The Sir Elwyn Jones Memorial Lecture

Bangor University

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THE MAINTENANCE OF LOCAL JUSTICE

It is a very great honour and privilege to have been invited to give this lecture[*] in memory of Sir Elwyn Jones MP[1] on the occasion of the first students arriving at the new law school at this University, an event which I am told he would have warmly welcomed. A new law school needs to look forward, but as the new law school is headed by Professor Thomas Watkin, one of the foremost legal historians of these islands who has done so much to get the Welsh Legal History Society firmly underway, I decided I would try and cover a contemporary subject but one which needs to be understood in its historic context.

In a part of Wales almost as far from Cardiff and London as it is possible to be, I want to speak of local justice and the challenges faced in seeking to maintain it. It is a matter of considerable contemporary interest, not merely because of the concern that is expressed at court closures in areas such as this, but because of the need to consider what is meant by local justice and how to deal with the acute financial problems that arise in providing it in the light of current Treasury policy which they succeeded in imposing after dogged persistence for over 100 years.

There are, I think, three matters that have to be considered

(1) The systematic organisation of local courts
(2) Courts that can provide justice locally, and
(3) The finance to provide a system of local justice.

(1) The systematic organisation of courts

In considering how local courts should be organised, I could not begin better than to look at the first systematic attempt to provide for a new system of courts. These are still with us – the County Courts. They were established in 1847, after many years[2] of resolute parliamentary effort, by an Act in 1846 entitled, "An Act for the More Easy

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[*] I am greatly indebted to Miss E.A. Buchanan for the extensive assistance given in the research for and preparation of this lecture which was given at Bangor University on 8 October 2004.

[1] 1904-1989: a member of the Council and Court of Governors of the University from 1939 and Treasurer from 1970-1989.

Recovery of Small Debts and Demands in England". Although the title refers only to England, the special needs of Wales were recognised as the Lord Chancellor undertook to give preference in appointments in Wales to those who spoke Welsh[3].

The jurisdiction was limited at first to certain types of action where the sum claimed did not exceed £20. A session of the court had to be held at least once in every month in each of the 495 districts into which England and Wales was divided[4]; the districts were organised into about 60 circuits (mapped out by population rather than area) to which a judge was appointed. If the judge was ill or unavoidably absent (the cause of which had to be recorded in the minutes of the court), the judge could appoint a deputy whom the judge remunerated himself. He was allowed as holiday only the time elapsing between the monthly holding of the courts; in a district where there were 12 courts, the period was short!

The new courts were an enormous success; within 21 months, 856,826 actions were tried in them, in addition to those settled out of court; when the jurisdiction was extended to £50, 10,000 cases a year involving amounts between £20 and £50 were tried; litigants were attracted by the speed, simplicity and finality of the procedure[5]. So successful was the court that its jurisdiction was progressively extended.

Sir Thomas Snagge, a County Court judge who did much to raise the status of the County Court[6], writing first in the 1880s[7]:

> "Every Member of Parliament who has a new legal measure on the stocks naturally suggests that the County Court shall be the instrument or machinery for carrying out his scheme. The staff is there, so all objections to the proposal on the score of expense are ingeniously avoided, and undoubtedly a considerable amount of important modern legislation relating to social subjects would have been impracticable if the useful domestic court of all work was not at all times available and equal to the occasion."

He attributed the success of the courts to the "absolute division of labour and the absolute delegation of responsibility"[8]. By this, he meant that the judge[9] was given

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[2] An account of the campaign by Lord Brougham for the establishment of the Courts is given by Sir Thomas Snagge: The Evolution of the County Court (London: William Clowes and Sons Ltd., 1904 edition), p 5 - 13: and by Patrick Polden: A History of the County Court System 1846-71 (Cambridge University Press, 1999), p. 5 – 37.

[3] See: Legal Wales, Its Modern 0rigins. Vol 1 Welsh Legal History Society page 116.

[4] Each court in each district had a clerk (renamed a Registrar in 1856), who was a local attorney appointed by the judge with the approval of the Lord Chancellor and a High Bailiff appointed by the Registrar with the approval of the judge; they were remunerated by fees paid.

[5] Snagge: p 14.

[6]He had been a barrister with a distinguished academic record who had taken a County Court judgeship when he gave up the demands of practice on the back of significant private means.

[7] Snagge: p 16.

[8] Snagge: p 17.

the responsibility to hold courts on the circuit and the staff were left to administer the work on the circuit[10]. One commentator[11], writing in the Law Quarterly Review in 1893, regarded the courts as a scientifically organised system of courts[12].

Although the county courts are regarded by some now as the Cinderella of the court system, the detailed planning that went into this systematic organisation is one that must be emulated in locating our civil and criminal courts, if we are to provide justice to local communities. The unification of the administration of the Magistrates, County, Crown and High Courts which comes into effect next April gives that opportunity, of which advantage is clearly being taken here in Wales and elsewhere.

(2) What should be encompassed within civil justice and the local courts that administer it?

It is rightly accepted that local justice must include courts of civil and criminal jurisdiction and that it is proper to locate, in a centre convenient to several localities, courts where the more serious cases can be heard[13]. However, many civil issues important to the public, such as most employment and social security disputes, are heard by tribunals rather than courts. Moreover there is a recognition that procedures for settling disputes or resolving the debt problems of individuals need more

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[9] A judge cannot however be left on his own too long. The Times in a leading article on 19 February 1879 put it in this way:
"It is found that a good judge is much improved by a good Bar. He profits by sharp critics and learned counsellors, and this whetstone many a County Court Judge lacks. If he is left to himself, or if his equals do not practise before him, he is apt to become arbitrary or slovenly."

[10] Snagge considered that the fact that in 1901 there were only 137 appeals from the County Court remarkable: p 18.

[11] 1893 ix LQR 321: William H Owen: The Reorganisation of the Provincial Courts at p 323.

[12] The admiration was not entirely universal; for example, (1891) vii LQR 346 – Charles Cautherley: "The County Court System". Sir Mackenzie Chalmers, then a judge of a circuit in the Midlands, was more critical of the work loaded onto the courts: (1887) iii LQR 1: "The County Court System"

> "But of late years there has been a growing tendency to decentralise the administration of civil justice, and the County Courts have been selected as the instruments for carrying this policy into effect. All kinds of jurisdictions have been pitchforked on to the original structure. New wine has been plentifully poured into old bottles with the familiar result."

He also considered that the circuits by 1887 need reorganising (because of the spread of the railway system and the movement of population into towns) and smaller courts closed; he pointed out that the travelling required of judges to small courts could be high in proportion to the time spent in court.

> "I heard of a case the other day where the judge telegraphed to enquire what his work at a distant court would be. He was informed that there was one judgment summons for four shillings. Like a sensible man he paid the money himself and thus got rid of a long and expensive day's travelling for nothing." (p 3)

[13] Sir Mackenzie Chalmers in an article on The County Courts Consolidation Act 1888, v LQR 1 pointed out the problems of carrying local justice too far, dealing with the then current conditions and suggesting the heavier case not be tried at the smaller courts, he observed:

> " A heavy case is always tried at a disadvantage at one of the small courts. The judge is probably due at a distant court the next day, and must sit to an unreasonable hour to finish his work. If he takes the big case first, a lot of small people, who can ill afford it, are kept waiting. If he takes his small work first, he perhaps cannot begin his heavy case till a late hour. Counsel, jurymen and witnesses are all tired with waiting and distracted with the notion that they will miss the last train. If a point of law arises, there is no library to which reference can be made. The court is usually held in some casual building peculiarly ill-adapted for the purpose, and everybody is suffering from conditions of physical discomfort which militate against the proper trial of the case. The parties are put to heavy expense in bringing counsel and skilled witnesses (if required) from a distance. The judge (wrongly perhaps) is a human being and not a machine and the fact that he is wet, cold, tired, hungry, and generally uncomfortable does not improve the quality of his work. Altogether the whole of the conditions under which the case is tried are unsatisfactory." (p 6)

systematic provision. The question that therefore arises is what should be encompassed within a system of justice and within local courts of justice? This is a question that must be discussed, but it cannot be discussed without some understanding of the issue that lies, in my view, at the heart of local justice – the question of what the State is prepared to pay for.

(3) The finances needed to provide a system of local justice

The importance of the subject is considerable; it may be appreciated by recalling that one of the reasons why we in Wales lost our own court system, the Courts of Great Sessions, was to enable money to be found for the provision of two more judges for the Courts of Common Law in London.

The State has such an interest in the maintenance of law and order that it has never been in doubt that the state should pay for the provision of the criminal courts. However, the question of financing civil justice is quite different and of acute current debate; it has been the view of the Executive branch of Government in the last two decades that civil justice should be entirely paid for by those who become suitors before the courts. It is a view that is having profound implications for the future viability of local justice. But whether that view is correct depends in part on the view taken of the interest of the State in civil justice and, in common with all issues of State expenditure, the exigencies of State finances. The current view is, however, one that has been reached by reference to the second consideration without examination of the first – namely, public debate as to the real interest of the State in civil justice and whether or not the state should contribute to its provision. Let me explain, for the history of this issue has, as far as I can ascertain, never been fully set out nor the philosophy been debated publicly for over a hundred years.

I shall in a moment refer, with modern high authority, to the provisions of Magna Carta, but the consideration of the issue must begin with Jeremy Bentham.

Jeremy Bentham

Jeremy Bentham had in 1795 published a paper entitled " *A protest against law taxes*"[14]. Although some of what he attacked was repealed, the text was influential in the debates of the nineteenth century, as fees on suits were often described as taxes

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[14] Text available on the web in the digitised 1843 edition: Classical Utilitarianism Website: www.ucl.ac.uk/Bentham-Project.

on suits[15], as they in fact are. His views were clear; in a closely argued text he sought to demonstrate that the imposition of a tax on law suits was wrong. One passage must suffice:

> "Justice is the security which the law provides us with, or professes to provide us with, for everything we value, or ought to value for property, for liberty, for honour, and for life. It is that possession which is worth all others put together: for it includes all others. A denial of justice is the very quintessence of injury, the sum and substance of all sorts of injuries. It is not robbery only, enslavement only, insult only, homicide only – it is robbery, enslavement, insult, homicide all in one.
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> The statesman who contributes to put justice out of reach, the financier who comes into the house with a law-tax in his hand, is an accessory after the fact to every crime; every villain may hail him brother, every malefactor may boast of him as an accomplice."

