reform is far from a novelty to the Scottish legal system. In terms of dispute resolution, the state sector, in the guise of the civil justice system, influences the way negotiations are carried out and ensures agreements are enforced (diligence). But it is also a major source of dispute resolution in its own right, and it is in this way that it exerts a major influence on dispute resolution and individual behaviour throughout the whole economy. Increased competitiveness in the state sector will invigorate the entire system of dispute resolution, to the benefit of all and not just for those who go to court.

There are in circulation many good ideas regarding procedural reform in the civil justice system. These include fast track procedures, judicial case management, conditional fees, contingent fees, franchising of legal aid, and so on. Rather than striving *ex ante* to find the optimum combination of these possibilities and imposing it

on the entire system of civil justice, one possibility would be to introduce a market-led expansion of judicial capacity by allowing court fees to be determined by market forces with the proceeds ploughed back into judicial capacity. This would provide more competition for the alternative dispute resolution industry and be to the benefit of consumers of dispute resolution services (both of the formal court-based variety and ADR). Given that the object of the system of civil justice is to further the interests of those who pay for it -- whether directly by fees or indirectly through the tax system -- one is bound to ask whether the safeguards in place in the existing system offer the most effective way of furthering that end.

A reasonable defence might be offered for the view that the suppliers of the judicial services are so constrained by professional ethics, by law, and by associated regulations, that clients are indeed well served. That defence might be elaborated as follows: (i) solicitors and advocates/barristers are bound by professional standards enforced by their professional associations to advise clients whether or not to proceed with or to defend an action and to reveal if there are circumstances which prevent them taking on a case, e.g., a conflict of interest or doubts about the identity of the principal of whom the lawyer is the agent; (ii) lawyers, following “client care” rules, are enjoined to clarify how their charges are computed and to warn clients that the final bill is beyond their control because of uncertainties surrounding the time scale, the complexity and the outcome of the action; and (iii) a comprehensive procedure is in place in order to deal with complaints by clients about the service offered by lawyers.

Whatever the merits of this defence of the *status quo*, the individual client not continually engaged in litigation is in an exposed position³⁰. The nature of the “product”, justice, is elusive and is naturally defined by the client as a judgement in her favour, an outcome which cannot be guaranteed whatever the cost incurred. For many consumers, the assessment of the chances of success in an action cannot be based on the experience derived from regular purchase of the service, but rests on the quality of the advice of the lawyer who, unless his services are in excessive demand, has an interest in going to law on the client’s behalf. While it may be appreciated that a lawyer cannot give a precise estimate of the cost of proceeding with or defending a case, except as to explain how charges are made up, he can benefit materially from the length and complexity of an action. These factors may reflect the desire to maintain the quality of justice, but it is the client who pays for this and not the lawyers, unless it is agreed to share these costs as with a “no-win no-fee” system.

While a comprehensive complaints system may act as a deterrent to professional negligence and malpractice, it can only operate retrospectively, which is of little use to an individual client who has needlessly lost a case and who has to incur the time and expense involved in pursuing a complaint. In any case, the Legal Ombudsmen for Scotland and for England and Wales have no means at their disposal to obtain redress for clients to discipline or fine lawyers along the lines available to the regulators of the personal pensions system.

³⁰ A casual reading of McCormack’s *The Terrible Truth About Lawyers* (1987) brings this home quite clearly.

In short, the client is, as we have already suggested, rather like the position of those obliged to accept “cost-plus” contracts once they are locked onto a transaction in which the outcome is far from certain. Their defences against “exploitation” suggest an agenda for making the judicial system more responsive to individual needs.

