

Lawyers: Socio-Legal Perspectives

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Contents

| | |
|--|----|
| Introduction | 2 |
| <hr/> | |
| The Banking Crisis, Legal Engineering, and the Role of the Corporate Lawyer | 3 |
| <hr/> | |
| Barristers: a Modern Elite? | 7 |
| <hr/> | |
| Lawyers and Dispute Resolution: Capture and Escape | 11 |
| <hr/> | |
| Legal Professionals: How They Are Seen and What They Do | 15 |
| <hr/> | |
| Participants | 19 |

Introduction

We live in a legalistic world. The law is expected to perform more and more tasks: resolving conflicts, arbitrating on justice, providing checks and balances on governmental power, and regulating both the mundane aspects of life and the increasingly complex worlds of international trade, finance, medicine, and development. Laws do not just need to be made, however, they also need to be implemented, administered, and monitored. Lawyers are at the centre of many of these processes, but the roles they play are various and sometimes ambiguous. Within an adversarial system they must argue for legal interpretations that favour their own clients' interests, regardless of the coherence of the broader legal framework; lawyers are employed to exploit

loopholes and weaknesses in the legal system, as much as to ensure its smooth implementation; the interests of justice, which may demand long hours of expert legal work, often conflict with the goals of accessible and affordable 'access to justice'.

The lawyers confront such tensions and conflicting interests daily within their work and have always done so. But how do they deal with them? What approaches have they evolved and how are they changing? What are the professional and ethical standards that come into play and how well do they work in the modern world? Indeed, how well are their roles within the wider legal processes understood, by the scholars as much as by their own professional bodies?

The interests of justice, which may demand long hours of expert legal work, often conflict with the goals of accessible and affordable 'access to justice.'

In this report four scholars based at the Centre for Socio-Legal Studies address a number of these issues. These are supplemented by comments from practitioners and other scholars from a variety of backgrounds.

The Banking Crisis, Legal Engineering, and the Role of the Corporate Lawyer

Doreen McBarnet, *Professor of Socio-Legal Studies, University of Oxford*

The recent banking crisis raises questions about the role of corporate legal work and the corporate lawyer in business and in society. The financial products and transactions that led to the banking crisis have been generally characterized as innovative financial engineering, and particularly as innovative financial engineering gone wrong. A prime explanation, or excuse, for the crisis, has been that financial instruments became so complex and arcane that those involved simply did not understand them, or the risk, organizational and systemic, they were creating, leading to what we might think of as a 'tragic accident' model of the banking crisis. Here, I shift the focus, however, to a different form of innovative engineering that was just as centrally involved in these key financial products and strategies – legal engineering – suggesting a different model of the crisis, a different perspective on the issue of responsibility, and more general questions about the role of corporate legal work.

A good deal of responsibility for the crisis has been placed on regulations and regulators, who have been seen as too lax; operating with too light a touch. That is an important issue. But business culture and practice in relation to law, regulation, and compliance must also be brought into the picture as primary factors. Whatever regulations had been introduced, they would have been met by business with the same response: here is a regulatory constraint; how do we gain a competitive advantage by getting round it? Innovative legal engineering is characterized by what I would term 'creative compliance'. It involves seeking out means of structuring or restructuring transactions and instruments in order to circumvent or innovate beyond regulation without overtly breaching it. In the

banking context, there were regulations in place to try to control risk and ensure its disclosure. But creative legal work was knowingly and deliberately brought into play to bypass them, and this is normal business and legal practice.

Whatever regulations had been introduced, they would have been met by business with the same response: here is a regulatory constraint; how do we gain a competitive advantage by getting round it?

I draw on empirical research carried out before the crisis, involving interviews with senior business executives, lawyers, and accountants in a wide range of sectors, including banking. I present some quotations from interviews in the banking sector to illustrate in that context the culture of creative compliance which is seen as permeating business practice.

First, law is seen very much as a hurdle to be overcome:

the credit group at [X] bank is a specialist structured group in the capital markets which focuses on credit instruments to securitize, and it's a wonderfully lucrative business, but there are lots of laws, regulations, and concepts, and natural justice principles, which, you know, inconveniently get in the way and they have to be creatively dealt with.

Second, the role assigned to lawyers is to creatively deal with those obstacles: 'If the law is inconvenient to the economic features of the proposal the lawyer must get round it'. Third, it might be noted that this

legal engineering can be crucial for commercial value. In the case of banking, effectively dealing with regulatory obstacles was seen as fundamental to the economic viability of the financial product: 'The potential of the product depends on the ratio of cost it would incur to get round legal, regulatory, tax, or accounting difficulties'.

These attitudes to law and compliance are highly significant. The 'hurdles', 'difficulties', and 'inconveniences' which creative corporate legal work sweeps away are, viewed from a different perspective, regulations with a purpose, in this case, accounting and banking regulations expressly set up to ensure disclosure of risk and to protect against systemic banking risk.

This demonstrates some of the ways in which banks responded to banking regulation with creative legal engineering. Right from the beginning of the Basel banking regulations in 1988, there was a creative response by banks to try to gain competitive advantage by circumventing their impact. The Basel Concordat essentially tried to ensure 'capital adequacy', establishing ratios of capital to lending which banks had to meet, with the aim of providing some balance-to-lending risk. For the purposes of calculating the sums required to meet the ratios, capital was divided into Tier I and Tier II strata, the first being seen as safer capital and having greater weighting in the calculation. This regulation, and the two-tier distinction, immediately set a challenge for legal engineers to find ways to structure products such that they could claim to meet the criteria of Tier I capital while avoiding the disadvantages associated with normal Tier I capital forms.