The influence of his views was considerable, as we shall in a moment see, because an examination of the history of the issue must again begin with the County Courts.

The initial position in the County Courts

It was intended that the County Courts should be largely self financing[16]; in fact they were entirely so at first, because of their success. However, on 20 August 1853, a Royal Commission[17] was appointed under the Chairmanship of the then Master of the Rolls, Sir John Romilly[18], to enquire into the state of the County Courts, particularly with respect to

> "the fees levied in the said Courts and whether the same can be reduced in amount, or can be levied in a manner less burdensome to suitors, and whether the costs of proceedings in the said courts can be reduced".

The Commission heard evidence from a number of witnesses; amongst the complaints were that fees were too high in default cases and operated as a tax on

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[15] See for example the speech of Lord Westbury on 28 April 1865 (Hansard 3rd ser vol 178 col 1178) where he refers to the imposition of fees to help fund the new building for the law courts (see below) as "a small tax on suitors in the Courts of Law"; others referred to this as a fee. A similar use of the word tax was made by the Select Committee referred to in footnote 32 and by a deputation of lawyers who visited Gladstone in May 1862 when they discussed the building of new law courts in London: see footnote 49.

[16] There were two main classes of fee - a class two fee for the general fund, levied as a poundage on claims over a £1, which defrayed the cost of court houses and offices and class 1 fees for proceedings and steps taken which were used to pay the judges, their travelling expenses, the clerks and the bailiffs: First Report of the Commissioners appointed to enquire into the state of the County Courts (1855), pages 21, 24 and 38. Reports from the Commissioners: Vol iv. See also the speech of Sir Roundell Palmer on 10 February 1865 Hansard 3rd Series vol 177, col 176

[17] First Report of the Commissioners appointed to enquire into the state of the County Courts (1855). Reports from the Commissioners: Vol iv.

[18] Master of the Rolls from 1851 to 1873; he was the second son of Sir Samuel Romilly, a leader of the early nineteenth century law reformers and a close friend of Bentham. For a year after his appointment as Master of the Rolls, he still sat in the House of Commons; he was the last Master of the Rolls to do so: see Holdsworth Vol. XVI 119.

the poor[19]; one witness, Judge Willimore QC urged that public attention ought to be directed at the fact that[20]

> " while in the rich man's Superior Courts, the suitors pay nothing towards the salaries of the judges, officers etc, yet in the poor man's County Courts, the suitors are taxed to pay for all these, and something extra by which the State is mean enough to make a small profit".

He added:

> "I cannot understand how any one except a very timid Chancellor of the Exchequer, could justify, or even tolerate an injustice so gross, palpable and cruel".[21]

The importance of the Commissioners' Report was not their view that the fees should be reduced, but the fact that they set out first in modern times their views as to the principle:[22]

> "We now proceed to consider a question which is preliminary but essential to this branch of the enquiry, that is, whether the County Courts should be self supporting. We are of the opinion that they should not. To compel suitors to pay fees sufficient to support the establishment appears to us unjust in principle, as, that which is for the benefit of the public should be supported by the public; but we fear that at present, financial reasons will render it impracticable to reduce fees in strict conformity with the principle we have enunciated. We think, therefore, that the suitors should pay an amount sufficient to remunerate the clerks and high bailiffs of the court, and that all other expenses of the establishment, such as judges' salaries, buildings, stationery, and other matters, should be borne by the public revenue."

The recommendations were accepted[23]. There was no real discussion of the principle apparent from the report, though one witness put forward a case which today reads curiously[24]:

> "The moral influence of the County Court has been such that it has very much improved the condition of the agricultural labourers. They used formerly to get hopelessly into debt to the county shopkeepers, and being reckless of the consequences, they spent their money on the Saturday night at the public house; but now I am told, and believe it is the fact, that the agricultural labourers being emancipated from the thraldom in which they were held by the shopkeepers before, take their money home to their wives who go with that money in their hands to the shops and get much better served, and in every way more advantageously to their family. In fact that result is so fully

[19] Q 154 -156; they were a real hardship to the poor who usually at once admitted their debts: Appendix pp 68-9.
[20] Appendix p 172.
[21] Q1486 (Appendix p 76) ; the same point was made by another judge – see Q290.
[22] Page 42; they also recommended that the remuneration of the clerks should be by salary and not by fee (page 44). This was achieved in the County Courts Act 1856.
[23] The Commissioners recommended that the general fund fee be abolished and other fees reduced with the result that the income derived from fees was halved. The estimates put before the House on 8 July 1856 showed that £77,700 was to be paid from the consolidated fund for judges' salaries, and grants from Parliament were to pay the travelling expenses of the judges (£13,000) and other expenditure amounting to £79,00. PP 1856 (340) L.
[24] Q 299: Judge William Furner (Sussex District): Appendix page 77.

confirmed, that I am told, country brewers begin to complain of it. I have heard as a fact that the brewers in the country complain that the agricultural labourers do not spend so much money at the beershops as they used to, and I have no doubt that that is in great measure attributed to the moral influence of the County Courts."

However, it is clear that Romilly's views were influenced heavily by Bentham's treatise. When giving evidence over a decade later in 1869[25], Romilly observed:

> "I confess that my great regret was, that having a large fund by which you might have prevented what I think was the worst of all taxes, namely, a tax upon law proceedings (and which during a great number of years you had diminished, to a great extent) you have been obliged to give up that system, and have been obliged now to increase the tax upon law proceedings, and increase the fees for the purpose of enabling courts to be built…Your Lordship and probably every member of the Committee is familiar with a little tract by Mr Jeremy Bentham, probably the ablest thing he ever wrote, called "A protest against Law Taxes", in which he points out their evil very strikingly, and in a very few pages."

When the County Courts underwent their next major examination, that in 1872 by the Judicature Commissioners, their jurisdiction had been vastly expanded, so that they made the recommendation that the County Court be incorporated into the High Court[26] – but for reasons time does not permit me to go into, the proposal was not accepted.

The Commissioners observed in their Second Report that fees in the County Court were too high and should be reduced, as the initial fees in the Higher Courts were less than those in the County Court[27]; one County Court Judge gave evidence that he had tried three cases where the fees were more than twice the sum recovered[28]. There was no discussion of principle in the report, though some evidence was given that the courts ought to be provided at public expense.[29] Nothing was done. In 1889 it was pointed out that a writ in the High Court cost ten shillings for an unlimited amount, but the fee on a plaint in the County Court for £20 cost £1[30]. Within the County Court the burden was heaviest on the smallest claims; in Leeds it was calculated that four fifths of the total fees were derived from cases where the claim was for less than £10.[31]

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[25] Minutes of Evidence to the Report of the Commissioners (1870) referred to in footnote 54, page 149, 23 July 1869; he had expressed similar views to the Committee considering a Bill introduced in 1861 to provide for the building of new courts of justice (mentioned below); see debate on 10 April 1862 Hansard 3rd series vol 166, col 806-7.
[26] Second Report of the Judicature Commissioners page 13.
[27] Second Report of the Judicature Commissioners page 20.
[28] Evidence of Judge Henry R. Bagshawe QC – evidence to the Commissioners, Part 1, page 56.
[29] Evidence of Judge E.J. Lloyd QC – evidence to the Commissioners, Part 1, page 80.
[30] 1889 v LQR 10: M.D. Chalmers.
[31] 1891 vii LQR 350: C. Cautherly.

The position in the Superior Courts

The position in the Superior Courts was, as the quotation from the evidence of Judge Willimore indicated, quite different. It is not, I think, necessary to look back before the middle of the nineteenth century, as before then, the system was summarised by Holdsworth:

> "Payment by fees, saleable offices, and sinecure places were the predominant characteristics of a bureaucracy which could not be defended even upon historical grounds".[32]

It was the desire for a building in which all the superior courts of law could be concentrated that brought the debate on financing the administration of justice alive. The project for consolidating the courts in one new building was much discussed from the middle of the nineteenth century[33]. In 1859, a Commission under the chairmanship of Sir John Coleridge was appointed to report on the desirability of providing a building for all the superior courts and the means of paying for it[34]. Some thought the state should pay. It was Sir John Romilly's evidence[35] which was hardly surprising in the light of his acceptance of Bentham's views, that:

> "I think it is the duty of Government to supply all the conveniences and advantages necessary for the due administration of justice. I confess that I doubt very much whether you could induce the Government to supply the funds necessary to concentrate the courts."

He was right in his doubts and therefore the key to proceeding with the project was the identification by Sir Richard Bethel (later Lord Westbury, Lord Chancellor) in his evidence to the Commission[36] of a ready source of funds (which he had suggested to the Government three years earlier) - the Suitors' Fund of the Court of Chancery. In essence, suitors in Chancery deposited significant sums in court (in 1859 it amounted in total to over £47m) which the court was usually asked to invest on their behalf and if so investment income was credited to the account of the suitors. Sometimes suitors forgot to ask for the sum to be invested and in such cases they

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[32] History of English Law: vol 1 647; some of the worst abuses had been eliminated earlier in the nineteenth century; see volume xiii p 404 and the Reports of the Select Committee on Fees in the Courts of Law and Equity, 9 July 1847, 25 July 1849 and 14 August 1850. Romilly was a member of the Committee. A powerful illustration of the abuses in the Court of Chancery was given by Mr Edwin Field (who is referred to in footnote 35) in his evidence on 5 June 1847 by reference to court fees totalling £8 which had to be paid in respect of a disputed widow's annuity of £3 a year.

[33] See: David B Brownlee: The Law Courts: The Architecture of George Edmund Street, Architectural History Foundation/ MIT Press, 1984.

[34] Report of the Commissioners appointed to inquire into the expediency of bringing together into one place or neighbourhood all the Superior Courts… 1860.