First, as in defence contracting, some form of competitive tendering offering and incentive for suppliers of legal services to give the fullest information on the nature of the service provided. Informative advertising should be the rule rather than the exception. Voluntary organisations supporting ordinary citizens, such as the Citizens’ Advice Bureaux should press professional legal bodies for the fullest description of lawyers’ services and obligations. One step forward would be to break down the process of seeking redress in law to a two part process whereby advice as to what is needed or what is possible could be obtained from one source, while that prescription could be filled by another source, possibly after some shopping around. The advice network proposed in *Access to Justice. Beyond the Year 2000* may be a step in this direction. There will be difficulties here, however, as the nature of the remedy is so tightly bound to the delivery of the remedy. Persuading one practitioner to accept blindly and follow the prescription of another practitioner would threaten professional values. But franchising and competitive tendering for legal aid contracts may eventually make this approach more generally acceptable.

Second, and as a possible adjunct to the above approach, clients must be informed of the alternative ways in which they can pursue or defend an action, including seeking agreement on whether to go for the “fast-track” method, ADR, or follow the conventional routes. Information about alternative sources of the supply of justice, with the prospects that quality has to be traded off against cost, should be a clearly recognised professional responsibility. Alternative procedural arrangements and fee contracts should be investigated, and product innovation encouraged.

Third, the client must be assured that the discretionary element introduced into the costs that he must bear as a result of entering the judicial process are minimised, if not eliminated. This reinforces the view that the cardinal element in his protection is efficient management of the process. This could involve giving power to trial judges to control the passage of a case from the time it is raised until it is decided -- case management. In other words, the task can only be assigned to those who have no financial interest in the judicial prices involving the case. How this is to be achieved is a sensitive matter because it entails a radical change in the existing system.

Fourth, the supply of judges must be addressed. It certainly seems reasonable that the supply of judges should be made more responsive to market signals. Charging court fees to reflect full costs is a start in this direction. The logical step after that is to initiate additional judicial appointments where market projections suggest they can be self-sustaining in revenue terms. The positive externality aspect of civil justice can be addressed by subsidising identified “public interest” cases as has been suggested in the context of legal aid reform, or by subsidising court proceedings in general (and particularly at the appeal stage). The problem is as old as Adam Smith (1776), who puzzled over the question of how to offer incentives to judges to dispense justice efficiently. Interestingly enough, he considered that judges should be paid per case and should be paid only when the case was completed!

Such is the case of the advocates of reform, following the principle of maximising benefits to the consumers of justice. If the principle is accepted, but the suggested reforms are not, then the onus of proof lies with critics to show why they should be rejected and/or how they might be improved. Not to accept the principle, however, risks leaving the legal profession open to the charge that the system of civil justice is a *Ding an sich* designed primarily to promote their own interests.

Glossary of terms.

Advocate: in Scotland this job title is equivalent to barrister in England and Wales and, perhaps, trial-lawyer in the USA. It, as the title suggests, is a lawyer who specialises in pleading or arguing a case (usually in court). Advocates no longer have the sole right of audience in the Court of Session as solicitor-advocates may now appear.

Bar Council: is the professional body that regulates the profession of barrister, i.e., those who specialise in trial procedure and, until 1995, had the sole right of audience in the Crown Court and the High Court in England and Wales.

Champerty: is where a third party funds litigation in an understanding that they will receive part of the damages recovered by the plaintiff if the case is successful. Occasionally this concept is grouped with barratry and maintenance (see Painter, 1995). Traditionally forbidden in England and Wales, the common law offence was abolished in the Criminal Law Act 1967, and in 1995 the Lord Chancellor, under the provisions of the Courts and Legal Services Act 1990, explicitly permitted conditional fees which allow the lawyer and client to agree on a fee-plus-uplift if successful and no-fee if unsuccessful (as opposed to contingent fees where a given percentage of the damages goes to the plaintiff's legal team in lieu of fees). The uplift could be up to 100% of the normal hourly-based fee, where lower uplifts would be appropriate when the probability of success was higher.

Circuit Judge: Judges (part-time) in the Crown Court (criminal) system in England and Wales who will have served at least 3 years as a Recorder.

Civil justice: the civil justice system is that part of the legal system that is available to individuals who wish to seek redress or compensation for some wrong done to them. It includes matters relating to contracts, personal injury and family matters. It should be contrasted with the criminal justice system which, almost always, concerns the behaviour of the state as it seeks to punish and hence deter wrong-doing.