An early reported response by one bank was to devise the innovative 'permanent, interruptible preference share'. In practice the shares were structured such that they could be redeemed after five years so they were not really equivalent to equity, and they avoided the constraints normally associated with equity. There was no rights issue, and since an off-balance-sheet Special Purpose Vehicle was used, the need to seek the approval of

shareholders was avoided. However, on the basis of their carefully constructed legal form, the bank treated them as Tier I capital, claiming the same advantageous Tier I status as equity. Contemporary reports noted the banking supervisors' concerns that such innovative instruments would subvert the goals of the Basel agreement. Yet creative responses to regulatory attempts to control risk, as the paper demonstrated, only became more sophisticated over time in response to both competition and changing regulations.

Of course the capital adequacy regulations were just one of many sets of legal and regulatory obstacles to be dealt with. In any legal engineering, solving the difficulties involved in one set of regulatory requirements might have adverse consequences for another, or have adverse tax implications. In normal usage, capital in the form of equity would be best for capital adequacy regulatory purposes, since it did not have to be paid back in the event of a crisis, but its downside was that it was not tax deductible. Capital in the form of corporate bonds did have tax advantages but would be less good for capital adequacy regulatory purposes (since it was debt that had to be repaid). So creative legal engineering conjured up 'hybrid capital', capital in a legal form which could meet the criteria of debt for tax purposes and the criteria of equity for capital adequacy purposes. Generally, legal engineering tends to produce quite complex structures and products, since solving one set of regulatory difficulties can simply produce a new structure which itself involves overcoming new regulatory, tax, or accounting difficulties, so that the structure evolves into more and more labyrinthine forms to meet a multiplicity of requirements.

This focus on the legal engineering underlying financial engineering has implications for the 'tragic accident' model of the banking crisis. First, if the financial instruments underlying the financial crisis had become too complex and opaque to be understood, it was not by chance. One important reason for the complexity of any structured finance is the legal engineering that lies behind it and the

multiplicity of regulations being circumvented in order to avoid regulatory constraints. Second, whether or not there was awareness of the financial risk being created by financial engineering, there was most certainly a clear awareness that the regulations intended to control and disclose financial risk were being systematically circumvented by legal engineering. That indeed was its purpose. Research over the years has suggested that the risks that primarily concerned legal engineers, whether in the corporate or the banking sector, were not financial risks at all but 'structural risks': the risk that the regulatory and tax circumvention integral to the transactions might be challenged by the authorities.

The practice of legal engineering, exemplified here in the context of the banking crisis, and the body of attitudes to law and compliance that underlie it, raises implications for regulators and business but also for our assessment of the role of legal work and the legal profession. It shows that the driving characteristic of much of the creative transaction structuring in corporate legal work is to deliberately and systematically thwart regulation and bypass regulatory control. Indeed, finding arguably legal ways around legal and regulatory obstacles is a key function of the corporate lawyer's role. The question now posed is whether this role is either appropriate or responsible.

A fuller presentation of this research and analysis can be found in D. McBarnet (2010) 'Financial engineering or legal engineering: legal work, legal integrity and the banking crisis', in O'Brien and MacNeill (ed.) The Future of Financial Regulation. Oxford: Hart. Also available as working paper 1546486 on ssrn.com.

Response: D. J. Galligan

According to Professor Doreen Mc Barnet, the banking crisis of 2008 raises questions about the role of corporate legal work and the corporate lawyer in business and in society. After describing the complex financial arrangements banks entered into before the crisis, Professor McBarnet goes on to detail the legal arrangements which were necessary to give effect to

the financial instruments and which, she suggests, were similarly innovative. This 'legal engineering' raises questions about the responsibility of lawyers and about the role of corporate legal work.

Central to the analysis is the notion of creative compliance, which Professor McBarnet has developed and relied on in her earlier research. Creative compliance in the financial context means: 'seeking out means of structuring or restructuring transactions and instruments in order to circumvent or innovate beyond regulation without overtly breaching it'. Creative legal work of this kind was: 'knowingly and deliberately brought into play to avoid [regulations], and this is normal business and legal practice'. In a nutshell, the argument is that the banks employed lawyers to find legal ways of ensuring that the complex financial instruments complied with the law. Or, to put it more provocatively, lawyers were employed to find legal ways of avoiding regulatory constraints.

The first thing to notice is the seeming paradox in saying, on the one hand, the regulations were complied with, but, on the other hand, they were complied with in such a way as to defeat their purpose. On one view, the role of lawyers is to advise their clients how to arrange their affairs to comply with the law. Lawyers are trained to know the law and to understand how to apply it in practice, and in that sense corporate lawyers are doing what lawyers generally do. To add that this must be done in such a way that it does not defeat or undermine the purpose of the law is to add a normative standard, and as a normative standard it has to be justified. There are two hurdles to get over. First, it is not at all clear that the practicing lawyer has a duty to enter into, try to ascertain, and then apply the purposes behind the law. Whether purposes are part of the law raises issues of what counts as law, itself a complex question of legal theory. Secondly, the purpose or purposes of a law or set of regulations are not always clear, may be several and competing, and are themselves a matter of arguable interpretation.

This leads to the question of the utility of the concept of *creative compliance*. It is put forward, as I understand it, as a sociological concept, which is useful in understanding legal work and, in particular, in providing a basis for separating legitimate legal work from illegitimate. There are two main problems.