[35] Minutes of Evidence page 86, 25 February 1860; a leading solicitor, Mr Edwin Field, expressed the same view in his evidence on 27 February 1860 (minutes of evidence page 95). He was, according to Lord Selborne (Memorials Personal and Political, Part II, London 1898) vol I, p 23, the moving spirit behind all the activity to concentrate the law courts.

[36] Minutes of Evidence, page 34, 21 June 1859, question 709.

were only paid out the sum paid in, without any investment income. That was invested and the income kept by the Court and known as the Suitors' Fund[37].

The Commission reported in 1860 that it was desirable there should be a new building for all the courts, that they considered it could be built for £1.5m and that:

> "there *do* exist funds, which, if they can with propriety be made available for the purpose (as for the reasons hereafter stated, we think they can), will be sufficient to carry out these important objects into complete effect, without imposing any – or, if any, a moderate and temporary- burden on the finances of the State."[38]

In addition to the Suitors' Fund of the Court of Chancery, from which £1.291m was available, there were two other funds from surplus fees – over £201,000 from the Court of Chancery and over £88,000 from the Courts of Common Law. The report examined in detail the origins of the Suitors' Fund of the Court of Chancery[39] and concluded that it was proper to use it not merely for the Court of Chancery[40], but for all suitors as "the due and proper maintenance of all the Courts is, therefore, an object in which all Suitors have an interest"[41]. If there was a shortfall[42] in the funds required, then there should be a payment from the Consolidated Fund:

> "It appears to us, that the providing of suitable Courts and Offices for the due and convenient administration of justice is an object of supreme national importance, and involving the weightiest national obligations: that it is, in fact, one of the primary and paramount obligations of the State."

However, the proposal ran into immediate difficulty. The Treasury circulated a minute which indicated the cost might be £2m, that only £1m would be available from the identified funds, and that there would be a shortfall of £1m to be borne by the State[43]. The Bills introduced in 1861 to give effect to the Commission's proposals failed, largely because of this memorandum, but also because of opposition to the use of Chancery funds[44].

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[37] see Paragraphs 24 and following of the Report.
[38] Paragraph 22 of the Report
[39] See also the explanation give to the House of Commons on 14 March 1862 on the First Reading of the Courts of Justice (Money) Bill, Hansard 3rd series vol 165, col 1558-60 and by Sir Roundell Palmer on 10 Feb 1865 Hansard 3rd Series vol 177, col 166-177.
[40] Sir William Page Wood (later Lord Chancellor as Lord Hatherley, and then a Vice Chancellor), dissented from this part of the Report; Sir John Romilly, Master of the Rolls, in his evidence to the Commission strongly objected to the use of the fund (Minutes of evidence, p 86 and following, 25 February 1860).
[41] Paragraph 72. They also considered the argument that Chancery suitors would be disadvantaged as the fund had been used to defray part of the costs of running the Court of Chancery and thus reducing the fees (see paragraphs 79 and following).
[42] See paragraphs 93-4 for an explanation.
[43] See Brownlee, page 70 and following and Parliamentary Question on 19 July 1861 Hansard 3rd series, vol 164, col 1188.
[44] See, for example, letter 10 of a series of letters by Lord St Leonards (Lord Chancellor 1852) published in "A Handy Book on Property Law (Edinburgh: W Blackwood, 1869) and in his speech on 28 April 1865 in the House of Lords: Hansard 3rd series vol 178 col 1181 and his protest on 8 May 1865 Hansard 3rd series 1589 where he emphasised that it was the duty of the state to provide buildings for the courts.

However, from 1862 Gladstone, as Chancellor of the Exchequer, strongly supported the project[45]:

> "… the concentration of our law courts was a scheme of practical improvement, which was worthy of being prosecuted, even at the hazard of considerable public charge."

Despite this change of heart at the Treasury, it was only a pragmatic compromise, put forward in February 1865, which enabled the Bills[46], introduced by Sir Roundell Palmer as Attorney General (later Lord Selborne, Lord Chancellor) in February 1865[47], to pass into law. These set out the compromise - only £900,000 was to be taken from the Suitors' Fund[48], £200,000 was to be raised by sale of the existing offices, and savings on other offices, and £400,000 was to be financed by the Treasury with the amount being reimbursed by raising fees to a small extent, except on Chancery suitors, to repay the amount (with interest at 3.25%) over 50 years[49].

There appears to have been little discussion of the principle of levying fees when the ideals of Bentham gave way to pragmatism on a limited scale; that was because, as Palmer observed, the fees to be levied were "small and almost nominal"[50] and "almost imperceptible"[51].

> "There were some who thought that the levying of fees in courts of justice was altogether improper, and that the State ought to defray all the expenses of such courts. Whether this was right or wrong in the abstract, this was not the occasion to inquire. It had certainly not been the practice of Parliament to act on that principle, and it would probably turn out to be one of those things that were beautiful in theory but which could never be reduced to practice. Great objections might be made to every species of tax, and if the suitors in our

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[45] 14 March 1862 on the introduction of the Courts of Justice (Money) Bill, Hansard 3rd series vol 165, col 1563; the Bill failed on the second reading in 1862.

[46] The Courts of Justice Building Act 1865, The Courts of Justice Concentration (Site) Act 1865 and The Courts of Justice (Salaries and Funds) Act 1869; see also Gerald Gardiner's memorandum of January 1949, referred to at footnote 86.

[47] 10 February 1865, Hansard 3rd Series, vol 177, col 166-7 and 175-6.

[48] Funds were needed to cover obligations to officeholders that had been covered by the Suitors' Fund. Some of the Suitors' Funds were transferred to the Treasury on the basis that the income would be credited to the courts without deduction of tax; tax was in fact deducted – see Appendix III to the Macnaghten Report on Supreme Court Fees referred to below; despite the illegality of the deduction of the tax being made clear in that Report, the Treasury continued to deduct it – see page 8 of Gerald Gardiner's memorandum referred to in footnote 86.

[49] In 1851, it had been suggested in an Address to the Legal World on the Centralisation of the Courts of Law and equity by Robert Alfred Rouch and Charles Wetherell Brown that a penny tax be levied on each suit which would cover the interest on a loan and provide a sinking fund to repay the loan; they considered that the precedent for this was the way in which the buildings for the County Courts had been financed through the General Fee referred to in footnote 16. On a visit to Gladstone in May 1862, a deputation of lawyers from the Society for Promoting the Amendment of the Law proposed such a contribution: see (1862) 37 LT 354-5.

> "Whatever extra expenses there were might be met by a tax levied on suitors, who would be much benefited by the speed that would follow the concentration. By a very moderate tax on the issue of writs, they would be able to raise a sum that would pay the interest on half-a-million of money.."

[50] 10 February 1865, Hansard 3rd Series, vol 177, col 175; fees were to levied upon each writ and each grant of probate.

[51] 23 February 1865, Hansard 3rd series vol 177, col 606 (Committee stage)

> courts were only taxed for purposes connected with the administration of justice, he was by no means sure that they were worse off than other people."

The reason the debate was limited was because the amount to be levied was described as "a very trifling sum"[52] and "so small that it would hardly be noticed by suitors". The compromise was therefore one of a very limited nature[53].

After the passing of the legislation, a Royal Commission, including the Lord Chancellor, Chancellor of the Exchequer and the Chief Justices, was appointed in June 1865 to superintend the project; one of its tasks was to keep under review the fees that would have to be charged[54].

In fact, the estimate of £1.5m laid down in 1860 was exceeded by only about 30% by the time the courts were finally completed in 1882; the public works account drawn up in 1885 shows the total expenditure of £1.97m[55]; £893,000 came from the the liquidation of the £1m of securities in the Suitors' Fund[56]. There was a balance, after adding interest, of over £990,000 which the Treasury claimed had to be raised from fees to repay them. How was this to be done and effect given to the legislation of 1865 which embodied the compromise?

The Supreme Court of Judicature Act contained a provision[57] under which the fees were to be set with the concurrence of the Treasury and the consent of the judges or any three of them. A Supreme Court Fees Committee was established. Sir Kenneth Muir Mackenzie, the first Permanent Secretary at the Lord Chancellor's Department, when agreeing to serve on the Committee observed that there was good reason for him to serve on it, as there was a danger that the Treasury might

> "perhaps take the opportunity to try and make a general revision in the direction of making the judicature self supporting"[58].

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[52] In the speech of Westbury LC in the second reading debate in the House of Lords, Hansard 3rd series, vol 178, col 1177; in the third reading debate (8 May 1865) they were described in similar terms , Hansard 3rd series vol 178 col 1579

[53] In the debate on 23 June 1884 referred to below, Sir Hardinge Giffard stated that the principle had been passed without discussion; other speakers added that it had been agreed as Parliament thought the charges were for a limited period and so small that they might be justified; Hansard 3rd series vol 289 col 1191.

[54] See The Report of the Commissioners appointed to advise and report as to the Buildings proper to be erected, and the plans upon which such plans shall be erected for the New Courts of Justice (1870); the Commission had frequent dealings with the Treasury, but in its 1870 Report, had reached no concluded view on the financial issues, as the Government had not determined what was to be included in the new building.

[55] NA Work 12/58; the preamble of the Royal Courts of Justice Bill introduced in 1884 (NA LCO 1/84) which gives an account of the use of the funds gives the cost as £2.083m, but this may be accounted for by the fact that this includes interest.

[56] Treasury letter of 5 November 1907: NA Work 12/58/6

[57] S.26 of the Judicature Act 1875.

[58] Letter Muir Mackenzie to the Lord Chancellor, 23 June 1883: NA LCO 1/84

He had perceived the real problem and the dispute which lasted for nearly 100 years before it was eventually resolved in favour of the Treasury's view.

