

# *‘Listing Concentrates the Mind’: the English Civil Court as an Arena for Structured Negotiation*

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**Abstract**—The dominant image of courts as agencies of trial and judgment has a long history in the common law world. Yet across that region sponsorship of settlement is now widely identified as the courts’ primary responsibility, transforming them into sites where the profoundly different rationalities that ground negotiated agreement increasingly supersede those of rule-based adjudication. This study examines the work of one English court—the Mayor’s and City of London Court—in sponsoring settlement and considers how that role is legitimated on both propositional and symbolic levels. This evolving role raises questions about the Victorian court premises themselves. How are we to regard the now frequently empty courtrooms, designed for trial and judgment and decorated with Gothic elevations linking them symbolically with processes of medieval kingship? Should we simply see this Victorian site of contemporary settlement processes as no more than the quaint residue of a vanished era? Or can these historic features retain potency and relevance at a symbolic level, providing legitimacy for bilateral negotiation rather than the open processes of trial and judgment for which they were originally constructed?

## *1. Introduction*

Close links with government and a core role in providing trial and judgment have historically been central to our understandings of what a ‘court’ is in the West. Under the ideology of the rule of law, ‘justice’ has been conceptualized in terms of command realized through reasoned judgment; and we have come to think of judges virtually exclusively in those terms. This dominant neo-classical image of the court persists in the cosmologies of the common law world, an apparently essential and enduring component of the ideology of legalism. Yet it does so in the face of widely recognized transformations. Over the last 30 years, it has become generally acknowledged that lawyers routinely use the procedural

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path of litigation for their settlement negotiations and that the number of civil trials has gradually decreased.<sup>1</sup> Latterly also, the articulated priorities of government, and of the courts themselves, have shifted dramatically. Sponsorship of settlement is now explicitly identified as the courts' primary responsibility, with supervision of trial and the delivery of judgment becoming residual, the solution of last resort. So common law courts are today sites where the profoundly different rationalities that ground rule-based adjudication and negotiated agreement co-exist and interact.

In England, this 'culture of settlement' has been advocated by the higher judiciary,<sup>2</sup> adopted as government policy, enshrined in a new regime of civil procedure and increasingly realized in court practice. In broad, schematic terms, the procedural regime introduced through the Civil Procedure Rules of 1998 promoted settlement through two radical changes.<sup>3</sup> First, through Pre-Action Protocols, a wholly new pre-litigation field is marked out under which information exchange and negotiation is required prior even to the filing of a claim if the possibility of later cost sanctions is to be avoided. So the procedural framework is now designed to enforce and police negotiations in the pre-litigation phase, with governmental intervention reaching out into what was previously the private sphere. Second, once a claim is filed, the dispute moves into a phase of settlement oriented 'case management' during which the parties are subject to judicial supervision as they move along the procedural route at the end of which lies the theoretical possibility of trial and judgment. So even once 'litigation' is formally commenced, settlement continues to be prioritized and we will see that a phase is provided during which direct, active judicial sponsorship of settlement may be attempted.

In the face of these profound transformations, we need both a clearer empirically based understanding of what happens in common law civil courts today and, as Martin Shapiro argued in his seminal book *Courts*, 'a more general theory of the nature of judicial institutions'.<sup>4</sup> There, seeking to revise the neo-classical model of trial and judgment, Shapiro suggested that 'courts are much less independent and adversarial than the prototype suggests' and 'seek to elicit the consent of the parties to their judgments by introducing important elements of mediation and compromise'.<sup>5</sup>

<sup>1</sup> For the English scene, see Dame Hazel Genn's Hamlyn Lectures, *Judging Civil Justice* (CUP, Cambridge 2009). See, for the seminal examination of this latter development in the United States, Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in the Federal and State Courts' (2004) 1 *J Empirical Legal Stud* 459–570.

<sup>2</sup> Most prominently in the report prepared for government by Lord Woolf. *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London 1995).

<sup>3</sup> For accounts of the new rules see, Simon Roberts, 'Settlement as Civil Justice' (2000) 63 *MLR* 739–47; Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (CUP, Cambridge 2005).