First, it must be questioned whether, as a sociological concept, creative compliance has any content. In order to have content and therefore be of use, we should be able to distinguish it from 'non-creative compliance'. The concept of creative compliance is useful, in other words, only if it is a particular kind of compliance with which may be contrasted forms of compliance that are not creative. As it stands, it is hard to identify the component parts of creative compliance; there is also an absence of empirical evidence to support the concept and its distinctiveness.

If lawyers are expected to transcend the ideology of their culture, employer, or society, what are the 'meta' set of ethical values that they should be applying?

This leads on to the second problem: is creative compliance really a sociological concept or is it a normative concept? There are reasons to suspect it is more normative, setting a standard that lawyers should meet, than sociological. If that is so, it changes the nature of the debate; for the debate then would be: how should corporate lawyers behave. That is of course an important debate, but it is different from a sociological enquiry into the nature of legal practice.

Response: Christopher Decker

A number of rationales have been identified in the mainstream economics literature for why a society might want to regulate the work of lawyers and the activities of the legal profession. These include concerns about distributive justice and imbalances of

power between lawyers and their clients; problems associated with the specialization of knowledge and difficulties for some consumers in assessing whether they are getting a 'quality' product; and the incentives of the legal profession, particularly in light of the historical tendency for lawyers to organize themselves in guild-like associations and to introduce rules and customs restricting entry and specifying particular conduct.

Professor McBarnet's analysis of the role of lawyers in the banking crisis suggests that these standard rationales do not account for risks associated with 'legal engineering'. An implication of the analysis is that lawyers should be treated differently to other professional service providers, and, given the nature of their work, and its importance to society, should collectively be required to maintain what might be described as a higher level of 'professional social responsibility'.

The research raises a number of questions. Firstly, whether the notions of 'professional responsibility' and 'social responsibility' are necessarily commensurate. I question whether there may be a legitimate need for lawyers to maintain a degree of professional indifference to matters social and political in daily practice, and whether this may, in fact, be a characteristic from which the law derives much of its integrity. Secondly, I question whether it is possible to abstract lawyers from their specific social, cultural, and economic contexts when considering appropriate professional ethics. If so, and lawyers are expected to transcend the ideology of their culture, employer, or society, what are the 'meta' set of ethical values that they should be applying? Finally, a question was raised about the generality of the analysis: is it restricted to lawyers, or is there a more general principle that should also apply in other 'socially important' professions, and if not, why not? All of these points are important considerations in current debates about the nature and scope of regulatory structures for the legal profession.

Barristers: a Modern Elite?

Fernanda Pirie, *University Lecturer and Director, Centre for Socio-Legal Studies, University of Oxford*

Starting with the Green Paper prepared for the Thatcher government in 1989, the Bar of England and Wales has been subject to a barrage of criticism, scrutiny, and attempts to undermine its old-fashioned practices, to make it reform, open up, and diversify. Restrictive practices have been swept away and many thought the Bar would wither and die in the 1990s. But the Bar has remained, an independent, and largely flourishing, profession. Is this because it has successfully modernized? Or is it hanging on to its privileges despite a tumult of reform? It is too easy to mount a neo-Marxist critique of an 'elitist' profession, suggesting that through a mystique of excellence and covert restrictive practices barristers maintain ideological cover for the exercise of power. It is true that barristers, like all professionals, maintain effective control over the most specialist knowledge.¹ But is this the whole story?

I suggest here, that we need to look at the work of the Bar from another angle, from bottom up. Why do solicitors still instruct counsel? And litigants, the small section of the population that ever encounter a barrister: why do *they* value the profession, enough to pay its fees and take its advice?

Change

Lawyers' restrictive practices were formerly entrenched in nineteenth-century codes of practice: barristers could only be instructed through solicitors, only barristers addressed the higher court, the Inns of Court controlled 'call to the Bar'. In more subtle

ways, too, barristers marked themselves off from their professional clients, the solicitors, with explicit ethical principles, including the 'cab-rank rule', a ban on marketing, and a myriad of unwritten customs and forms of etiquette.

As far as the lay client was concerned, consulting a barrister meant being taken, by your solicitor, into one of the Inns of court. Its scholastic atmosphere was rather like an Oxbridge College, with quads and stair-cases, the barristers' chambers indicated by name-board. Inside, the place was shabby, with dark corridors and a chaotic clerks' room, and there was next to no client service. The waiting room was part of the corridor and the barrister's room had piles of papers everywhere. Some great man dispensed advice from behind a large, old-fashioned, probably battered desk, while the clients had to perch on chairs with their papers on the floor. You could also expect a condescending attitude: it was not unknown for a client to be told to 'shut up' if s/he asked a question at the wrong time. You might have compared the scruffy and chaotic, but intellectually brilliant Oxford don. Lawyers, like academics, operated in a special world, one that did not have to be made accessible, welcoming, or comprehensible to the layman.

Early in the 1970s, barristers began to express concern over the 'deeply conservative' nature of the Bar, that they were not providing 'service', and were resistant to change: 'In order to restore respect for our law we need lawyers who speak the idiom of the people, and who can command their respect because they command their understanding'.² The 1989 Green Paper criticized the profession's mysterious recruitment systems, its code of ethics, and

1. Abel, R. (2003) *English Lawyers between Market and State: the politics of professionalism*. Oxford: Oxford University Press.

2. Hazell, R. (1978) *The Bar on Trial*. London: Quartet Books.

disciplinary procedures as self-serving and anti-competitive. Legal reforms allowed the Law Society to grant solicitors rights of advocacy in the higher courts, and led to the separation of the Bar Council's functions of regulation and representation.