The fees set by the Committee were raised on the basis that they would provide an amount that was to go to the repayment of the sum advanced by the Treasury. However, one of the judges nominated to give their consent, Fry LJ, objected to the proposal to levy fees on the Chancery suitors for this purpose on the basis that suitors in Chancery had already made their contribution when the Suitors' Fund was taken and they were exempted from contribution by the 1865 legislation, as I have mentioned; separate fees and accounts should therefore be provided for Chancery work. The Lord Chancellor rejected his arguments, essentially on the basis that the fees would not be imposed under the 1865 Act, which had the exemption, but under the 1873, Act which did not; in any event, the Court of Chancery had ceased to exist as a separate court and there were no longer any separate suitors[59]. Another judge was found in place of Fry LJ[60] and the Order was duly made in early 1884.

There had however been a decline in the number of writs issued and the promulgation of the new Rules of the Supreme Court in 1883 had dramatically reduced the number of summons and orders and thereby gave fewer opportunities to charge fees[61]. Although it seems that the 1884 Fees Order took this into account, the Treasury nonetheless introduced, in the spring of 1884, the Royal Courts of Justice Bill, the purpose of which was to impose on the Lord Chancellor and the Judges an obligation to levy fees on (or tax) the suitors for the purpose of making the administration of justice almost self-supporting by charging the whole of the expenditure on the suitors, apart from the salaries and pensions of the judges.

It was met with a hostile reception[62]. The opposition in Parliament came to a head on the night of 23 June 1884 over clause 3 of the Bill which sought to impose fees to cover a "rent" of £17,500 for the Royal Courts of Justice. The removal of this clause

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[59] Letters of 24 December 1883, 27 December 1883 and 29 December 1883. NA LCO 1/84.

[60] The difficulty was overcome by the Lord Chancellor writing to the Lord Chief Justice at the request of the Treasury pointing out the difficulties they would have with Parliament if the new fees Order was not made; he was therefore asked "to communicate with such other judges as he may select in order to obtain the requisite assents" and to discuss the issue with Fry LJ and the Lord Chancellor.

[61] 77 LT 45 at 46 (17 May 1884).

[62] See 1884 76 LT 462 (26 April 1884); the Law Society objected on the grounds that control over the cost of the building had been lost, resulting in changes and delay and far more had in fact been taken from the Chancery Suitors' Fund than the Treasury had conceded, as several millions had been taken to reduce the National Debt under the provisions of the Law Fees Act 1867 and the Courts of Justice (Salaries and Funds) Act 1869 . The funds had more than covered the costs of the courts. The Treasury accepted, in the letter of 1907 referred to in footnote 56 that funds had been taken, but interest was paid on it and credited in the accounts of the Supreme Court – for a detailed explanation see Appendix III to the Report in 1922 referred to in footnote 72.

from the bill was proposed by Sir Hardinge Giffard (who, as Lord Halsbury, was to become the Lord Chancellor a year later); he pointed out:

> "The rent was assumed to be a proper charge - that was to say, suitors ought, when they came to have justice done, to pay rent for the building in which justice was administered. That seemed a strange notion; but that lay at the root of the Bill. People were actually to be called on to pay, as suitors, for the rent of the court in which justice was administered…. It was upon this clause that the judgment of the Committee was asked, and he submitted, both in principle and as a matter of practical justice, it was one of the most extraordinary proposals ever made…. He thought, however, that the Committee should refuse to adopt so monstrous a system of taxation as was proposed in the Bill and decline altogether to have a measure passed into law for the purpose of hanging around suitors for the next half-century fees of so extravagant an amount." [63]

The Attorney General, Sir Henry James, did not respond in that debate; his views were clear. In a private letter to the Chancellor of the Exchequer in April 1884[64], toning down his original objection that the scale of fees to be imposed could not be defended from any point of view, he had set out his view that the burden sought to be imposed would be an obstacle to the administration of justice. He went on to say that, in principle, suitors should not have to pay for the cost of the building of the new courts or their maintenance:

> "Every member of the community receives some benefit from Courts being maintained wherein justice can, at all times, be properly administered. The means of securing such administration is almost as valuable as actually obtaining it and some of the cost of so doing should be borne by the taxpayer generally and not alone by the suitors."

It was therefore left to the Financial Secretary to the Treasury to respond to Sir Hardinge Giffard and in so doing he set out the Treasury's view:

> "Fundamentally, the question raised …was whether it was proper to make the suitors in our Courts contribute anything, and, if so, how much, to the expense of the Courts. The principle which had been acted upon hitherto by the Legislature and the Executive Government was this – that the expense of the Courts, other than the salaries of the Judges, should be met by charges levied on the suitors. Those salaries were met by payments out of the general Exchequer; but the expenses of the offices and accommodation of the suitors and Court officials were defrayed by the suitor, which appeared to him to be a very fair and reasonable compromise. He should like, at all events, those who opposed the principle to say what share, if any share, of the cost of the Courts and the expenses of their maintenance should be defrayed by the suitor; or whether they thought that the suitor should be wholly exonerated from all share of the burden thrown upon the taxpayers of the United Kingdom? Both in principle and equity, it appeared to him to be desirable that

[63] Hansard 3rd series, vol 289, col 1187-1198. He complained of the fact the matter was being debated at 1:30 am and suggested that it was being debated then because the Government "did not want all the facts to be known and publicly debated". See also Committee Stage on 9 June 1884, Hansard 3rd series, vol 288 col 1877.

[64] Letter of 25 April 1884: NA LCO 1/84.

the moderate allocation of the costs of the Court mentioned in this Bill should be defrayed by the suitors."

There were three further speakers in the short debate; two of those made clear the limited nature of the compromise in 1865 and the third, the Solicitor General, Sir Farrer Herschell (Lord Chancellor in 1886 and from 1892-1896), made no attempt to defend the principle and accepted that some fees should be reduced. The clause was removed form the Bill by a majority of 24, that majority being received with cheers[65]. The Bill was subsequently abandoned. The clear conclusion which can only be drawn was that Parliament had rejected the view of the Treasury and accepted the very limited nature of the compromise in 1865, but, as will be seen, the Treasury adhered to its view.

I shall come in a moment to show how these events were treated subsequently, but I would like to stress that there are two matters that must be borne in mind which made the position in the Supreme Court different to that in the County Court. First, the Royal Courts of Justice, the main building for the High Court, was, as I have described, paid for by litigants, and the court houses at which the judges of Assize sat out of London were provided by the counties. Second, the Supreme Court enjoyed the benefit of huge fees on non-contentious business from the grant of probate.

It was for these reasons, that between 1886 and 1910, the fees provided a surplus for the whole of the expenditure of the Supreme Court (including the costs of the Assizes and the Lord Chancellor's Department), except the salaries and pensions of judges. The cumulative surplus of over £1m was set off by the Treasury against its contribution to the cost of building the Royal Courts of Justice[66]. In 1911, the cost of the Court of Criminal Appeal was added and this caused a deficit in that year, but in the years to 1918, the fees covered the costs, including the costs of the Court of Criminal Appeal after deducting the salaries and pensions of the judges. The First World War, however, brought about a dramatic change in the financial position.

[65] 77 LT 158 (28 June 1884).

[66] See paragraph 4 of the Macnaghten report on the Supreme Court Fees (Cmd 1565) and the memorandum of Gerald Gardiner QC of January 1949 referred to in footnote 86.

The financial crisis after the First World War

THE PRESSURE FROM THE TREASURY

In the immediate aftermath of the First World War, it became clear that the fees being charged in the Supreme Court were insufficient to cover the expenditure which they had covered before the war; as a result of increases in salaries and other expenditure a deficit had arisen in and after 1919. In the County Court, a deficit on the basis on which those fees were calculated had arisen in each year from 1915.[67]

The Lord Chancellor, the Earl of Birkenhead, first established a Committee under Sir Malcolm Macnaghten KC (then a Unionist MP and from 1928-1947 a High Court Judge) to consider the position in the Supreme Court and the 1884 Fees Order (as amended) and to report "having regard to modern conditions" which fees could be increased.

Whilst this Committee was at work, a Treasury Circular to each department in May 1921 required each department to bring about a reduction in the amount they required from the Treasury. Birkenhead was specifically pressed by the Treasury to make a general increase in County Court fees. His response was to set up, in June 1921, a further committee chaired by Sir Malcolm Macnaghten to consider the fees charged in the County Court "with reference to the alteration in the financial condition of the courts and to the fall in the value of money" and what additions could be made, either through increases in existing fees or new fees. The Treasury had a strong influence in the terms of reference and ensured that the Committee had a clear lead that there were to be increases, though they would not have minded a passing reference to poor litigants "if it is not unduly emphasised"[68].

These were shrewd moves by Birkenhead, as a further urgent review of Government expenditure was initiated in August 1921 by a Committee under the chairmanship of Sir Eric Geddes, an industrialist brought into Government to run the railways and the convoy system during the First World War, with a view to finding means to reduce public expenditure[69] by an amount far greater than the usual demands of the Treasury; it was known therefore as the "Geddes Axe" committee. The aim initially was to reduce the total Government expenditure of £1.1bn by £100m[70], though the demand for the reduction increased to £175m. Its first report recommended savings

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[67] Macnaghten County Court Fees Committee: Cmd 1856 table under para 6.
[68] Letter Treasury to Schuster of 3 June 1921: NA LCO 2/542.
[69] See Cabinet Minutes of 2 and 15 August 1921: NA T172/1228.
[70] Letter from Geddes to the Chancellor of the Exchequer (Sir Robert Horne) 22 January 1922: NA T 172/1228.

of over £70m. However, the Committee found it difficult to recommend cuts that would bring about the remainder of the desired savings. The third interim report in February 1922 recommended savings from the budget for the courts of only £94,500[71]; the axe was only swung lightly because of the existence of the two committees under Macnaghten.