<sup>4</sup> Martin Shapiro, *Courts* (University of Chicago Press, Chicago 2005) vii.

<sup>5</sup> *Ibid* viii.

The argument here is that we need to go much further than Shapiro's call to expand the neo-classical model to allow for a mediatory element. The folk model of the court as agent of trial and judgment no longer provides a plausible analytic starting point; and we need not extend the protracted period of mourning that has already attended the 'vanishing trial'. Instead, recognising that civil courts no longer correspond to the neo-classical model, and that they today re-conceptualize their primary role as the sponsorship of settlement, we have to begin again by examining empirically how they are in practice used by their lay clientele and the professionals representing them, and how court personnel have both actively sponsored and responded to that changed use.

This fundamental reorganization is taking place on sites self-consciously designed for the conduct of public trials and the delivery of judgment. The great Victorian courts, erected during the second half of the 19th century, remain; but their internal arrangements—consisting primarily of large spaces for trial and ancillary waiting areas—are difficult to reconcile with the new primary propose of sponsoring settlement. This discontinuity is underlined on the symbolic level. The Gothic architectural styles chosen for the external elevations and internal fittings of these buildings recall the imagined authority of medieval kingship and in doing so confer legitimacy on judgment. How should we think about these buildings—and the surviving exotic persona and manners of the judiciary that still inhabit them—in the context of the courts' new primary role of sponsoring settlement? Recognising the fact that the great courtrooms now often lie empty, and that the primary role of the courts is no longer the provision of trial and judgment, can the Gothic elevations of the courts and their internal spacial arrangements continue to legitimate the courts' new role, or is there not now a significant symbolic and interpretive deficit?

This article makes a tentative start on the process of re-examination by reporting an ethnographic study of one English civil court in a metropolitan commercial location, The Mayor's and City of London Court. The justification for an ethnographic approach in studying the contemporary work of this court lies in the now transformed nature of court productions—from 'public', recorded processes of trial and judgment, to 'private' processes of settlement. The substance of litigation now lies in the completion of forms and in small face-to-face interactions. The former processes required no painstaking recovery. 'Law' has long spoken freely—even garrulously—about itself. So that native voice has been heard in an articulate cosmology of legalism centred on the 'rule of law' and a florid native discourse consisting of: codified norms; recorded judicial utterances; specialized practice conventions and a long tradition of professional commentary. Beyond all this already lies an elaborated 'meta analysis' of academic commentary ranging in stance from ideological commitment to emancipated critique. That existing *oeuvre* of commentary has focussed on courts as agents of trial and judgment, giving particular attention to the analysis of superior court decisions.

Although that native voice is strong and clear, in no obvious need of rescue, there has of course always been more to say about courts than lawyers themselves and their academic commentators have generally articulated, particularly those aspects that take place beyond the public view. But that point can now be made much more strongly with the newly proclaimed role of sponsoring settlement. While to a considerable extent these processes lie in a textual rather than an oral culture, they take place beyond the public view and require careful recovery and submission to analysis.

While the task and goal of an anthropologically informed study of a court in the contemporary West must differ in important respects from those classic ethnographies that struggled to record worlds that would otherwise have been lost, their oral cultures unrecorded, the method is the same. At the heart of anthropological research has been sustained participant observation, directed toward the production of ethnography—'living in the village with no other business but to follow native life'.<sup>6</sup> This method is intended to yield accounts of local social worlds that represent as closely as possible the way in which actors in those worlds experience them. Upon this recovered material, but kept distinct from it, the anthropologist expects also to construct a 'scientific', theoretically grounded, analytic commentary.

Accordingly, this study seeks to do two things. First, it aims to recover the thick texture of The Mayor's and City of London Court's evolving role in sponsoring settlement by observation of court processes, including Case Management Conferences and court sponsored mediations. These direct observations have been supplemented by reading of court files and interviews with the resident judiciary and court staff. Second, it examines how the Court's role in sponsoring settlement is legitimated on both propositional and symbolic levels.

