

15 May 2006

INTERIM REPORT ON CASE MANAGEMENT

1. Case Management is a vast topic; the working group therefore decided to limit the scope of the work to two main issues
 - a. the provision and management of resources; and
 - b. the timeliness within which cases are decided.

Questionnaires were drafted and sent to all members, but, despite reminders, the responses were unfortunately few. This was a disappointment as this is such an important topic. It is perhaps useful to begin this report by dealing with the importance of the issues.

The relationship to judicial independence

2. Various events have shown how easily judicial independence can be threatened by the Government. One of the easiest ways to attack the judiciary is to attack the way in which the business of the courts is being conducted by the judiciary. For example, if the Government can point to delay or the failure to remedy a wrong through an efficient appellate system, it is easier to attack the judicial system as inefficient, out of touch and old fashioned and thus, in the name of efficiency and good governance, to try and exercise a greater degree of control over the way in which judges deal with cases.
3. The efficiency with which the judiciary manage the case load of the court and individual cases is therefore of paramount importance to the maintenance of confidence in the judiciary and its independence.

I THE PROVISION AND MANAGEMENT OF RESOURCES

4. It strikes many, at first sight, that it is strange to seek as one of the characteristics of a judge an ability to manage resources. However resources play an essential role in being able to administer justice properly. It was of course in the past possible to do the work with little by way of resource –a judge could administer justice with one or two books, a table, chair and a room, much as the lawyer is portrayed in Pieter Breugel's "*The Peasant Lawyer*."
5. But even in Breugel's "*The Peasant Lawyer*", the papers covering the table and the room and the queue of litigants demonstrate the need for the proper management of resources. In the modern state, the proper administration of justice requires resources such as an up to date library and suitable building and the management of those resources by means such as the proper organisation of the case load of the courts in a city or

area and the organisation of judges so that they can handle that case load efficiently.

6. The key issues are:
 - a. Is the setting of targets by the Finance Ministry as a condition of the provision of resources consistent with judicial independence?
 - b. To what extent are judges sufficiently involved in the management of resources – both financial and judicial - and the achievement of those targets?

Targets and the obtaining of resources for justice

7. The ability of the judiciary to be able to deal with the cases before the court in as speedy and economical a way as is consistent with the interests of justice is entirely dependent on the resources provided by the State. The first question addressed under this heading is the provision of resources.
8. Unsurprisingly the ways in which the State provides resources differs from nation to nation. In general, however, the Ministry of Justice is responsible for making a bid to the Finance Ministry to obtain the necessary resources.
9. In some countries, the negotiations involve the imposition of targets by the Finance Ministry.
 - a. In Finland the Chief Judge of each court is consulted by the Finance Ministry before the bid is made in order to agree the targets to be achieved and the funds necessary to achieve them.
 - b. In Denmark, targets are set for each of the courts.
 - c. In England and Wales, the Finance Ministry and the Department of Constitutional Affairs (the nearest equivalent to a Ministry of Justice) agree on the funds needed to achieve targets that are set out in a Public Service Agreement between the Finance Ministry and the Department.
10. In England and Wales the Judges' Council is consulted about the resources needed and the targets to be set; the ultimate decision is that of the Ministry. The Council makes clear what is needed and whether what is being discussed is adequate and the practicality of the targets. In Italy, the Council for the Judiciary has no competence in determining or managing resources, but it can submit reports to the Ministry on these issues.
11. A question for debate is whether it is right to make the provision of resources dependent on the achievement of targets. It can be said that access to justice is a fundamental right of each citizen and the state has therefore an obligation to provide the funds necessary to achieve that. But in a modern state, it can be said that the State has an interest in ensuring

that the resources provided are managed efficiently and the setting of targets is one of the ways to achieve this. The real issue may therefore be the nature of the targets set. If the targets set are ones which are compatible with the proper and fair administration of justice, are they then objectionable? The task of the judges may therefore be to see that the targets set (or any other means of monitoring the use of the resources provided by the state) are compatible with the proper and fair administration of justice.

The management of the financial resources

12. The next issue that arises is the involvement of the judiciary in the management of the resources – financial and judicial. This report deals separately with financial and judicial resources, but they are, of course, interrelated.
13. There is a distinct difference in approach between the management of the financial resources and the management of the judicial resources – the deployment of judges and the allocation of cases to them. Whereas it is accepted that the latter must be for the judges, practices differ on the management of financial resources.
14. In Italy and England and Wales, the funds obtained are passed to the Ministry of Justice (Department of Constitutional Affairs) who are entirely responsible for the management of those funds
 - a. In Italy it is the Ministry of Justice which determines what is needed by each court; the Council of the Judiciary evaluates on a biennial basis the performance of each court through the provision of reports.
 - b. In England and Wales, the Department of Constitutional Affairs allocates the resources to the courts dependent upon the number and type of cases that they are expected to handle to achieve the targets set. The judiciary has no express responsibility for the ability of the courts to achieve their targets, but in practice the achievement of the targets is dependent on the judiciary and the judiciary pay close attention to them; the judges in charge of each court reports each year on its performance
15. In Finland, the Chief Judges of the Courts are required to use the resources allocated to them effectively; they monitor the performance of their courts with the assistance of their senior colleagues and employ performance indicators based on productivity, efficiency and effectiveness. The Ministry of Justice also monitors the performance nationwide by looking at measurements such as the outstanding case load and the time taken to complete proceedings.
16. In Denmark, the funds are entrusted to the Court Administration, a body independent of the Government which is responsible for the efficient allocation and administration of the funds; the allocation to the various different courts depends in part on the efficiency and productivity of the