THE SUPREME COURT

The Macnaghten Committee on the Supreme Court Fees submitted its report on 3 November 1921 with detailed recommendation for increases; the report was not published until 1922. The importance of the report to subsequent history is that it recorded what was claimed to be the established principle for the Supreme Court[72]:

> "At the time when the Schedule to the Fees Order of 1884 was being prepared, it was authoritatively laid down that the salaries and pensions of Judges ought to be paid by the State out of public funds, and that all the other expenses of the administration of Justice in the Supreme Court should be borne by the suitors. It has, we believe, been suggested that this principle is to be found in Magna Carta itself; or it may be said that, apart altogether from the provisions of Magna Carta, it was considered unseemly and improper that the fees paid by the suitors should provide even indirectly the remuneration of Judges of the Supreme Court.
>
> Another ground on which the principle may have been based has been suggested. The Supreme Court is not merely engaged in the work of dispensing Justice to private suitors who resort there; it administers public Justice, not only in criminal matters but also in civil matters, such as proceedings on the Crown side of the King's Bench. For the cost of the administration of Justice, where the public is itself directly concerned, the state ought, it is suggested, to provide the necessary funds, since there can be no reason why the private suitors should do so. Though it would no doubt be difficult to calculate exactly how much of the expenditure of the Supreme Court is attributable to the administration of public, as distinguished from private Justice, the salaries and pensions paid to the Judges may perhaps be taken to represent fairly that figure."

It is important to stress, in the light of the way this report was subsequently treated, that the Committee did not consider it was[73]

> "within our province to express any opinion on the question whether the principle laid down in 1884 is well founded or ought to be maintained".

It is hardly surprising, given its terms of reference and the circumstances in which they completed the report, that they never examined the issue of principle[74]. However, much more serious was the fact that they had misunderstood what had

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[71] Page 138 of the Third Interim Report of the Geddes Committee. 1922 Cmd 1589.
[72] 1922 Cmd 1565 paragraph 3.
[73] Cmd 1565, paragraph 4.

happened in 1884; the authoritative view which they recorded was in fact the view of the Treasury which Parliament had not accepted.

THE COUNTY COURT

Before turning to Macnaghten's report on the County Court, it is necessary to point out that the Treasury had a direct control over the County Court as the administration of the County Court finances was carried out under a Department of the Treasury headed by a superintendent; this had meant that in practice the Treasury was looked on as the lead Department, with the Lord Chancellor's Department only exercising "a somewhat indefinite control". In October 1920, a Committee under Rigby Swift[75] recommended the creation of a central administrative authority which looked on the system "from the point of view of the best administration of justice and not from a purely financial point of view". This was accomplished in August 1922 when the County Court staff transferred to the Lord Chancellor's Department and the Permanent Secretary became the Accounting Officer of the County Courts.

The importance of the Rigby Swift Committee to this account was that its Report recorded the then Treasury policy[76] which had been acted upon by them in setting the fees for the County Courts:

> "This view has been that in providing for the administration of justice, the cost of the Judges and the buildings should be borne by the State, and the cost of the other officials and expenses should be covered by fees paid by the public. In our opinion, in present circumstances, this cannot be - and is in fact not-applied to the administration of the County Court system. Moreover, the administration of justice is a function of Government and the County Courts are an integral part of the judicial system of the country, and the care of the officials should be as much the concern of the State as is the care of other public officers. While we have endeavoured in our recommendations to keep economy of administration and the burden on the taxpayer in mind, we attach much more importance to working out a system which has for its object that justice may be done, and that it be administered by men of character, ability and reputation."

Before the second committee under Macnaghten was asked to look at the position in the County Court fees, there was a debate between the Treasury and the Lord Chancellor's Department as to the applicable principles. The Treasury considered that the County Court should be self-supporting; this was rebutted in robust terms by

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[74] Gardiner contended that, despite Macnaghten, the policy of the Geddes Committee led in the 1930s to the fees being set at a level where they even covered the salaries of the judges attributable to criminal work – see the memorandum referred to in footnote 86.

[75] The County Court Staff Committee was appointed on 14 July 1919; Rigby Swift had been an MP from 1910 to 1918 and was appointed a High Court Judge in 1920.

Sir Claud Schuster, the then Permanent Secretary to the Lord Chancellor, in a letter to the Treasury[77]:

> "From time to time jurists have contended that all justice should be free, that is to say, that the State should provide justice for nothing, the litigant I suppose paying for such professional assistance as he requires. This is an intelligible principle. But I have never been able to see that there was any intelligible principle in the contention that the State, whilst providing all sorts of other services at the expense of the general taxpayer, should provide justice at the sole cost of the litigant. Justice, like war, has in past times been a source of profit – sometimes to the State and sometimes to the individual possessor of local jurisdiction. So has war. The idea that in modern days either of these two activities can be made a source of profit to the State is, I should think, held by no one. Of course, war can be a source of indirect profit. So can justice, and I should have thought - and be prepared to argue – that the duty which lies upon the State to provide for the protection of its citizens by making preparation to protect them against foreign enemies, there lies next the duty to see that each of its citizens can obtain impartial and expeditious justice at a reasonable cost. Everybody recognises this in criminal matters because they see clearly that if the burglar is not brought to justice at public expense, he may burgle them tomorrow. It is no less true of civil justice."

With this statement of principle, he then launched into the pragmatic argument that it was impossible then to raise County Court fees[78] and what was needed was machinery to deal with these issues. As I have explained, that machinery was provided by the second Committee under Macnaghten – that to examine the fees charged in the County Courts.

Again the real importance to this account of their report[79] published in 1923 was that it again recorded the view of the Treasury that the balance of the expenditure and revenue of the County Courts

> "should be adjusted on the basis that the State should bear the cost of the Court buildings and the salaries, pensions and travelling expenses of the Judges, and the rest of the expenditure should be defrayed by the suitors' fees".

The Committee proceeded on the basis this principle was to be applied and, as the courts were on this basis operating at a deficit, made recommendations for a modest increase in fees. There was again no consideration of principle.

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[76] Report of the County Court Staff Committee Cmd 1049 (1920), page 7.
[77] Letter to Treasury (R.S. Micklejohn) 19 January 1921; NA LCO 2/525.
[78] An interesting point made by Schuster to Micklejohn was that, as the main paying business in the large centres was professional debt collection, the raising of fees by a considerable amount would result in a detriment to both debtors and creditors; unless there was a means of recovery, a debtor would not get credit.
[79] Report of the Committee to Consider County Court Fees Cmd. 1856, paragraph 6.

Over the following years the accounts for the County Court were in fact prepared on a basis less favourable to the Treasury's view, as not only was the cost of buildings included within "allied services" to be paid for by the State, but there were also included stationery, postage and pensions for the County Court Officers; this appeared to be have been accepted by the Treasury.[80]

The effect of the Second World War: Austen Jones and Evershed

During the Second World War, there was a marked decline in business in the courts and therefore a significant deficit in the accounts for the County Court, as the expenditure had not declined[81].

The post war period was also the time of a reforming Government. In April 1947, two committees were established, one to examine the position in the Supreme Court and one for the County Court. That for the County Court under the Chairmanship of Austen-Jones J.[82] was asked to review the procedure of the County Court, including fees charged. Several who gave evidence thought that the County Courts were run at a profit for the state, though this was not in fact the case. In its report published in April 1949, significant increases in fees were recommended, but without any examination of the principle in the report as published. The issue was, however, examined in an earlier draft[83], but not in the version published, probably because of

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[80] Before the First World War the revenue from fees was greater than share of the costs to be borne by the litigant, as the number of proceedings issued in the County Court exceeded 2m annually; the Treasury therefore received the surplus, though there would have been a deficit if the state had not paid for the cost of the buildings and the salary of the judges. The position changed when the volume of business fell during the Second World War: see July 1948 draft of the Austen Jones report (NA LCO 2/3269).

[81] By 1947/8 the deficit was £461,904; if the state had not paid the cost of the buildings and the salary of the judges the deficit would have been £876,006.

[82] Final Report of the Committee on County Court Procedure Cmd.7668, paragraphs 120-128. Austen Jones had been appointed a County Court Judge in 1931; he became a High Court Judge in 1945.

[83] A draft of the Report in July 1948 made it clear that the fees were regarded as a "contribution to the services rendered in providing the machinery for the administration of justice": NA LCO 2/3269. The question of principle was also addressed in these terms:

> "We have considered whether it is within our Terms of Reference to enquire whether, as a matter of principle, it is right that those who resort to courts of law should be required to pay fees to the State. This question of principle was frequently debated by Parliament in the nineteenth century, when disputes arose about the expenses of the new Royal Courts of Justice. Bentham and others had urged that the duty of the State was to provide, without charge, machinery by which a man might be enabled to enforce his rights, but the view ultimately accepted by the Legislature towards the close of the nineteenth century and acted on ever since is that it is proper to require the suitor to bear a moderate proportion of the costs of the administration of justice."

The draft then set out the principle embodied by the Macnaghten Committee Report on County Court fees (1923) and observed that they considered that, although justice should be obtained cheaply in the County Court, the system of charging a proportion to the litigant was justifiable:

> "In civil litigation, suitors use the machinery of the courts to settle private disputes which may have arisen through the fault of one of them. The settlement of these disputes confers a benefit on the litigants themselves, and they should therefore contribute to the cost of the machinery of settling them. It might therefore be said that the State would be justified in demanding from the parties a large proportion of the cost of the machinery of justice, but the existence of the machinery of justice is of importance to the community as a whole. The maintenance of law and order is assisted because the subject has a means of enforcing his rights without taking the law into his own hands. Commercial interests benefit by the existence of judicial machinery which is available for the enforcement of their contracts. Further, private litigation results in judicial decisions which, by expounding the law, tend to prevent future disputes or to the

what happened in the contemporaneous examination of the position in the Supreme Court.

The Committee for the Supreme Court was established under the chairmanship of the Master of the Rolls, Sir Raymond Evershed, and was asked to examine a number of matters relating to the practice and procedure of the Supreme Court. One of the matters that was raised in evidence was similar to that raised before the Austen Jones Committee – the level of the fees being charged. There was a strong view, pressed by Sir A.P. Herbert, that the position was not accurately stated in the accounts and that the State was in fact making a profit from the Supreme Court; it was suggested by several that court fees should be abolished.

The Evershed Committee, in the light of this evidence, considered whether its terms of reference included the question whether litigation should be provided completely free to the litigant with facilities for this being provided by the State, whether court fees should be abolished and whether all successful appeals should be paid for at public expense.