## 2. *The Mayor's and City of London Court*

The Mayor's and City of London Court, incorporated in the general County Court system in 1971, claims to be the oldest local civil court in England, situated close to Guildhall since the 13th century. When the Court was re-built in 1888 on its present site just off Guildhall Yard, its design boldly proclaimed that open, contested trials were its primary purpose.<sup>7</sup> From the entrance hall, a massive stone stairway wound up to an open area giving onto two large courtrooms for the Judge (40' × 25') and the Registrar (30' × 25'). Spacious chambers for these officials lay behind their courtrooms. In the background, on the ground floor, was accommodation for the Clerks and the Bailiffs.

<sup>6</sup> B Malinowski, *Argonauts of the Western Pacific* (Routledge, London 1922) 18.

<sup>7</sup> Material relating to the construction of the court was obtained from the Minutes and Reports of the Law and City Courts Committee of Common Council. These Minutes and Reports are kept at the London Metropolitan Archive, Northampton Street, London EC 1.

The central purpose of the court as a government sponsored agency of trial and judgment, marked out in these internal spacial appointments, was underlined on a symbolic level by the external architecture of the building. Its Perpendicular Gothic elevations, chosen by the Law and City Courts Committee of Common Council in preference to an Italianate design offered in the alternative by the architect,<sup>8</sup> represented what must then have been a predictable choice given the immediate proximity of the Guildhall. They now seem unremarkable as the almost routine insignia of a great period of Victorian court building, a readily understandable attempt to secure continuity and legitimacy for the new Court by associating it with imagined roots in medieval kingship.

These arrangements have been slightly but significantly altered to accommodate the contemporary business of the Mayor's and City of London Court. Both original courtrooms remain, now available to the two resident Circuit Judges. But two further, smaller courtrooms and chambers have been provided for the District Judges. One of these is situated on the first floor, behind the original Registrar's Court, carved out of the formerly ample space set aside for attorneys and counsel. The second is on the ground floor, created within some of the space originally occupied by the Bailiffs. The judges are assisted by an administrative staff of 14—12 clerks and ushers, and two managers—occupying a General Office on the ground floor.

Today, for a substantial part of the average working week, the two great courtrooms forming the centrepiece of the building lie empty. The greater part of the contemporary business of the court is now conducted in the parts of the building occupied by the District Judges and in the General Office. We look at this business in more detail below, but we should note here that some of this work relating to settlement, formerly conducted in the privacy of 'chambers', is now done 'in public', as the two new courtrooms are largely devoted to case management conferences.

With the main action moved elsewhere, how should we see the historic space represented by the original courtrooms and the Gothic elevations that clothe the whole building? Are these now largely redundant, sediments of an almost vanished past, or do they continue to provide legitimacy on a symbolic level for the parties' bilateral negotiations and the court's sponsorship of settlement?

<sup>8</sup> The first drawings for the new court were prepared by the Corporation Architect, Horace Jones, in 1885. See, *New City of London Court*, Report to Court of Common Council, presented 3rd December 1885. For these Jones chose Perpendicular Gothic rock faced elevations, complementing those of the adjacent, recently completed library. Following Jones's death in 1887, slightly revised Gothic elevations were submitted to the Law and City Courts Committee, alongside alternative Italianate elevations, by his successor Andrew Murray. The Gothic version was chosen by the Committee [See Minutes of Meeting on 22nd June 1887: COL/CC/LPC/01/14], a choice endorsed by Common Council. See, *New City of London Court*, Report to the Court of Common Council, from the Law and City Courts Committee, presented 23rd June 1887. These elevations are realized in the present court building. The Committee seem to have gone for Gothic for three reasons. First, this was the style lately used in the immediately adjacent library reconstruction. Second, the Committee was strongly impressed by Street's Royal Courts of Justice, completed five years before a mile or so to the West at the far end of Fleet Street. Perhaps most important, Gothic elevations responded directly to those of the Guildhall itself.