Lawyers, like academics, operated in a special world, one that did not have to be made accessible, welcoming, or comprehensible to the layman.

Members of the Bar have also become acutely aware of commercial pressures, or what are seen as such. When I asked about change during my own research, this was generally the first thing they mentioned. Barristers feel the need to engage more actively in the commercial world, to respond to client expectations, to be more 'user-friendly', more available, and turn work around more quickly. There has been a huge increase in marketing. There are, thus, social, governmental, and commercial pressures for more openness, more explicit forms of organization, selection, and training, less mystery, and less elitism.

The Bar and its clients

So how do barristers effectively maintain their utility in the eyes of those who instruct them? Is it because of this turn towards modernity? Have they simply become good service providers? Or is there a lingering mystique of excellence, harking back to the days of scruffy and arrogant superiority?

It is a relatively small section of the population that ever employs barristers and this is, primarily, another group of professionals, the solicitors. These are smart, legally trained professionals, a group that is demanding and sceptical; they are highly unlikely to be mystified by what the barristers are doing. They must also have confidence that their clients will be happy to entrust their case to a member of this (elitist) profession. Let us consider the two main points of encounter: the courtroom and the conference (advice) in chambers.

A court case is about real people, real facts and events, but it happens in a rarefied context. Within any courtroom, from the dazzling grandeur of the new Supreme Court through to the dingy court buildings erected in the 1960s and 70s, a drama is enacted. A myriad of small rules and points of etiquette governs conduct: rules for standing and sitting; who talks when; how to address the judge; the language of polite but devastating criticism. It is also a place governed by strict ethical rules: counsel are under an absolute duty not to mislead the court, to reveal all relevant information to their opponents, and not to be disrespectful. The court is the centre of the legal process. Changes to the overt symbols of the process, the wigs and gowns and the grandeur of the courtroom, have done little to diminish this sense of the courtroom as a sacred space. Perhaps it is not surprising that surveys indicate court users favour retention of wigs and gowns. Even in the provincial court centres, in which it may be hard to distinguish the door of the court from the door of the toilet next door, and where the courtrooms are cramped, dingy, and low-ceilinged, as soon as a case starts, the whole place is transformed: it becomes a place of drama, an adversarial process, a contest. The litigant needs a skilled advocate, someone who will fight his corner, be his representative, an expert.

Before reaching the courtroom, however, much of the barristers' work is done in their chambers. Now it is almost unthinkable that these should not provide a 'modern' service, that their members should not be concerned about the expectations of their clients. Many are far more ostentatious than previously in their commercial success. Almost all have conference rooms for meeting clients, keeping them away from individual rooms with their piles of papers. The image of most chambers is smart and modern. There is far more emphasis on 'client care', including the use of emails and availability, with barristers more willing to go to solicitors' offices, to be part of a team, to be 'user-friendly'. The concerns of the 1970s have largely been answered.

The barristers, moreover, often say that they want to be judged on performance: there is an ethic of meritocracy. However, in a host of more subtle, but important ways, they do maintain a professional distance from solicitors. As one barrister astutely observed, after a difficult meeting in which she had to disappoint her lay clients, 'maybe clients want to come somewhere like this, to a stuffy environment, with old-fashioned prints on the walls, to hear the bad news'. The barrister is the one from whom the clients will have to take it, if they don't have a case. It matters that the person is an expert. It is significant that most London chambers are still located in or near the Inns of Court, which retain their rarefied atmosphere – it is still a cloistered, scholastic world, albeit a modernized one, to which the clients are taken to hear the ultimate advice.

Of course the solicitors like the more modern service, that junior barristers will go to their offices to work on documents. But there are still key points when a strategic review is necessary, when someone has to give an opinion and pronounce on the chances of success, and the whole team is then likely to go to the barrister's chambers. S/he is the ultimate authority on the merits. Barristers, that is, perform a function, but one that depends on their being different, being detached from the case, a point of referral, someone who can be held up to the clients as a source of expertise. They have to play a part, to be confident, skilful, and authoritative.

The mystique

In each of these areas, then, a mystique of excellence is important. The legal system remains complex and mystifying, despite attempts to make it more transparent, and the courtroom is still full of rules and etiquette. It is a place of drama, a public arena in which a game of skill is played out, and in which the litigant wants and needs the best advocate, where the whole process demands an elite. Outside court the barristers serve important, practical functions, as a source of advice, slightly detached from the lay client. But in order to perform this function they have to, and do, play the part of the expert, acting out their authority.

Both the Bar and the judiciary seem concerned to shed their outdated image in the modern world, to change the old-fashioned markers of status, the wigs and gowns. But changing symbols does not change substance and my suggestion is that a lot of this is missing the point. Do its clients *want* the Bar to be demystified? Behind the remaining symbolism of the law courts are the structures of the legal process, the dramas of the courtroom, and behind all this is the whole intellectual edifice of justice: the idea that there is a just solution to a tricky problem, that you can go to court and receive an answer, that justice will be done. It is this rarefied world that demands a professional elite.

Response: Philip Lewis

What follows contains some remarks both for would-be reformers and for those researching on legal professions. In the first place, care is needed in understanding change, especially where it was thought to come from reforms. There has not been much considered assessment of the effects or effectiveness of legal profession reforms, particularly of those seeking to increase the role of the market. On the face of it, the Bar has changed in the ways described because of governmental action and market forces. However, no evidence shows that the Bar continues to flourish because of these changes. Instead, Dr Pirie showed the significance of an unchanging benefit that the Bar brings to clients. The modernization processes are what sociologists call 'mimetic', rather than efficient; that is, promoted and adopted for conformity to a prevailing ideal rather than for actual improvements for the benefit of clients.