They sought the advice of the Lord Chancellor, Lord Jowitt, who consulted his cabinet colleagues, including the Chancellor of the Exchequer. In October 1948[84], Jowitt wrote to Evershed to tell him that these matters were outside the Committee's terms of reference. In relation to court fees, Jowitt stated that the proposal for abolition would

> "involve the abrogation of a principle which has been accepted by Parliament and the country for many generations, viz: that suitors in the Courts are properly required to bear some proportion of the costs of the machinery of the administration of justice. The taxpayer already contributes a substantial proportion of the costs and the transference of the whole financial burden of the machinery (which would have to be not only for the Supreme Court, but for all other courts of law) would, we feel, involve questions of public finance that are far beyond the scope of the Committee's enquiry".

The Committee was only to look at the incidence of fees, not the issues of principle. This was accepted by the Committee. In the interim report[85] published in March 1951, they contented themselves with the observation that, although the view had

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> settlement of disputes without litigation. On the other hand, an individual litigant should not be asked to pay a prohibitive fee; otherwise there is a danger of denial of justice."

The draft then examined the policy of charging a fee for each step in the proceedings; the cost of the fee was not related to the cost of the services rendered.

[84] Letter of 15 October 1948: NA LCO 2/4036; reproduced in part in the Second Interim Report of the Committee on Supreme Court Practice and Procedure (Cmd 8176) at paragraph 141.

[85] Part V of Second Interim Report, paragraph 142.

been expressed that the imposition of court fees was a violation of the principle as old as Magna Carta (that the subject should have the right of free access to the King's Courts), they had not considered the issue further. They concluded, in a passage that is far from easy to follow, that although the fees received covered the whole of the cost of civil litigation in the Supreme Court, (including judges' salaries and pensions), the principle laid down for the Supreme Court by Macnaghten had not been infringed and fees should not be reduced overall, but adjustments made to individual fees. They appear to have accepted the argument of the Permanent Secretary that the principle stated by Macnaghten as applicable to the Supreme Court did not have binding effect. They went on to justify their position by observing that, if fees were to be reduced, they would have to consider reducing non-contentious fees and that was outside their terms of reference.

Thus, there passed again the opportunity to consider the issue of principle. However, surviving records of the internal discussions of the Committee contain three matters of interest.

First is the problem of understanding the accounts. The then eminent silk, Gerald Gardiner (to whose actions as Lord Chancellor I shall refer in a moment) prepared a memorandum with the assistance of the Lord Chancellor's Department in January 1949[86]. This demonstrated that although it was the accepted principle that the State should make a substantial contribution to the cost of justice, the state, far from making a contribution, had made a profit from 1922. In the memorandum, he was highly critical of the way in which the accounts had been presented, as it made discerning the position so difficult.

Second is the reliance on probate fees and the difficulty of justifying this reliance. The position[87] was that it was the non-contentious fees charged, largely probate fees, which actually provided the bulk of the income; these fees provided the State with its profit and subsidised the contentious litigation business; in 1946, for example, two thirds of the fee income came from probate and one third from litigation[88]. The justification advanced for this was that the executor, in registering a will for probate, had available to him the machinery of the state to protect the estate against

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[86] NA LCO 2/3977.

[87] See the memorandum of W.T. Wells produced in January 1949 which Gerald Gardiner agreed with in his letter of 29 January 1949: NA LC0 2/3976.

[88] Evershed Second Interim Report paragraph 143.

unfounded claims; the executor could therefore be seen as one potential consumer of litigation subsidising another.

Third is the importance of politics in setting the balance between the relative contributions. It is clear from the internal papers that, once the decision was made that the principles could not be examined, the issue was one of politics. As it was put in an internal memorandum, suggesting as a solution to the issue that the taxpayers should pay for the salaries of the judges and judicial officers, and fees should provide for the administrative staff and the upkeep of the buildings:

> "The man on top of the Clapham omnibus would probably see at once the connection between his own welfare and the existence of a judicial Bench adequate both in numbers and in quality; and such a Bench is the basic essential of a system of justice. To take the other extreme, he will almost certainly not be capable of being persuaded to take the same interest in clerks of whom he has never heard or buildings he will never use or visit; and the man on the Clapham omnibus is the man after all who will do the paying. The case for the taxpayers being charged with the salaries of subordinate judicial officers such as the Masters, is admittedly not so strong, though the public has a very discrete concern with the quality of all such as have to exercise a judicial discretion in the course of their duties.
>
> Whilst admitting a certain vulnerability, therefore, in the logic of my proposal, the question before the Working Party is not an exercise in logic, but a problem of politics. And in politics it is more important for the ordinary man to be able to apprehend the reason for a certain course's being taken than for that reason to emerge triumphantly unassailable from a critical examination."[89]

Viscount Kilmuir

Although the fee increases (which had meant that the average fee payable in the County Court had doubled between 1939 and 1956) and the rise in business increased the fee income, the County Court still operated at a deficit, despite a further increase in 1956[90].

In June 1957, the Treasury returned again to the principle on which the County Court should be financed. The view of the Financial Secretary was that it should be self-supporting, though it was accepted that the position in respect of the High Court was different as

> "owing to the fortunate accident of the High Court's Probate Jurisdiction, the income from Probate Fees is almost sufficient by itself to maintain the whole establishment"[91].

[89] Paragraph 9 of the memorandum of W.T. Wells to Working Party F of the Evershed Committee; Gardiner was in complete agreement with the compromise– see letter Gardiner's letter of 29 January 1949: NA LCO 2/3976.
[90] See Memorandum to Sir George Coldstream 10 July 1957: NA LCO2/7137.
[91] Memorandum Rieux to Viscount Kilmuir, LC: 3 June 1957: NA LCO2/7137.

There was, as far as I can see, no public debate on this occasion, but Viscount Kilmuir established a very favourable outcome for civil justice.

In January 1958, the Treasury and the Lord Chancellor agreed that the fees for the Supreme Court should bridge the gap between the overall costs, less the judges' salaries and pensions, and the cost of providing buildings including their maintenance, rental or capital value and rates. It was accepted by the Lord Chancellor that this was not based on

> "any true principle of logic or justice. Nor would the formula which we devised have been possible if the non-contentious probate business not been so buoyant"[92].

The Treasury sought to apply the same principle to the County Court, but appreciated that this would mean an increase in fees of 40%[93]; they sought to return to the strict application of the principle recorded by Macnaghten for the County Courts – the taxpayer should pay for the judges and the buildings and that the litigants should pay for everything else, including pensions for officers, printing and postage. The Lord Chancellor's Department argued that the County Court should be treated differently, as it had no extraneous source of income from non-contentious probate; it would therefore be unjust for litigants in the County Court to pay for the cost of the greater part of the administration of justice when this was not required of litigants in the High Court. They thought it unlikely that the Lord Chancellor would agree to a change on "so important a question of principle of policy as the distribution of costs between the litigant and the taxpayer" without a further independent enquiry[94].

The matter was settled by a compromise, without agreement on principle, by the Lord Chancellor's agreement to increase County Court fees to reduce the deficit. Viscount Kilmuir emphasised the role of the Lord Chancellor:

> "As Lord Chancellor I have personally a peculiarly difficult decision to make because I must have regard both to the needs of the litigant and the taxpayer. I can never forget that the County Court is the poor man's court."

He pointed out that 87% of all claims in the County Court were for less than £20 and 68% for less that £10:

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[92] LCD (Boggis-Rolfe) to Treasury (Hayes) 7 July 1958 and 15 September 1958; NA LCO 2/7137; memorandum of 1 January 1965 NA T 227/2155 which refers to the agreement in an exchange of letters on 13 January 1958.
[93] Treasury to LCD 20 February 1958: NA LCO 2/7137.
[94] Letter Boggis-Rolfe to Hayes (Treasury) of 7July 1958: NA LC0 2/7137.

> "This is the class of business with which I am dealing and I could not possibly agree to any formula for apportioning County Court fees between the taxpayer and the litigant which imposed too great a burden on suitors having regard to the amount at stake in the proceedings."

He made it clear that the Macnaghten Committee had merely recorded the Treasury's view and that he could not agree to it "and in any case, the question of increasing County Court fees is a matter of practicability and expediency and not one for hard and fast formulae"[95].

The Treasury, in their turn, made it clear that they did not abandon the principle for which they contended. They maintained it was to be the guide they would want when next there was to be an increase in fees. In a subsequent negotiation, one Treasury official described one of Kilmuir's letters "as how to say nothing doing over three foolscap pages of single space typing"[96].

By 1960 there was again a growing deficit in the County Court. There was no discussion of principle, but an examination to see whether new fees could be levied[97]. The issue was dealt with by an increase in fees[98]. During the early part of 1961, there was again pressure from the Treasury to raise County Court fees, but the LCD perceived that it could not raise them without raising the fees in the Supreme Court, some of which had not been raised since 1930[99]. Again the crucial factor that determined the position in the Supreme Court was the receipt of probate fees, a charge that one Treasury official described as "a small estate duty and the system by which they largely finance the Supreme Court is logically pretty indefensible"[100]. Fee increases were agreed with the Treasury and those for the Supreme Court put to the Judges for their consent[101]. Again there is no record of a debate on principle with the judges, possibly because one of the LCD officials took the view that

[95] Exchange of letters between Lord Chancellor and Financial Secretary, 9 October, 19 November and 5 December 1958; NA LCO 2/7137.
[96] Butt memorandum of 15 August 1961: NA T 227/2155.
[97] Consideration was given to levying a fee for the work in administering judgment orders paid by instalments; it was suggested that the taxpayer should not be required to fund work that was in such cases mostly for the benefit of the hire purchase companies; such work be should paid for by the hire purchase companies, not the taxpayer: memorandum Butt to Thesiger 1 July 1960: NA LCO 8/81.
[98] Although the point does not appear to have been raised with the Treasury, it was noted by the LCD that the salaries of Registrars were a significant item and accounted for over a third of the deficit; as a significant amount of their time was devoted to judicial work, it was difficult to see why the taxpayer should not bear that expense. Gregory's memorandum of 9 January 1961: NA LCO 8/81.
[99] 27 February 1961: NA LCO 2/8051.
[100] Memorandum (Butt) 15 August 1961: T 227/2155.
[101] S. 213 of the Judicature Act 1925. It appears that the Lord Chancellor only found out about the increase conceded by his officials from a Cabinet paper: see memo Boggis-Rolfe to Coldstream: 13 November 1961 NA LCO 2/8054.