### 3. Claims and their Trajectories

During 2008, 8500 civil claims were filed at the Mayor's and City of London Court (see Table 1). These claims covered a broad spectrum of contract, property and tort cases. Reflecting the busy commercial milieu of the City, business includes a considerable proportion of complex commercial contract and property disputes.<sup>9</sup> Among the tort cases brought to the Court are large numbers of personal injury claims. The Court does not exercise jurisdiction in family matters; and Small Claims account only for approximately 18% of cases allocated to track.

The trajectory of claims at the Mayor's and City of London Court follows a pattern broadly similar to that observable at other County Courts in England under which a very large proportion of claims filed are settled or otherwise disposed of as cases move through an established sequence of procedural phases, increasingly rarely culminating in trial. At the Court in 2008, a defence was entered in approximately one quarter of cases filed. A large percentage of the undefended claims were concluded in default judgments, processed administratively in the General Office without the files being seen by a judge. Of the defended cases, more than half (62%) were discontinued before being allocated to track. Among cases that were allocated to track, nearly 46% were

**Table 1.** The Mayor's and City of London Court: Business Summary for Three Years to end of December 2008<sup>a</sup>

	2006	2007	2008
Claims issued	5777	6465	8500
Defence entered	2021	1741	2108
Allocated to track	914	759	809
Listed for trial	637	463	443
Finally determined at trial	140 <sup>b</sup>	139 <sup>c</sup>	124 <sup>d</sup>

<sup>a</sup>Data extracted from *Business Management System Trend Reports*.

<sup>b</sup>Number of cases finally determined at trial supplied by Chris de Souza, Ministry of Justice. This is the actual figure for the 12 months to the end of March 2007.

<sup>c</sup>Number of cases finally determined at trial supplied by Julia Hopkins, Ministry of Justice. This is the actual figure for the 12 months to the end of March 2008.

<sup>d</sup>Number of cases finally determined at trial supplied at Mayor's and City of London Court from HM Courts Service statistics. This is the actual figure for the 12 months to the end of December 2008.

<sup>9</sup> The sharp increase in claims filed during 2008 in part reflects the fall-out of the difficulties surrounding the building society Northern Rock.

settled or otherwise discontinued prior to listing for trial. Of those surviving to be listed, a high proportion settle with only 27% determined at trial (see Table 1).

These figures centre upon four obvious, pivotal moments of the contemporary litigation process—the filing of a claim, the entry of a defence, allocation to track and listing for trial. Around each of these markers a substantial portion of court business reaches its conclusion, and together they provide the occasions around which most claims are disposed of.

### A. *Filing a Claim*

Today, under pressure of the Pre-Action Protocols, filing a claim is ideally—and increasingly in practice—preceded by a period during which the parties are in co-operative communication and attempts are being made to settle the case by negotiation. So filing a claim in many cases represents the culmination of a process of information exchange and learning at the end of which both parties, if not in harmonious agreement, share a common understanding that matters have been concluded and will terminate with filing and the ensuing administrative processes (including judgment by default) then set in train. Where agreement has already been reached, filing a claim may represent a prudent means of ensuring enforcement should that become necessary. In other cases it will be clear to both sides that the defendant lacks the resolve to continue; there, following the filing of a claim, the ensuing judgment by default provides a formal coda. In the result, in the large majority of claims, ‘filing’ is most accurately seen as signalling the conclusion of a dispute process, rather than its initiation.

Even where a common understanding has not been reached at this point, the matter may still be concluded bilaterally in a flurry of negotiations following filing of the claim without formal defence. But the defence itself is perhaps best seen as the initiation of a further cycle of negotiations.

### B. *Entering a Defence*

In those cases where a defence *is* entered, an existing dialogue is formalized and continued. Reading a claim, defendants and their legal representatives are forced to think carefully about the formulation of their defence, and that formulation prompts serious reciprocal reflection when read by claimants. In consequence, once a defence is entered, the terrain of the dispute has been surveyed and possible options have been clarified. That clearing of the ground sets the scene for further negotiation. In the result, nearly two thirds of surviving claims (62%) settled quickly at this point in 2008, before a District Judge had even had a first opportunity to read the file.