Secondly, the presentation showed how, contrary to much of the legal professions literature, the wishes of individual clients can shape legal practice, though academics have tended to under-rate their influence on lawyers compared to those of commercial organizations. In the present case, the economic interests promoted by market-oriented reforms might have prevailed: solicitors might have stepped in to replace barristers, or chosen not to because access to the Bar is a tool for smaller firms to equalize

resources in solicitors' market competition. Instead, Dr Pirie showed that it is clients' preference for this form of independent expert representation that is significant; even the most down-at-heel court and a room with 'old-fashioned prints' can be the scene for the demonstration of the expertise which the client needs to trust.

One illustration of the importance of detachment outside a commercial setting may help: research on UK government lawyers has shown that the Bar plays an important part in settling differences between government lawyers, administrators, and Ministers, and much of their disagreement can be resolved by resort to counsel. This, like the attitudes described by Dr Pirie, rests on an acceptance that there can be independent expertise, and the Bar continues to flourish because of this widespread acceptance.

Lawyers and Dispute Resolution: Capture and Escape

Christopher Hodges, *Head of the Civil Justice Programme at the Centre for Socio-Legal Studies, University of Oxford*

The paradigm of dispute resolution in modern (common law and/or Western) jurisdictions is the courts, and judicial adjudication of a dispute. Prior to the 2010 British General Election, the Law Society issued a manifesto, *Access to Justice Review: Supporting Solicitors*, that called for maintaining 'access to justice' (code for 'public funding for lawyers') couched solely in terms of litigation and courts. But how important are courts? It has always been true that very few claims end with a judicial decision: the process leads in over 95% of cases to settlement not adjudication.

The court paradigm has come under attack, especially in the common law world, owing to the cost and delay of its processes. There have been attempts at reform throughout the common law world, and also in some civil law jurisdictions. England and Wales is a leading example of such reform attempts. The 1995-96 Woolf Reports were implemented in 1999 with major revisions to the Civil Procedure Rules. Lord Woolf's explicit guiding principles were to reduce cost and delay. He set new goals for the court system:

- settlement was introduced as the goal of the system, replacing adjudication or clarification of law;
- mediation was inserted into the litigation process, and encouraged both before an action is started (by pre-action protocols) and during its process;
- claims management, with separate 'tracks' for different types of case, was introduced so that judges can control progress, and hence cost and delay;

- fixed costs were introduced for low-value claims, to add to the no-costs rule for small claims.

At the same time as the Woolf reforms to the procedural structure and rules, the government took a major step towards reducing the public cost of legal aid to finance litigation. The government introduced a privatized system, involving regulated conditional fee agreements (CFAs). Since claimants would be subject to the 'loser pays costs' rule, they would either have to have enough resources to cover the risk (which most people would not), or to hold insurance. Quite a large number held before-the-event (BTE) legal expenses insurance (LEI) but the government encouraged after-the-event (ATE) insurance policies also. The ATE sector burgeoned, and there were various scandals over mis-selling and fraud on consumers, which led to the introduction of regulation for claims managers.

How important are courts? It has always been true that very few claims end with a judicial decision: the process leads in over 95% of cases to settlement not adjudication.

By the end of the decade, there was widespread concern that the system was still too slow for many types of claims, and that, far from falling, costs had risen and remained unpredictable. A senior judge was appointed to undertake a major review. The Jackson Costs Review 2010 proposed many reforms, including:

- redressing the balance between claimants and defendants, by removing the ability of claimants to recover the success fee elements under a CFA and the premium for an ATE policy, leaving only the 'normal' lawyers' fee recoverable;

- extending the fixed costs regime to larger claims;
- introducing (more) costs management;
- encouraging more privatized funding of litigation, through BTE policies, introducing regulated contingency fees, and the fast-expanding 'third party funding' industry.

Some legal systems do not give rise to costs or delay. This was a conclusion of the 2010 Oxford comparative costs study. The German system of civil procedure, for example, uses tariffs for own-party costs (although different fees may be agreed) and, critically, for recoverable costs. Tariffs are possible, in simple terms, because judges do more work; lawyers less, than in the common law procedure. The result is that the costs of both courts and lawyers are both predictable and comparatively modest. Predictability of cost enables and encourages LEI, which is widespread in Germany, and this in turn leads to a comparatively greater degree of litigation than in some neighbouring countries. Lawyers in Germany retain a monopoly on legal advice so, for all these reasons, fewer alternative dispute resolution (ADR) pathways appear to have developed in Germany than in countries such as the Nordics, the Netherlands, and the United Kingdom. However, the more flexible, but costly, procedures of arbitration, rather than the courts, are used for resolving business disputes. This means that it is misleading to compare the German civil procedure system with the English Commercial Court.

Wherever court costs are high, there has clearly been a major shift of dispute resolution *away* from courts and lawyers and towards alternative pathways. The ADR movement is most familiar to lawyers through its manifestations either in the separate world of commercial arbitration or in the introduction of mediation into litigation procedure. However, wider worlds of ADR have grown up, almost unnoticed.

Firstly, compensation schemes exist for some types of injuries. The New Zealand Accident Compensation Scheme is well-known. Less familiar are well-established compensation schemes in all Nordic states

for injuries caused by medical practice or medicinal products. France introduced a tribunal-type scheme linked to insurers in 2005 (known as ONIAM). Every advanced country has compensation schemes for vaccine injuries. The United Kingdom has schemes for lung disease and vibration white finger suffered by miners. There are many other examples.

