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# Licensed private 'courts' in parallel with public civil courts

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Private courts will co-exist with public courts for the determination of cases that fall within the jurisdictional limits of magistrates' courts and the District Court, or for a subset of those cases.[1] The dynamic set in train by an environment conducive to choice and experimentation will lead to far more effective changes than can be devised by solitary thinkers sitting at computer screens or by well-intentioned committees.

This may have been a shocking thought to people at the end of the twentieth century but it will have become less so on closer inspection. In some respects, the idea of parallel private first instance courts is an expansion of the arbitration system, combined with the growing phenomenon of private alternative dispute resolution services. It is not dissimilar in substance from the power that some courts have had since the late nineteenth century to refer an action to arbitration without the consent of the parties, with the arbitrator's award being entered as the judgment unless challenged.

At present, the majority of civil claims are dealt with in courts of summary jurisdiction and intermediate courts (District or County Courts). Most of these claims are abandoned, capitulated to, or settled by agreement. The remainder that reach adjudication do not constitute precedents within our system of *stare decisis*. The public interest in these cases is certainly real, because lower courts produce local understandings about how the law is to be applied, they protect individual rights and liberties, they equalise to some extent the balance of power between parties and they remove incentives for less desirable ways of settling disputes. Nevertheless, bearing in mind the relatively standard nature of many of these cases, especially in debt recovery and claims for damages in respect of personal injuries, a way has been found, in this vision, of preserving the public interest in them whilst providing effective alternatives to the publicly funded court system.

The vision entails the licensing of private organisations to provide court services in certain matters up to particular jurisdictional limits (in no case higher than the District Court upper limit). Adjudicating officers in private courts will meet qualification standards, including having been admitted to legal practice for a specified period or having served as a judge. Legal obligations will be imposed in respect of natural justice, confidentiality and avoiding conflict of interest, and legal practitioners will remain subject to their general ethical duties. The jurisdiction of a private court will be based on informed consent, including consent given through a contractual term before the dispute arose. If an applicant chooses to commence proceedings in a private court, the respondent may object (unless already contractually committed) and the matter will be transferred to the appropriate public court. Otherwise, it will remain in the private court subject to a later application by either party to transfer it on the ground that there are special circumstances making the transfer appropriate; for example because of the unexpected complexity of the matter, the desirability of consolidating it with a case in a public court, or because an interlocutory injunction is required. ➢

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➢ (Private courts would have no coercive powers and so could not give injunctive relief.)

Appeals against private court decisions will be to the District Court or Supreme Court, as the case may be, in the normal way. Procedural fairness in private courts will also be subject to judicial review by the Supreme Court. Judgments of private courts will be enforced by registration in the Magistrates' or District Court, depending on the amount involved, and then execution in the appropriate way. By statute, the duty that lawyers owe to the court will apply in private courts, but that duty will be enforced in the normal way by a regulatory body or the Supreme Court.

The private court will decide for itself whether to operate a costs indemnity rule or any other costs rule, in the light of what will attract applicants or respondents. Taxation and enforcement of any costs orders would take place in the appropriate public court.

The incentives driving the system will be for organisations to offer dispute resolution services at a price and a quality that fully informed consumers may choose to select, and to build up a reputation for service. There will be pressure, subject to regulation and the supervisory jurisdiction of the Supreme Court concerning natural justice, to devise procedures and facilities (including opening hours) that offer an adequate level of service at the lowest cost or at the most expeditious pace. The resultant contrast between public and private courts will force all courts to consider continually their operating methods and the level of service they provide.

The system will have been introduced gradually, following pilot projects and experiments. It might also have been introduced for selected kinds of matters in the first instance. Initially, quite restrictive regulations on the ownership of companies operating private courts may have been necessary. It is likely that organisations controlled by lawyers and former judges will have been the pioneers. Where private courts have failed, it has been because the public courts offered something of higher value to litigants. Conversely, where they have succeeded, it has been because they offered something that people and businesses wanted. The publicly funded civil justice system may have contracted in line with the success of private courts but not necessarily so. The total volume of civil litigation may have increased but that was because there was a demand for dispute resolution that was not previously being met. Because a defendant under this vision always has the right to choose a public court, there is no reason to suppose that frivolous litigation or other abuses of process by plaintiffs will be any greater than if private courts did not exist. If public courts are today deterring frivolous litigation they will continue to deter it because the defendant will simply elect that the case should go to a public court. More likely, any increase in civil litigation will reflect a level of genuine claims that are currently being damped down by the imperfections of the public system.

In no circumstances will appellate matters or cases warranting the attention of a superior court of record be heard in private courts. The quality and independence of constitutionally-protected judicial officers, and the resources available to run a superior court, will be at least as high as today so that, inter alia, a proper system of supervision of the lower courts is maintained. Precedents will be produced by superior courts in the normal way. These courts will, however, have benefited from the experiences of lower courts and introduced further procedural reforms that are appropriate to their jurisdiction. ❖

## Endnotes

1. For an expanded discussion of the parallel private courts idea, see S Parker, 'A Case for Private Courts' (unpublished, 1998) which appears as an appendix to the Consultation Draft.

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