*C. Allocation to Track*

Once a defence has been entered, the Court requires both parties to complete and return an Allocation Questionnaire to assist the Court in assigning the dispute to the appropriate track. The contemporary state of this questionnaire<sup>10</sup> emphasizes the priority attached to negotiation under the Civil Procedure Rules. The first section of the questionnaire is headed 'Settlement' and an introductory note explicitly points to the requirement that 'parties should make every effort to settle their case before the hearing'. These efforts are identified for the purposes of the questionnaire as 'by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation'. The Questionnaire warns that the court will 'want to know what steps have been taken' in pursuit of settlement. In completing the Questionnaire, legal representatives are required to confirm that they have explained to clients 'the need to try to settle; the options available; and the possibility of cost sanctions if they refuse to settle'. A first question requires representatives to state whether they want to attempt settlement at this point and a second whether they want a 'one month stay' in order to do so. They are then asked explicitly whether they would like the court to arrange a mediation appointment. If they do not propose settlement attempts at this moment, reasons why this is inappropriate have to be entered on the Questionnaire. So the mode of disposal by settlement is heavily underlined at this point.

We consider below<sup>11</sup> what takes place during the phase in the litigation process initiated by the filing of Allocation Questionnaires by the parties; but in general terms this phase represents the first opportunity for District Judges to influence directly the trajectory of a case through the use of stays and Case Management Conferences. During 2008 46% of cases allocated to track were settled in the space prior to Listing for trial.

*D. Listing for Trial*

The next formal watershed at which parties and their legal representatives are forced to take stock arises when the case is listed for trial. Required to fill in a further Questionnaire at this point, litigation specialists are unanimous that 'listing concentrates the mind': reports of experts will be in, issues will have clarified and narrowed, Part 36 offers will be on the table. Serious thought now has to be given to the prospect of trial and resources devoted to preparing for it. As a result, the great majority of surviving claims settle (73% in 2008)—sometimes under the pressure of 'reality checks' administered by District Judges at pre-trial review—as trial approaches. Such checks may involve the

<sup>10</sup> HMCS Form 150, that came into force in April 2008.

<sup>11</sup> See Section 4.

court in probing carefully the extent to which lay disputants understand the financial implications of proceeding to trial.

### *E. Trial*

Once trial commences, judges at The Mayor's and City of London Court assert that their role in sponsoring settlement is exhausted and that they direct their efforts exclusively towards securing a hearing for the parties and the delivery of judgment. Observation of trials confirms this position: while a few cases settle during adjournments, judges were not seen to exert any pressure towards that end. Something of a mystery does, however, surround the failure of those cases that *do* reach trial to have settled beforehand. Most of these seem to the observer no different from many in their cohort that did conclude in settlement. Perhaps one significant variable is that a high proportion of the few cases reaching trial involve plural defendants. The more elaborate communications arrangements necessitated under these conditions may help to explain 'failure' to settle. If that should be the case, it would provide an argument for more extensive use of mediation in multi-party litigation.

This picture of the Court as primarily constituting an arena where settlement takes place, conveyed by the trajectory of business during 2008, reflects the still evolving consequences of the procedural reforms introduced in 1998. Against a rising number of Claims filed (8500 in 2008, as opposed to 6465 in 2007 and 5,777 in 2006), proportionately fewer cases were defended, allocated to track and listed for trial in 2008 than in the two previous years (see Table 1). Significant too was the increasing number of cases settled or otherwise discontinued during the phase of active judicial involvement commencing with the filing of Allocation Questionnaires. This increase must in part be attributed to the growing engagement of District Judges in actively sponsoring settlement. In that context it is significant that 414 Case Management Conferences were scheduled at the Mayor's and City of London Court for 2007 as opposed to 359 in 2006.<sup>12</sup> Under pressure from the Ministry of Justice, increasing numbers of these conferences are conducted over the telephone.