Court of Session: senior court for civil procedures in Scotland. It is a court of first instance (the Outer House) with a jurisdiction that substantially overlaps that of the sheriff courts. It hears appeals from the sheriff courts, can hear own appeals (in the Inner House) and cases can be appealed to the House of Lords.

Diligence: is the enforcement of any court ruling obtained against a defender.

Discovery provisions: the entitlements available to each party in terms of examining the evidence available to the other side in advance of a court-room appearance. This is essentially integrated into the Scottish system of written pleadings where the arguments and rebuttals that comprise the kernel of the case must be carefully laid out to the agreement of both sides.

District Judge: judges in the county court (civil) system in England and Wales. Formally (until 1990) known as county court registrars.

Faculty of Advocates: the professional body that regulates the conduct of advocates in the Scottish courts (cf. the Bar Council in England and Wales for barristers).

High Court: In England and Wales this is the most senior court of first instance. In criminal procedure it ranks above the crown courts (which are themselves superior to the Magistrates Courts). In civil procedure the High Court ranks above the County Courts which are senior to the Magistrates Courts. In Scotland, the High Court is the superior court of criminal jurisdiction (sitting above the sheriff courts and the district courts). Only criminal proceedings are heard in the High Court in Scotland (the Court of Session being the equivalent civil procedure court).

Inter-partes costs: This is the category of costs that are allowed, subject to the scrutiny of the Taxing Master in England and Wales or the Auditor of the Court in Scotland, when the losing side is required to pay the other party's costs (as is generally the case under the "English rule"). This is a less generous or less all-encompassing basis than "solicitor-and-own-client costs". See Hurst (1995).

Loser-pays: sometimes known as the "English rule" but, in truth, the approach adopted in most jurisdictions outside of North America, whereby the losing party is responsible for paying the legal fees and expenses of the prevailing party. This contrasts with the "American rule" where, in general, each side pays their own costs irrespective of the outcome.

Proof: Trial in a civil case before a judge sitting without a jury in the Scottish system.

Queen's Counsel: In England and Wales this is a senior level of barrister appointed, on consultation, by the Lord Chancellor. The term "silk" is sometimes used in a reference to the style of gown worn. This elevation usually means a higher fee can be commanded. A roughly similar system applies for advocates in Scotland.

Recorders: Judges (part-time) in the Crown Court (criminal) system in England and Wales and appointed for a limited period.

Reparation: the area of Scots law, sometimes known as delict and similar to tort in the English system, where one individual seeks compensation, or some other remedy, from another party for an infringement of his/her legal rights by that other party.

Sheriff courts: courts in Scotland that hear both civil and criminal cases over a wide range of gravity and importance. Jurisdiction of each court is restricted to that of a particular sheriffdom (there are 49 sheriff courts organised into 6 sheriffdoms). Very minor criminal cases are more likely to go to the District Courts, particularly serious criminal cases to the High Court, and particularly complex civil cases to the Court of Session. The senior judge in each of the six sheriffdoms known as Sheriff Principal and the other judges, each assigned to a particular sheriffdom, are known as sheriffs.

Summary Cause: In the sheriff courts this applies to a case where the value of the cause does not exceed £500 -- usually related to recovery of debts or possessions. Somewhat relaxed procedural rules apply regarding the recording of evidence given etc.

Taxed costs: when, under the system of cost allocation that is generally used in Europe, the losing side is ordered to pay the costs ('expenses' in Scotland) of the successful party in a civil litigation, the costs that must be so paid are subject to the scrutiny of the court. This is done by a Taxing Master in England and Wales and by the Auditor of Court in Scotland. The costs so awarded are usually inter-partes costs (see above).

Tort: is the part of the common law that relates to civil justice. The area is known as delict in Scotland. Common law is the body of law that is judge-made, in the sense that it rests on previous cases and the judgements therein. It can be contrasted with public law which generally concerns various laws passed by parliament.

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