Some countries, especially the United Kingdom, the Netherlands, and Nordic states, have extensive dispute resolution systems that are closely linked with regulatory, or self-regulatory, mechanisms. Some leading examples are as follows. The UK Financial Ombudsman Service was created alongside the Financial Services Authority, and handles over 100,000 cases a year that do not go to court. Complaints are free to consumers, and banks cover the £500 cost per case. The result is binding on the bank, but not on the consumer, who may go to court if s/he wishes. Around 40% of consumers choose not to proceed further after the Ombudsman has looked at their case.

Codes of business practice for general consumer trading, telecoms, or utilities, which include dispute resolution schemes, are sponsored by trade associations and subject to rules laid down by regulators, such as the Office of Fair Trading, Ofcom, and Ofwat. These schemes again process cases that never involve litigation. The dispute resolution aspects often involve a three-tiered structure: firstly, encouraging direct contact between consumer and provider, which statistically resolves many issues; secondly, involvement of the trade association as mediator, seeking to put pressure on the firm or to explain realities to the consumer; thirdly, speedy and cheap arbitration arranged through an independent body. These systems increasingly provide information on products, services, and performance, whether on general trading or on the dispute resolution process, that is fed back to firms and to supervisory bodies, such as code authorities or regulators, and also published. Errant firms therefore have an opportunity to improve performance, but may also be subject to formal sanctions or to commercial damage to their reputation.

The architecture and effectiveness of these schemes is undergoing development and now coming under proper scrutiny. Some depend on the existence of strongly competitive market conditions in order to succeed. In addition, powers are being trialled under which regulators can operate outside their traditional role of 'command and control' enforcement, and apply not only risk-based and responsive regulation enforcement approaches but also restorative justice. In other words, regulators can deliver compensation, especially where multiple consumers have suffered loss.

The above developments are at early stages. This area of 'ADR' is a largely unknown wonderland, affording significant opportunities for development. Research is continuing on the operation of specific schemes, and the framework under which they might best operate. There are significant implications for business, consumers, lawyers, and public finances. Some commentators have decried 'vanishing trials', but the expansion of ADR raises 'vanishing litigation'. This has implications for the role and governance of ADR systems in relation to courts and the legal system as a whole. Society is asking a sequence of fundamental questions. What options exist for redress – can pathways other than courts solve problems? Which of the optional pathways is best value for money and provides best outcomes? Which issues should a court decide, and which might be resolved elsewhere? What exactly is the quality of 'justice' that is to be found in both courts and ADR schemes? If lawyers and judges had captured dispute resolution, have users and the system escaped?

Conclusion

European jurisdictions are developing a new framework for achieving behaviour control and restitution – issues that are traditionally called regulation and compensation. The new system integrates and prioritizes various techniques. It starts with direct customer–business communications and negotiation. The central space involves regulators, self-regulatory business codes, and external assistance in dispute resolution, whether through conciliation, mediation, or arbitration. Regulators play

an important role in overseeing business conduct, in compliance with both substantive standards and dispute processes. Courts play a long-stop role and also a supervisory role in dispute resolution – in contrast to their traditional exclusive role. This framework raises many challenges, but it already exists.

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A fuller presentation of this research and analysis will be contained in a forthcoming book by C. J. S. Hodges. The materials on costs and funding are in Hodges, C. J. S., Vogenauer, S., and Tulibacka, M. (2010) The Costs and Funding of Civil Litigation. A Comparative Perspective. Hart Publishing and CH Beck: Oxford.

Response: Glenn Campbell

English common law litigation, both criminal and civil, developed organically over time with the aim of displacing dispute resolution by brute force. As judges were, and remain, officers of the Crown, an element of practice and procedure was framed in order to fetter and restrict their otherwise considerable and potentially oppressive powers. For this reason, we have the principle of common law precedent and, until it was challenged by the House of Lords,³ the unquestioned supremacy of the legislative chambers of Parliament over the judiciary and the courts, and a strong disinclination to question any aspect of business within the walls of the House. Most notable is the institution of the jury, with its development and presence in both criminal and civil proceedings, and its express preservation in the United States by the Sixth and Seventh Amendments to the Federal Constitution. Juries limit and fetter judicial power, which is why some judges do not like them. When facts and issues are decided by a jury, the lawyers, judge, or advocate are compelled to conduct litigation, whether criminal or civil, in a way which the jury can follow and understand. This leads to inevitable consequences in the development of legal principle and in the determination of specific cases. If a case has to be

3. *Pepper-v-Hart* [1993] AC 593 and, more recently, *R-v-Chaytor* [2010] UKSC 52

understood by a lay jury, it will be intelligible to the lay litigant and to anyone sitting in the public gallery.

In recent decades, there has been an apparent increase in 'lay' representation and participation in the decision-making processes of public sector and professional bodies. To what extent this is a real change or a superficial one is for others to judge. If, in fact, those participating are a representative sample, not of the public as a whole, but of a self-perpetuating class of the almost great and the good, or at least the well off and the worthy, then their impact on the process in which they are engaged is arguably more apparent than substantial. Hand in hand with this change has been a reduction in the power of juries in civil cases from the 1960s onwards,⁴ coupled with attacks on the criminal jury leading to the introduction, inconceivable in the United States and not seen in the United Kingdom save for the 'Diplock Courts' used in Northern Ireland in terrorism cases, of a power for judges to try serious criminal cases without a jury, over the objection of the accused.⁵ Added to these developments is the increased power of the judiciary, at the ECHR level and nationally, to question and challenge decisions made by democratically answerable public bodies. Judicial activism is a well-known concept in America, and perhaps requires more investigation here, where there appears to be an increasing, and justified, public discontent about it.