courts. The Court Administration monitors the courts to see if they meet their targets and evaluations are published annually for each of the courts, in addition to the national evaluation.

17. The question for debate is the extent to which the judiciary should be involved in the allocation and management of the resources provided by the State for justice. The fair and efficient functioning of a judicial system is dependent not only on the adequacy of the financial resources provided but on the efficiency with which they are used. As the way in which the judges work has a critical influence on allocation and management should they not be more closely involved? Should not the judge's voice have a decisive influence on the question of whether a court needs more books or one more judge? If the decision is for more books, should not the judges be accountable for ensuring they hear the cases as quickly as they would have done if they had asked for an extra judge instead of extra books?

Management of judicial resources – allocation of judges to cases

18. The essence of the efficient management of resources is ensuring that the judges are allocated efficiently to cases. This is, it seems, accepted as a judicial responsibility. This may be because it is essential to the fair and impartial administration of justice that the Government cannot be allowed to influence the selection of a judge who hears a case or the posting of a judge who may decide a case in the way the Government does not like.
19. In Finland the management of the case load of the court is a matter for the judges. There are general and specialist courts and cases are allocated to judges with the relevant experience and expertise. Where a court is overburdened, judges are transferred from other units within the court or, if the overload persists, then temporary judges are used and funds are sought from the Ministry of Justice to pay for them. The position is similar in Denmark; reform is expected in 2007 to reduce the 82 judicial districts into a fewer number of larger Districts which will be able to contain fluctuations in their case load. In one specific jurisdiction there is an "ambulancehold" – a rescue team to deal with an overload of cases. In the proposed reforms, there is to be a more general supplementary team of judges to deal with any overload. England and Wales is also similar; cases are allocated to courts according to type and within courts, where necessary and possible, to judges with expertise and experience. Overloads of case are managed by the use of retired judges and part-time judges who are ordinarily members of the legal profession; judges (or cases) can also be moved from court to court to deal with overloads.
20. In Italy, the citizen has the right to be judged by the "natural judge"; a case is accordingly assigned to a judge under a mechanism that operates fairly automatically and the case cannot be moved from the judge who has charge of it. This is done to prevent the Chief Judge in a court "selecting" the judge; this system may pay greater attention to transparency in allocation than other jurisdictions where allocation may be governed by the

weight of cases that a judge has. There are also difficulties in dealing with an overload, as cases cannot be transferred from a competent court to another court, retired judges cannot be used and a change to the number of judges at a court can normally only be done on a permanent basis, after a complex procedure has been followed. The President of the Court of Appeal or the Council of the Judiciary can provide additional judges to a court for up to a year, but this can only be done if someone volunteers.

21. Although it is accepted that the efficient management of judicial resources is a judicial responsibility, the question for debate is the tension between (1) flexibility in the deployment of judges and the allocation of cases and (2) a more rigid system for the allocation of judges to areas and the automatic allocation of cases to judges. At the fulcrum of this tension is the nature of judicial independence. If the judiciary is entirely independent and impartial and perceived to be so, then can the judiciary be given the responsibility for the flexible management of the judiciary and the allocation of cases, as flexibility is recognised to be at the heart of the efficient summary management of resources?

II THE TIMELINESS WITHIN WHICH CASES ARE DECIDED

22. The second main topic was the achievement of a timely disposal of cases. The essential need for cases to be decided as quickly as the justice of the case permits is universally accepted; for example as long ago as 1215, *Magna Carta* laid down in England the principle: "Justice delayed is Justice denied". The fate of the fictional Jarndyce family in Dickens' *Bleak House* provides a vivid portrait of how far courts can stray from this.

23. The main topics for examination were:

- a. The imposition of time limits for cases and time targets for the case load of the court.
- b. The management of cases to ensure that cases were dealt with in a timely manner consistent with the interests of justice and the convenience of the parties.
- c. Other mechanisms to achieve timeliness.

The imposition of time limits

24. In Denmark, some time limits are imposed by law, but in all cases there are time targets. England and Wales is similar with time targets set for most cases; some of these are set by the Government as part of the agreement under which the Finance Ministry provides funds and some are set by the courts themselves. In both countries, the targets are set by reference to the resources available to the court, the legal rights of the individual and external factors.

