The Future of Civil Justice:
Culture, Communication and Change

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Introduction

- Aim of paper to provide the perspective of those who face civil justice problems, rather than the courts that are charged with resolving a proportion of them: place our general understanding of civil justice in a broader context.
- View from the courts may be misleading, and lead to conclusion that problems associated with the civil justice system are static
- Not dissimilar debate surrounding Common Law Procedure Amendment Act 1838!
- BUT: Evidence of Goriely, Moorhead and Abrams and Peysner and Seneviratne's reviews of the Woolf reforms both indicate that the culture of legal professionals can be changed and that case management can be improved
- Change can certainly be effected – although the suspicion in England is that costs have risen as a result of 'front-loading', so the scale of the challenge is clear.

Introduction

- It is clear that those of us engaged in this debate are NOT broadly representative of the general public.
- Neither are those who use the courts (including tribunals, etc.) – be users individuals or organisations
- The disputes that end up in the courts are not broadly representative of civil justice disputes
- The manner in which disputes are addressed by most lawyers and most courts is very narrowly constructed; particularly when contrasted with the objectives or needs of the parties.

Formal Process and the Courts

- When thinking about civil justice there is a tendency to focus too narrowly on legal professionals and the courts.
- In England in the 1970s and 1980s the Pearson Commission and the Oxford Study both demonstrated clearly the existence of what might be described as a justice pyramid, at the top of which sit the courts, and at the bottom of which exist all 'justiciable' events (Genn, 1999) (i.e. all those events/problems that could be addressed/resolved through formal process, whether or not they are).
- Similar findings from across the world, e.g. RAND in the United States

Formal Process and the Courts

- To sketch the position in England, there are (very roughly):
  - Around 60k trials in County Courts each year (2/3 small claims)
  - Around 2 million claims and applications through the civil courts (of which over ¾ are default claims, of which over ½ are bulk processed)
  - Around 1 million cases are brought to tribunals each year
  - Maybe hundreds of thousands of complaints are brought to Ombudsman schemes
  - Tens of thousands, at least, of disputes go to mediation

- These are big numbers. Nevertheless, they represent a fraction of the justiciable events that arise each year.

Formal Process and the Courts

- Evidence from the English and Welsh Civil and Social Justice (a large scale survey of people's experience of civil justice problems (Pleasence, 2006)) indicates that formal process is commenced in relation to little more than 10% of non-trivial justiciable events (11.2%). What of the 90%?
- ADR accounts for only a small additional percentage.
- Mediation, as indicated and as is being increasingly evidenced, is still very much peripheral to general dispute resolution behaviour.
- This is despite the efforts of governments and the courts.
- It is also despite the 'spectacular growth of ADR' that Justice Cronk talked of earlier in these proceedings – because this is growth from a very small base.

Communication issues

(Incidentally)

- One obvious consequence of this is that people who come to use formal processes and the courts cannot be reasonably expected to be familiar with them. They are not Galanter's 'repeat players'
- This lack of knowledge is a real concern coming out of the recent large scale research on tribunals commissioned by the Department for Constitutional Affairs (Genn et al, 2006)
- In fact, it is often observed that people's conceptions of courts and tribunals are based mostly on visions of fictitious criminal courts portrayed in film and on television (many of which will be American)
- However, it is of great importance that people using courts and tribunals are aware of what is facing them – both for them (to redress the fear factor) and for administrators and arbitrators (who want processes to run smoothly).

Communication Issues

- The existence of a justice pyramid begs the question of which cases come to court and why?
- Only in answering this will it be possible to properly address what parties entering formal process really expect and want of it.
- There are probably 4 main reasons why a dispute may come to use formal process:
  - Severity
  - Necessity
  - Intransigence
  - Public knowledge and cultural norms – which can be perpetuated by professional culture

Formal Process and Severity

- Measures in the Civil and Social Justice Survey indicate quite clearly that serious justiciable problems have a far greater likelihood than others of seeing formal process issued.

- However, that is not to say that serious problems always involve formal process. In fact, analysis using a 10-point scale of seriousness has indicated that four times as many of the most serious problems see no formal process as see formal process.

Formal Process and Event Type

- Not all justiciable problems are equal in their propensity to see formal process used.
- It is in nobody's interest for all problem resolution to use formal process. As Justice Cromwell articulated earlier in these proceedings, the backdrop of norms and principles developed through the courts allow people to resolve problems in what Mnookin and Kornhauser famously termed the 'shadow of the law.'
- 40% of all justiciable problems are resolved by agreement between the parties.
- But, the shadow of the law only extends so far.
- Importantly, independently of seriousness, not all justiciable problems are equal in their propensity to see formal process used
- Behind this, not all people are equal in their propensity to use formal process.

Problem Type and Process

- First, problems: Some types of civil law problem rarely (in a relative sense) see formal process issued.
  - 41% family justiciable events see formal process issued (within that just ¼ domestic violence)
  - This compares to 16% of employment problems, 14% of homelessness problems, 12% of welfare benefits problems, 5% of discrimination problems, 4% of rented housing problems, and virtually no mental health related problems.
- Some very serious problems see no formal action
- Why?
  - For the lucky ones, there is no need. Agreement is reached and justice is done in the shadow of the law.
  - But there are other reasons.