> "it has always been difficult to say exactly what the litigant should pay for in fees and how much should be provided out of general taxation for the administration of civil justice"[102].

Lord Gardiner

In January 1965, there were severe financial pressures on the Government of the day. When deciding what to do internally, it was accepted within the Treasury that there had been a clear agreement in 1958; if that stood, there was no scope to increase fees. In a submission to the Chief Secretary, they suggested a return to the argument that "litigants ought to cover the whole of the costs involved, including the judges' salaries and pensions and the cost of providing the buildings".[103] The officials seemed to have appreciated that some jurists (and, as they were given to understand, the then Lord Chancellor was amongst them) considered that "the provision of a system of justice is the right of every inhabitant and should be provided by the State". The officials considered, however, that such an argument was quite untenable. The Chief Secretary was duly impressed with the submission and arguments. He therefore wrote to the Lord Chancellor on 15 January 1965 asking for his agreement by the end of the month to an increase in fees.

The officials at the Treasury cannot have known that the Lord Chancellor had held a very robust view on fees from at least the time he had served on the Evershed Committee. His response before the end of the month bore this out; whilst he conceded a small increase in County Court fees, his response[104] was masterly in its critique of the proposals. First, he pointed out the Treasury were seeking the reversal of policy agreed between the Treasury and successive Lord Chancellors. Next, this could not be done in a fortnight; he had to obtain the consent of the judges to the increase in High Court fees, and County Court fees had to be laid before Parliament. He then pointed out that the United Kingdom got its justice dirt cheap – there were few full-time judges in comparison to the continental countries, the lawyers for the parties did much of the work and "even the Law Courts in the Strand cost the country nothing because it was built out of money provided by suitors' unclaimed funds in court". He went on to point out that it had always been accepted that the State had to pay a substantial proportion of the costs of the provision of justice:

> "(i) That justice in this country is something in which all the Queen's subjects have an interest, whether it be criminal or civil

[102] Memo Boggis-Rolfe to Coldstream and the Lord Chancellor: 16 November 1961 NA LCO 2/8054.
[103] Treasury memorandum of 7 January 1965 (Lucas): NA T 227/2155.
[104] 26 January 1965; NA T 227/3446.

(ii) That the courts are for the benefit of all, whether the individual resorts to them or not

(iii) That in the case of the civil courts the citizen benefits from the interpretation of the law by the Judges and from the resolution of disputes, whether between the State and the individual or between individuals.

Magna Carta, whose 750th anniversary we are about to celebrate, provides that we will not sell justice to the people."

After referring to the work in which he had earlier been involved, he concluded:

> "I think that in this respect the principle of Magna Carta ought to be maintained."

No change in these principles occurred in his Lord Chancellorship[105].

Lord Hailsham

On 3 August 1970, the new Chief Secretary (Maurice Macmillan) wrote to the new Lord Chancellor, Lord Hailsham, seeking again ways in which the Department's expenditure could be reduced. Hailsham was prepared to consider, like his predecessor, a rise in Supreme Court fees (including probate fees) with the consent of the judges[106]; the amount was to be discussed between their officials[107].

Nothing was said about County Court fees and when the Treasury realised their omission towards the end of 1970, the Chief Secretary at once wrote to seek to resolve the "longstanding problem over the level of County Court fees and the extent to which the expenditure on the County Courts is met by revenue from fees"[108]. Hailsham's reply[109] is interesting. After referring to the longstanding problem, he continued:

> "I understand that the Macnaghten Committee on County Court Fees (1922) approved the principle, which it said was authoritatively laid down in 1884, that the salaries and pensions of the judges ought to be paid out of public funds and that all other expenses of administering justice should be borne by the litigants. For a long time my predecessors have contended also that the litigants ought not to have

[105]On 22 September 1967, the Treasury, by circular 4/67, required all Departments to review annually the levels of charge for services with a view to securing an appropriate return on the capital employed or the full direct cost plus over heads; however there appears to have been no change in the applicable principles: see also letter Treasury to LCD (Kewish of the County Court Branch) 7 November 1967: NA LCO 8/81.

[106] The exercise of the power to raise court fees continued to require the consent of three of the four most senior judges: s 213 of the Judicature Act 1925; s 130 of Supreme Court Act 1981.

[107] Exchange 3 August 1970, 10 September 1970 and 15 October 1970: NA T 227/3451. The Chief Secretary did inquire whether there was scope to increase revenue by increasing fines, but was politely told by Mark Carlisle, on behalf of the Home Secretary, that it was not possible for the Home Secretary to influence the courts in imposing fines to increase the revenue.

[108] Letter to Hailsham, 9 December 1970. NA T227/3451; the view of Treasury officials remained constant – they wanted the cost recovered from the litigant – see exchange Gauntlett (Treasury) and Wells (LCD) 16 and 19 October 1970 NA T227/3451.

[109] 27 January 1971 NA T227/3451.

> to pay for the allied services and, in particular ought not to be expected to pay for the provision and maintenance of the court buildings and the rates. In recent years, inflation has made it less and less easy to adhere to the Macnaghten principle."

He then went on to say that the cost of recovering the allied services at that time was out of the question, as the fees would be out of proportion.

> "We would no doubt be accused of raising them to an extortionate level and told we were denying justice to plaintiffs and defendants alike. There would be sufficient substance in this to make the charge stick."

He therefore was at that time only prepared to concede a relatively small increase. It was then proposed that, if the matter could not be agreed, it be submitted to the Economic Policy Committee of the Cabinet. The officials, however, reached agreement on the increases in the amount that "the market would bear" and the making of economies – closing even more small County Courts[110].

Although that resolved the dispute at that time, it is important to note that the Treasury nonetheless saw its continued role as obtaining the Lord Chancellor's agreement that fees should cover all court costs and that there should be an annual review of fees. The Treasury noted how successful Lord Chancellors had been in the past in vigorously resisting this[111].

In contrast, it appears from the surviving papers that Lord Hailsham was not properly briefed as to which Macnaghten Report had laid down which principle, what had been agreed in 1958 by Viscount Kilmuir, or the position taken by Lord Gardiner.

It is at this point that the 30-year rule bites. We cannot see the way in which the change to the current policy of full cost recovery occurred; all I can do is to set out the fact of change.

The change: 1984 and 1992

In the 1981/2 session, the Public Accounts Committee[112] examined the question of the cost of civil justice. In evidence to that Committee on 22 February 1982 the

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[110] The Treasury considered the State should not subsidise 85% of the litigation in the County Court where the plaintiff was a trader trying to recover his debt; the court should not be a cheap debt recovery agency for traders who might be suspected of not taking sufficient care to establish that customers were creditworthy. Fees in such cases should be made irrecoverable, unless the court allowed the fees for plaintiffs who were not trading companies. The LCD successfully resisted this proposal - see Memoranda of 22 February 1971 and 5 March 1971- NA T 227/3451.

[111] Memorandum of R. Clifford Simpson to Stuart, 1 July 1971 NA T 227/3446.

[112] 12th Report from the Committee of Public Accounts Session 1981-2

Permanent Secretary to the Lord Chancellor's Department, Sir Wilfrid Bourne, made it clear that the Lord Chancellor and Treasury Ministers were reviewing existing policy. He put forward the traditional position of his Department. The Treasury official made it clear that the Treasury wanted the policy changed so that the full cost to the Exchequer, including the cost of buildings and judges' salaries was recovered; the Treasury looked on civil justice as a service, similar to other services provided by the State, and there was no reason to distinguish it from them; if full cost was not recovered, the Treasury was, in effect, providing an indiscriminate subsidy, as a person got the benefit of the service irrespective of means.

In its report published in April 1982, the Committee expressed no concluded view, but noted that there was a review of policy which seemed to them overdue. Whatever the level of fees, they considered that the accounts should disclose the full costs of the court service

It appears that the ministerial review was concluded quickly, as the Government announced in February 1983 its expenditure plans for 1983-4[113]. For the civil courts, "the plans take account of the agreed policy to recover full costs less judicial costs through court fees". The plans drew no distinction between the Supreme Court and the County Court[114].

In 1992, the Lord Chancellor's Department announced that civil court fees would be increased to bring them more into line with actual court costs[115]; the importance of this change was the fact that, for the first time, it was accepted policy that part of the salaries of judges attributable to civil justice work should be recovered from the litigants. The explanation for this change of policy was given in March 1994[116]:

> "Expenditure for court services is shown net of fees charged on civil business. Until 1992-93, those fees were set to recover about 80% of the cost of civil business. The 20% subsidy related to those services for which there was an approved social subsidy (mainly for family proceedings) and the costs of the judiciary. The Lord Chancellor decided in 1992 to phase out the judicial subsidy and the plans shown in table 1 include moving closer to recovering the full cost of civil business from court fees by 1996-7."

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[113] The Government's Expenditure Plans 1983-84 to 1985-6 (vol II p 42); the plans for 1982-3, presented in March 1982 had read "In the civil courts, the running costs are mainly offset by court fees" (see p 35 of vol 2).

[114] These plans and those for the following year were based on the assumption that the number of County Court proceedings would continue to rise; they were 1.83m in 1983 and were expected to reach 2/25m by 1986-7.

[115] The principles for charging for a service were set out in the Treasury's "The Fees and Charges Guide" published in 1993:

> "The purpose of charging for services is to ensure that resources are efficiently allocated. Charges should normally be set to recover the full cost of the service…."

[116] Cm 2509, para 11.

In 1996, a new fees Order which substantially increased existing fees also sought to abolish the exemption for those in receipt of income support; that part of the Order relating to exemptions was quashed[117]. Laws J made it clear that the effect of the order was to bar absolutely many persons from seeking justice from the courts. Access to the Courts was a constitutional right and it could only be denied if Parliament was persuaded to pass legislation which permitted the executive to turn people away at the court door.