Juries limit and fetter judicial power, which is why some judges do not like them.

No satisfactory litigation procedure is either free or instantaneous. Proper investigation of rival claims in a forum which is striving to reach the best answer will always take time and cost money. If the success of procedural changes in civil litigation and, to a lesser extent, in crime, are measured by a reduction in cost, then Woolf failed. Jackson, which appears to accept Woolf, is equally likely to fail. Woolf is based on a

notion almost equal to judicial infallibility, and proceeds on the assumption that judges are all sound, sensible, and fair, and will know the right answer if provided with the correct pieces of paper to read. It ignores the risk of the all too human failings to which judges, like anyone else, are subject, and which adversarial rules of procedure, along with stringent professional conduct rules and fiduciary duties owed by lawyer, operate to counter. The answer to the problems faced by litigation in England is not more of the same medicine in the form of increased paper and judicial power, but less of both.⁶ The sooner we return to the roots of the judicial process which led to the success of the common law in both this jurisdiction and around the world, and which made law the property of the people as a whole, and not of a narrow self-selecting class, the better.

Response: David Robertson

ADR is a case of 'it's all in the name'. It is sold as somehow or other a more practical, efficient, and economic solution to a well understood problem, a way of reaching an entirely uncontroversial end that any rational system would prefer to the slow and messy system of courts, trials, judges, and lawyers. And of course if you see the world as full of disputes which need 'resolving' it may well be that ADR has a lot going for it. If one takes the near collusive process of two large corporations needing an answer to a contractual conflict between them, one can well see why they would go for arbitration rather than trial. They need a quick answer, they need legal certainty more than any specific result, and only in the most distant writings of legal academic contract specialists can one imagine there being a 'right answer' anyway. At the other end of the spectrum it is hard to see why the generality of divorce cases should ever need more than mediation.

4. *Ward-v-James* [1966] 1 QB., 273

5. Criminal Justice Act 2003 s.44

6. See generally on developments in civil procedure the Hamlyn Lecture 2008 by Professor Dame Hazel Genn QC and also two speeches by Lord Neuberger of Abbotsbury MR in November 2010, both of which can be seen at <<http://www.judiciary.gov.uk/media/speeches/2010>>.

But these examples are not paradigmatic. The paradigm is the classic one: X has hurt Y, financially or otherwise, and Y is entitled to just recompense, not to what can be bargained, mediated, or umpired out of X. Or X, in fact, has done no such thing, and ought not to be pressured into giving Y anything at all. There is a correct answer, morally and legally, and that is what needs to be enforced after an authoritative figure, traditionally called a judge, hears the best arguments available on both sides. The incompetent and shady building firm which takes several thousand pounds from an old couple and leaves them with a half-finished kitchen with leaking plumbing does not have a *conflict* with his clients – he has cheated them, and should make good all that he promised.

There is a serious public interest at play which largely vanishes with the rhetoric of conflict resolution. The state must enunciate and enforce standards of behaviour, and it must protect rights. Rights are not bargaining chips, and public standards of behaviour

are not rough guidelines to an efficient resolution of a conflict, treated as just another example of social interaction.

If the courts and legal profession have made actual justice too slow and expensive, the answer lies in reform of the justice system, not in abolishing the idea of justice as the job of the state.

If the courts and legal profession have made actual justice too slow and expensive, the answer lies in reform of the justice system, not in abolishing the idea of justice as the job of the state. Hardly anyone remembers that the great reforming Labour Government of 1945-51 originally had the idea of paralleling the National Health Service with a National *Legal* Service. Perhaps we should revisit this idea, rather than multiply ADRs?

Legal Professionals: How They Are Seen and What They Do

Marina Kurkchiyan, *Law Foundation Fellow, Centre for Socio-Legal Studies, University of Oxford*

The current socio-legal discussion concerning why people tend to use or to avoid the legal institution as a method of conflict resolution is mostly focused on the analysis of the institution itself: its cost, efficiency, fairness. Although this is a valuable approach, it tells us only part of the story. The same question can be approached differently, by exploring how the institution is seen and perceived from the outside by its potential users.

It seems clear that the process of taking a claim to court is the last resort, not a matter of preference, regardless of whether the public trusts the court or not.

The conclusions of this paper are based on the data collected in a comparative study being conducted in Bulgaria, England, Poland, and Ukraine, using several different instruments of data collection in each location:⁷

- a representative survey drawing on a sample of 1000 people in each of the four countries;
- observation in the courts in England (London and Oxford), Poland (Warsaw), and Ukraine (Kiev);⁸

7. The project 'Legal Cultures in Transition: the Impact of the EU integration' is a five-year project (1997-2012) sponsored by the Research Council of Norway. Data has also been collected in Norway, but it has not been translated and therefore was not available for analysis.

8. This is a work in progress and research in a Bulgarian court is yet to be conducted.

- focus groups, of which eight were held in each of the four countries under scrutiny.

The data from the surveys suggest that there is no substantial variation in the proportion of people who have direct court experience in any of the countries under scrutiny, despite the significant divergence in the level of trust in the legal institutions across these countries. This finding challenges the common assumption that if the institution works well, if people respect the court, then they will be inclined to use it more often.

It seems clear that the process of taking a claim to court is the last resort, not a matter of preference, regardless of whether the public trusts the court or not. This realization gives rise to the question: what prevents everyone from seeing the court as an attractive option? Why is it the last resort? Is there something in the core of the institution, in every country, that produces this reaction?