Problem Type and Process

- Lawyers are not generally set up to deal with all types of civil justice problem.
  - There has been an explosion of poverty law in England over the past half-century. And while the profession has greatly expanded, it has not greatly shifted its focus away from traditional areas of practice.
- Lawyers provide advice in relation to only a minority of justiciable problems that people seek advice about; and a very skewed minority.
- A whole range of other advisers are turned to by people who face problems. But these, as with people themselves, do not necessarily think of problems as ‘legal’ or think of ‘going to law’ to obtain a resolution.
- Legal aid has until recently, in England at least, followed the practice of lawyers rather than the experience of people.

Problem Type and Process

- Just as some very serious problems see no formal action, some very serious problems do not result in the obtaining of advice
- Some very serious problems then do not get acted on at all. In all, 10% of more of non-trivial problems see no action.
- No action most likely in relation to problems concerning:
  - Mental health
  - Employment
  - Domestic violence
  - Discrimination
  - Unfair treatment by the police
  - Clinical negligence
  - Neighbours

People and Process

- Second, people: Not all people have an equal propensity to use formal process.
- 'The hardest-to-help groups in society do not shun formal dispute resolution procedures because of the anticipated cost or delay. Their inaction in the face of justiciable problems and disputes flows from a general sense of powerlessness and lack of knowledge about the *possibility* of redress, let alone any knowledge of precise procedures for redress.' (Genn, 2005)
- CSJS confirms this:
  - In terms of knowledge, many people never find justice, because they do not know where to look for it, or believe the search for justice will deliver it.
  - In terms of powerlessness, many people take no action to resolve serious problems because they are scared (e.g. domestic violence, employment, neighbours). Need for co-ordination of services to overcome substantial psychological barriers to justice; especially in context that the number of people concerned is on a similar scale to the total number using mediation.
- It is crucial to ensuring justice is accessible, therefore, that people become better aware of their rights, sources of advice and of the possibilities for redress.

Education and Complexity of Law

- This should not be interpreted as a call for grand scale public education – public education, though valuable, is expensive and fraught with difficulty
- (although) a greater presence of rights, advice and process issues in the English National Curriculum over the past few years is welcome (similar developments in Canada are sketched out in the Interim Report on the Jurisdictional Questionnaire).
- Knowledge can sometimes be targeted most effectively by those who have routine professional dealings with hard-to-help groups/community leaders.
- There is also, in the background, an issue of complexity of law:
  - Law has a habit, in the absence of radical intervention, of growing inexorably and becoming increasingly complex (and less understood by the public/accessible to the public)
  - It has been argued that complex laws reflect our complex world, and that complexity is important for certainty and consistency
  - Work by Ellinghaus, Wright and Karras in New South Wales casts doubt on these last assertions. It may be that decisions are as consistent when based on broad principles, as on detailed provision.

Barriers to Advice

Related to lack of knowledge is the inability of many people to effectively address problems because of difficulties faced in obtained advice.

For example, people may go to the wrong place for advice or not recognise legal dimensions to problems (and so not approach legal advisers).

Evidence of people being concerned at the potential cost of lawyers.

If people try to find a lawyer, this may not be simple in all areas of law.

Legal aid has an important role to play both in ensuring those who cannot afford to purchase advice can obtain it, and for ensuring that advice is available across all areas of civil law.

There are also good reasons for providing clear and recognised gateways to general advice.

These must be provided in a manner that is accessible to all. Language differences, cultural differences and disabilities must all be accommodated

Problem Clusters and Holistic Service Provision

So, it is important not to focus exclusively on reform of the legal profession and courts in looking to deliver civil justice.

It is also important not to become drawn into too legalistic view of the world. To focus on the relatively narrow legal issues of legal practice and of court decisions has the effect of artificially removing civil justice issues from their context.

The Civil and Social Justice Survey and evidence from elsewhere indicates clearly that **justiciable problems do not occur in isolation**. Frequently they occur together, and there are many causal connections between their experience and also between them and wider social, health and economic problems.

Problem clustering and Holistic Service Provision

Legal practice does not really reflect that. To a large extent because lawyers are trained to think about discrete legal problems, and also because courts are set up to deal with discrete legal problems.

3 Principal problem clusters identified through CSJS:

– Family (violence, divorce, ancillary to breakdown, children)

– Housing/social services (homelessness, rented housing, benefits, police)

– Economic (money/debt, neighbours, employment, consumer)

Also, problems have been identified that have a significant propensity to bring about further problems (e.g. domestic violence, Employment).

Problem Clustering and Holistic Service Provision

Organising legal practice and the courts in a manner that reflects this problem clustering and triggering would appear sensible.

In England and Wales, initiatives such as Family Advice and Information Networks and Community Legal Advice Centres are moving towards an integrated advice model. Law Centres, and their equivalents around the world have been doing something like this for some time.

In an ideal world, links between legal and non-legal issues might also be mirrored in practice (e.g. West Heidelberg, Melbourne)

More radically, one might start to conceive of Community Justice Centres that might blur the line between traditional courts, regulatory bodies and advocacy services – to focus on and address the range of issues experienced by vulnerable groups in a manner that mirrors experience and behaviour.

Some Conclusions

- It must be recognised that to address problems of access to justice, not just the courts and legal profession should be considered, but dispute resolution strategies beyond them and beyond even the shadow of the law.
- Access to justice reaches into the heart of everyday life.
- In looking to improve access to justice, broad cultural issues, as well as legal cultures, should be addressed.
- Services and institutions should respond to and reflect public experience and behaviour
- Communication is vital to extend access to justice. People who are not aware of rights, advice services or forms of redress – or who do not know what to expect of advisers or processes – will not be well placed to obtain justice and will not facilitate the smooth running of the justice system.
- Change must recognise all these things if it is to really deliver justice for all.