On 19 November 1998, the Lord Chancellor announced that, although the aim of the policy of the Executive was to recover the full cost of the civil courts through fees, there would be a set of principles for fixing fees so that they would not prevent access to justice[118]. A series of exemptions and remissions from the payment of fees followed.

It has since remained the policy of the Executive to ensure full cost recovery wherever possible in non-family claims; it is anticipated that by 2004-05, combined civil court fees will show a near cost recovery against anticipated expenditure of 99.96%[119].

The current position

The policy of full costs recovery has meant progressive increases in fees by very significant amounts[120]. This has been exacerbated by two factors. First, the subsidy from probate has almost been eliminated. More accurate internal accounting over the last few years has apparently identified the cost of the various different functions carried out by the courts and the view has been taken that there should be no element of cross subsidy. Accordingly, the considerable contribution previously made by probate fees has almost entirely been eliminated by the reduction in those fees[121].

[117] R v Lord Chancellor ex p Witham [1998] QB 575.

[118] The principles included: "Protection must be provided for litigants of modest means; fees should match the cost of the service for which they are charged; the pay-as-you-go system should be extended without deterring access to justice; flat rate fees reflecting the cost of the stage or application should be paid at other charging points; issue and enforcement fees should reflect the value of the claim; flat rate fees should be set on the basis of average not actual costs; fees should be paid by the claimant, or where a specific application is made, by the party who made that application; fees should be paid in advance." Fee exemptions were provided for certain types of family proceedings which warranted an element of public subsidy.

[119] See response to written question 25 from Constitutional Affairs Select Committee on the Department of Constitutional Affairs' Departmental Annual Report 2003/04, provided in advance of the evidence by Sir Haydn Phillips, which was given on 13 July 2004 and referred to in question 90 of that evidence.

[120] See the Response of the Civil Justice Council of July 2004 to the DCA Consultation Paper on Fees issued in May 2004.

[121] In the year 2003/4, the fees on probate exceeded the expenditure by £4.85m; the contribution was thus very small to the overall expenditure of £452m. See the answers referred to in footnote 119.

Second, there has been a considerable fall in the amount of civil litigation[122]. Any further significant fall in business or any policy that sought to discourage those parts of civil business that have traditionally made a very significant contribution to the funds needed to finance the provision of civil justice, would have a disastrous effect, given that the fixed costs of civil justice have been reduced to the point where further cuts would be difficult to achieve without seriously undermining local justice.

The present position is therefore such that there is a real concern as to the sustainability of access to local civil justice.

THE QUESTIONS THAT SHOULD BE DEBATED

A Consultation Paper issued by the Department of Constitutional Affairs in May 2004 on proposals to raise court fees again and to introduce, for the first time, hearing fees in the High Court, did not invite comments on the policy of full costs recovery. However both the Judges' Council[123] and the Civil Justice Council have made their position very clear in their response to the consultation – they take very strong objection to the full cost recovery policy which they consider wrong in principle, as it fails to recognise the significant element of collective benefit in the administration of civil justice and risks seriously weakening the provision of justice in the civil courts.

It is striking that there seems to have been little debate of the principle which was ever open to public examination and surely the time has come for a proper examination of the issues. May I identify some of them?

First, the issue as to who bears the cost of the courts raises the nature of the right of access to the courts. Is it a fundamental right? The answer given by Laws J that it is, is plainly correct, but if so, why has the Treasury view prevailed that justice should be treated as akin to other services provided by the State? Why was not Bentham correct? Is the right to justice sufficiently protected by the policy for remission and exemption?

Second, does the State have an interest in the resolution of civil disputes so that it is right that it should provide the system at its cost or at least make a significant contribution[124]? It is a striking fact that, until 1982 and 1992, it was accepted that it

[122] For example, the number of actions issued in the QBD has fallen from 115,000 in 1998 to 18,624 in 2002.
[123] See the paper of the Civil Justice Council Sub-committee on Fees published on the Civil Justice Council Website.
[124] It is clearly necessary to examine the position in other countries; this was only briefly examined by reference to France by the Public Accounts Committee in 1982 (see footnote 112).

did. Many believed that the State had such an interest and that it should defray the entire cost, but generally the compromise first suggested by Romilly was followed, and there was a split in the revenue to be raised between those costs to be borne by the litigants and those borne by the State.

Third, if fees are to be charged, on what principles should the cost of access[125] be charged? If fees are to be charged, I have seen no convincing argument put forward to rebut the proposition that the cost of the constitutional right of access should be reasonable. But it is wholly illogical to contend that the reasonable charge for access must be based on the recovery of the full cost of providing for the exercise of that constitutional right throughout the country. Furthermore, increasing the cost of using the courts may well accelerate the decline in business. As I have mentioned, it is difficult to see how costs can be significantly reduced without massive local court closures or real investment in technology. Thus there is a real risk of a vicious spiral resulting from the policy of full costs recovery, as higher and higher fees would be required to cover the costs. The charges for access would therefore become more and more unreasonable. Furthermore, if it is accepted that there should be no element of cross subsidy, what is the user of a function to pay for? The current proposals offer "an improved discount" to those such as utilities who use the bulk issuing centre; this is of course a sensible commercial view, if you are selling a service where someone buying in bulk is entitled to a discount, but is it right that one type of litigant seeking justice is treated differently from another? Should those who use rural courts pay a surcharge, if the cost of keeping rural courts open is greater, or those in big cities get a discount? Should the user of the Commercial Court who can afford to pay high fees pay anymore than is required to meet the costs of that Court? Similar questions arise in relation to the proposal to fund the civil business of the new Supreme Court through fees in the same way. Much of the court estate is comprised of heritage buildings. Is it reasonable to make the litigant pay for them?

Fourth, if the public is to contribute to the cost, is the cost calculated on acceptable accounting principles? Let me give one example. I have already pointed to the fact that the largest court in the UK was originally paid for by litigants. A capital charge of 3.5% is nonetheless applied to its value each year under Government accounting rules. Why? Current proposals set out in the Department of Constitutional Affairs' Consultation Paper envisage funds for investment being raised through fees. Is this

[125] This question is not answered by s.92(3) of the Courts Act 2003 which merely provides that "…the Lord Chancellor must have regard to the principle that access to the courts must not be denied".

to be treated in the same way and the litigant to pay for the cost of the investment and each year have to pay for the capital charge on the investment? Are the costs of the work done in the Royal Courts of Justice (including, for example, all the costs of the judiciary) properly and transparently allocated between civil and criminal business?

There are other issues, but the outlines of the four I have set out should demonstrate the powerful nature of the argument that current policy is misconceived. A public examination of these issues, with a comparison of the position overseas[126], would therefore, I hope, make it generally understood that the provision of local justice for civil matters, as well as criminal matters, is an essential right of each individual; and that there is a real interest in the State in providing it for the good order and governance of our nations and not selling it as some sort of service, even though it may be right to charge the litigant a reasonable amount by way fee.

But even if that understanding were to prevail, is there a realistic prospect that it will be reflected politically by a change in policy? In my view, there will be enormous difficulties in persuading the Treasury and wider Government of the need to depart from the policy set in the 1980s in relation to the financing of civil justice, if civil justice is confined to what is now provided in our civil courts. Must we not therefore re-examine the current policy as to what is provided as part of civil justice?

To address that issue I now return to the second matter I identified as essential to the maintenance of local justice.

The justice that should be provided locally

I would suggest that we must think again about what should be encompassed within a system of civil justice and within centres which provide local justice, just as the Victorians did when they created the County Courts. I speak not merely of attempting to locate civil and criminal courts and tribunals under one administration in one location, but of the need to encompass what today's society perceives as necessary for the maintenance of good order and governance. Our aim must be, surely, to put the courts of civil justice at the heart of the community in each locality and to ensure that when Parliament or the Government has a new legal scheme on

[126] Sir Wilfrid Bourne was questioned by the Public Accounts Committee in 1982 about this and provided a memorandum about the position in France where court fees were abolished in 1978. (This is printed at Appendix II to the Report); see further the Paper of Fees Sub-Committee of the Civil Justice Council, published on their website.

the stocks, the courts of civil justice, with their extant system of courts and staff, are used as the machinery for that scheme, just as the County Courts were in the Victorian age.

Can I take two examples, out of the many that could be given? It is now widely accepted that the settlement of a civil or family dispute without the need for a court hearing often requires some form of alternative dispute resolution. The enormous growth of mediation services, provided mostly on a private basis, has been the result. Why is not the provision of mediation a part of the function of a court of justice? Why pay others to do this when the machinery is there?

Secondly, it is also widely accepted that one of the ways of dealing with the problems of those whose debts overwhelm them is the provision of debt counselling. Why is that not a function to be provided within the courts of justice?

Without the debate for which I have called, and without such a re-examination of what is to be comprised in the provision of justice, I regret to say that the prospects appear bleak for the maintenance of local justice outside the narrow spheres of criminal justice and some aspects of family law.

The position in Wales

The re-thinking of the function of the courts of justice must in Wales have a particular relevance, quite apart from the need to maintain local justice. I have on an earlier occasion sought to demonstrate that the structure of the present division of functions between Westminster and Cardiff Bay cuts right across the criminal justice system[127]. The solution to that question is of course a political one.

But the provision of civil justice, properly understood in its wider context, as I have endeavoured to show, also cuts across the division of functions and the ability of a nation to seek its own separate solution to the maintenance of good order and governance in its wider sense. The details of this need more discussion than is possible in this lecture, and of course the solution is again a political one. It is a discussion in which it is essential that executive and legislative branches of the Government of Wales are engaged through a powerful Law Officer who can address these issues and build on the work done by the first Counsel General.

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[127] Address to the Institute of Welsh Affairs, June 2002.

I also hope that this new law faculty will, with the benefit of the great learning and understanding of our legal history that Professor Thomas Watkin brings, look at issues that might at first sight not seem that important to academic study, but which, unless resolved, may leave that law student and the wider community with a future that sees a lamentable decline in our provision of justice to communities such as this.

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