25. In Italy, time limits are not generally imposed by law or defined by the Ministry or the Council, though specific time limits are imposed for the provision for reasons (motivated sentences) within a specific time of the

making of a decision. Time limits are thought inappropriate because of the huge difference between the work undertaken by judges and courts; some courts have 6-7 judges, whilst others have over 300. Some judges have more than a 1000 filed cases whilst others have only 400-500. In the larger courts, judges can specialise, but in the smaller courts they cannot. However in many courts, Chief Judges are acting on their own initiative to improve timeliness – see paragraph **Errore. L'origine riferimento non è stata trovata.** below.

26. The question for debate is whether time targets are necessary for the proper administration of justice and compatible with the just decision of cases. Some judges might say that their function is to reach the right decision between the parties who have submitted themselves to the seat of judgment and the time taken to reach the right result is a secondary consideration. But is this right? Are not litigants entitled to a speedy decision within a timescale that meets their needs? Should not they be provided with guarantees of timeliness?

The management of cases to ensure compliance with timeliness

27. All countries have timescales, set by law or procedural codes or rules, within which certain steps have to be taken after the case is filed and many have methods for tracking compliance with these time limits – computer tracking systems or action by court officials.

28. In England and Wales, the strict application of time limits is enforced by the general principle that no second chance will be given to litigants who have had ample opportunity to comply and no good reason to default. This does not exclude considerations of proportionality. The principle of strict enforcement must bite only where non-compliance has been substantial. A technical mistake or a minimal overrun of a deadline should not provide a reason for declaring non-compliance. This would discourage technical objections to compliance. In civil and criminal cases time limits are applied strictly, and this is seen as an essential case management tool. If a party cannot comply he should come back to court, either orally or in writing, to seek to vary a time limit. In certain procedural steps, judgment may be entered, or a party not be permitted to proceed with, or defend, a claim if time limits are not complied with. Usually that party may apply to court for 'relief from sanction', but even if the court is prepared to allow a party such relief, it may order the defaulting party to pay the other party's costs caused by the application to court. For other procedural steps, the time limits may be varied by consent of the parties, although this usually requires court approval, on paper, without a hearing.

29. In England and Wales and Denmark, the courts and the court administration monitor the caseload of the court to try and ensure that the time targets are met, but, of course, keep a very careful eye on the "quality" of the decisions.

30. In Italy, a large number of Chief Judges have, following guidelines laid down by the Council, been debating with their judges arrangements to

guarantee average times for cases, setting timescales for various types of case and in improving case management. These local arrangements, involving discussion and cooperation with the legal profession, have made a positive and huge contribution to the more efficient and timely disposal of cases.

31. In England and Wales and Denmark, trial dates are fixed by the court taking into consideration the interests of the parties and their lawyers. In England and Wales court officers known as “Listing Officers” manage, under the direction of the judge in charge of the court, the diary of the cases before that court which are going to go to trial, so as to ensure that the number of cases to be tried on a given day matches the number of judges available, after allowing for settlements etc. In fixing the date the listing officer tries to find a date convenient to everyone within a reasonable time; if a date convenient to everyone cannot be found the listing officer or a judge will then fix one that is convenient to most within a reasonable time.
32. The issue for debate is the extent to which the judge in charge of the court must manage the caseload of the court to ensure that the cases come to trial as quickly as possible consistent with the interests of justice and the convenience of the parties. It would seem that there is a common view that this should be done. How is it best done in a manner that shows that the judges are managing the cases efficiently, but according to individual judge’s independent decision making and to the parties a recognition that their convenience is a very material consideration?

Additional means to secure timeliness

33. There is a considerable difference in approach to the various mechanisms that can be used to try and ensure cases are brought to finality as quickly as possible:
 - a. **Appeals:** No appeal can be brought without the permission of the trial court or the appellate court in England and Wales. In Italy, the right of appeal is unrestricted.
 - b. **Vexatious litigation.** In Denmark, some filters are applied, but the main deterrent is making the loser pay the cost. In Italy, vexatious litigation cannot be filtered or stopped, but a special fine can be imposed. In England and Wales, vexatious litigants can be prevented by order from starting litigation without permission of the court; any litigation can be stopped by the decision of a court (subject to appeal) that the litigation has no real prospect of success.
 - c. **ADR.** There is uncertainty as to the real success of ADR in bringing litigation to a timely and economical conclusion. Some claim it is efficacious; others are more doubtful. It is a subject in itself which requires separate study.

d. **The form of the hearing.** The form and timescale of a hearing must depend on the nature of the case; best practice amongst the courts is considered and spread between courts and discussed with the legal profession. Measures to make the hearing as timely and efficient as possible include:

- i. Setting a timescale for each case
- ii. Using written materials
- iii. Curtailing oral argument
- iv. Ensuring there is time for a continuous hearing

34. Many of these ideas are led by the judiciary. The question for debate is the extent to which it is right for the judges to lead on this.