Before moving on to suggest an explanation, I would like to make a point that while we tend to talk about courts and lawyers in different countries as the same social institution, even though one national legal system operates differently from another, the fact is that the legal institutions in different countries also carry out different social roles. This has shown up in the research in three countries, where I observed how cases are dealt with.

The English legal system can be described as providing *legal services* which respond to the needs and demands generated in the society. Cases are grouped partly by their complexity, but mostly according to a broad classification of whatever issue each one seems to be about, such as criminal, civil, welfare, employment, family-related cases, and so

forth. For each category of cases the court has evolved its own subculture, with different sets of actors in play, specialized procedures, and a distinctive use of symbolic and physical space. For those who have only seen High Court shows, all rigid, dressed up and confrontational, it can be a disconcerting experience to observe the performance of a judge in private chambers in a county court. The setting lacks any symbolic entourage, the atmosphere is informal and relaxed, and often the procedure consists of a movement towards a mediated outcome based on common sense, particularly if lawyers are not present. In my interviews, even the judges themselves referred to what they do as performing 'services', and when the talk happened to be about funding, some of them explicitly compared the legal institution to health care provision.

The Polish court I would describe as being engaged in *state regulation*. There is no attempt to adjust the procedure either to the type of case or to the severity of the problem. The identical procedure is always used, regardless of whether a case is big or small and regardless of whether it consists of criminal acts, civil issues, or family disputes. Even during a small civil case, people have to go to a witness stand, take an oath, be told precisely where to sit, and so on. The courtroom is full of state symbols. The judge always refers to herself as 'the court' (at the first instance courts, judges are mostly women in their early- to mid-thirties). The whole feeling in the courtroom is that all cases are equally important for the Polish state and that the judge is merely an anonymous figure who acts as the mouthpiece for an adjudication that is really being conducted by the impersonal, remote Polish state.

The Ukrainian court is best described as a big *bureaucratic machine* that grinds away to deal in equally rigid fashion with both grievances and offences. There is no distinction between administrative, civil, and sometimes even criminal cases. A typical schedule for a Ukrainian judge includes dealing with a series of unpaid utility bills, sorting out several charges of traffic violations of varying seriousness, settling a financial dispute

between businessmen about a huge sum of money, and then having to decide what to do about a petty disagreement between neighbours. All these cases are heard, or rather considered, in the judge's private office. No importance is given to the physical space in which a case is judged. The procedure cannot be described as formal in the sense of having strict rules, but it is also not informal and certainly not friendly. It is simply hierarchical. Most importantly, the concept of evidence is that it consists of a piece of paper bearing an official stamp.

It was evident that for the level of court that I was studying (small claims), there were substantial differences between countries. There were differences between the social roles that the legal institutions were performing. And there were substantial differences between the specific tasks that legal professionals in each country were expected to carry out. If we add to all that the variations that people experience in the physical setting of a court hearing and the personal treatment that they receive, one would expect that in different countries people would have significantly contrasting images of the legal institution and its professionals. But that is *not* the case.

In the focus groups, conducted in four countries, people were asked to articulate the mental images that they associate with judges and lawyers, and then we asked them to explain what those images mean to them. This technique of questioning usually helps people to articulate their cognitive pattern in addition to their instinctive reactions. The analysis that emerges is not based on the images as such, but on the explanations put forward to account for the images. This eliminates potential problems such as the possibility that the same image might mean different things in different cultures or that the same feelings might be expressed in different images according to the culture.

If we leave Ukraine aside (I will come back to it later) there was a single dominant idea that was articulated in relation to all lawyers and judges in all countries. That suggests that we are talking about a single

quality that people everywhere perceive to be the essence of the legal profession: the image is of *power*. That power was always seen as frightening and unpredictable. Admittedly there were nuances in how power was perceived from one country to another. For example, English people saw the legal institution as a sleeping lion that it would be dangerous to disturb, whereas for Bulgarians, who also think immediately of a lion, the image is of an arbitrary power, which does as it pleases. Poles see a lion that bites and claws and can destroy lives if it so chooses. In every country the legal professionals are associated not with a supportive image, but always with a fierce predator that is best avoided and is certainly not to be played with.

The public also sees distinctions within the legal profession that are once again identifiable as images that are shared between different countries. Everywhere judges are associated with the court as a public domain, and to that extent they are seen as, at least potential, guarantors of wisdom and justice. And equally in all countries lawyers are seen as ruthless free market operators, self-interested, always seeking profits, dedicated to finding victims that they can take to pieces. Surprisingly, this does not mean that people do not respect lawyers. Most of them do.

People are simply afraid of them. They see their activities as an intellectual game, the outcome of which is dependent on the amount of money that one can afford to put into the game in order to buy the services of a lawyer who can win. In all the countries that we studied, people made a clear distinction between good lawyers and bad lawyers. But the good/bad distinction was not about morality or justice, it was about professional knowledge and the legal skills needed to win the game.

An image expressed in Ukraine stands outside of this pattern. It carries an attitude of contempt rather than fear, and it dominates by repeated references to corruption. I am inclined to think that there may be a threshold of corruption at which the legal institution loses its dominant image of frightening power that everyone must respect, or at least be very much aware of. If the amount of corruption is excessive, that image is replaced by a sense of derision. The contrast between the findings for Bulgaria and Ukraine suggests that probably EU membership (with its energetic disapproval of corruption and its extensive countermeasures) may have lifted Bulgaria back across that critical threshold and thereby restored what seems to be a healthier attitude, albeit still very problematic.

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