We need to be clear about what 'settlement' in these contexts involves. The primary image of two people co-operating to resolve their differences through voluntary communication is undoubtedly a beautiful one. But whatever the beauty of that image, its realization is inevitably precarious. While the rhetoric of voluntary agreement is retained, settlement in the lawyer's sense should not be romanticized. It can be, even in the post-Woolf world, the culmination of a long, bruising process, characterized by secrecy and suspicion, during which one party's representatives have successfully opposed the other to a late point in the trajectory towards trial and judgment. They settle then rather than face the

<sup>12</sup> HMCS *Listing Analysis Reports*, 2006 and 2007.

further exposure to risk involved in proceeding to trial. Such a case is outlined below.<sup>13</sup>

A claim was filed in late August 2005 in respect of unpaid invoices relating to supply of tomatoes and cucumbers. The defence entered on 10 September claimed that this produce was unfit for supermarket sale. Following receipt of Allocation Questionnaires at the beginning of February 2006, the court ordered successive stays for settlement and the defendant paid £6,760 into court in mid November. At a Case Management Conference on 21 November, the dispute was referred to the City Disputes Panel for mediation, with a further stay until 14 December. Mediation was attempted on 7 December; but no agreement was reached.

On 15 December the case was allocated to Multi-Track with a trial-window of four weeks February-March 2007, and a trial date was ultimately fixed for 2 May. On 25th April the parties filed a draft Consent Order stating agreement that the claimant should receive the money paid into court in November and a further sum of £2,240.

#### *4. Court Sponsorship of Settlement*

Once the Allocation Questionnaires are returned to the court by all parties to the dispute, these are added to the file already containing claim and defence before it is first read by a District Judge for purposes of allocation. So at this point, and during the ensuing phase between receipt of the Questionnaires and listing for trial, the Court has its first opportunities to influence the litigation process directly. This influence is primarily exercised through the power to order ‘stays’ and to arrange Case Management Conferences.

‘Stays’ are best conceptualized as court-directed pauses during which the litigation process is temporarily suspended. They may be requested by the parties or ordered spontaneously by a District Judge. Parties use requests for stays strategically both to force opponents to reflect and to provide themselves with time for the collection and management of information. We have already noted that the first question on the Allocation Questionnaire concerns settlement and points to stays and third party assistance as means of achieving this. If either party ticks the ‘Yes’ box at this point, a stay is almost certain to be ordered; even if neither does so, the judge may still decide that a stay is appropriate to provide space for the parties to ‘take stock’ or to enter settlement directed negotiations.

The other principal avenue available to the District Judge on reading the Allocation Questionnaires is to convene a Case Management Conference. These occasions may be used to sponsor settlement as well as to plot the course towards trial. At the Mayor’s and City of London Court, those CMC’s that are not held on the telephone, are typically convened in the two new,

<sup>13</sup> 5MY03665.

small courtrooms—with the door open—rather than in Chambers. So the CMC now takes a place alongside the diminishing number of final trials as the public face of the judicial process. Reading the files and talking to judges and lawyers, it is clear that scheduling a Conference may ‘work’ in a number of different ways. First, lawyers are generally quite reluctant to appear at a Conference, in front of a District Judge, with their clients sitting beside them. Criticism for delay and the generation of unnecessary cost can be very embarrassing in this context. So, the Judge proposing a Conference—or a party requesting one—may in itself precipitate prompt bilateral negotiation, with ensuing settlement obviating a psychologically costly experience for members of legal teams. The following case history provides an illustration:<sup>14</sup>

This was a claim in contract, filed on 31 May 2006, in respect of alleged defective elements of a domestic swimming pool design. The pool surround, roof, ventilation and filtration systems were all claimed to be faulty. A defence was entered only in November, and Allocation Questionnaires filed in mid December. The file was read by a District Judge in early January, 2007, and a Case Management Conference arranged for 23 February. On that occasion the parties agreed to attempt mediation and the case was stayed till June to enable mediation to take place. Mediation was originally set for 4 June; but this was postponed at the instance of the claimants on the basis that inadequate discovery had taken place. Further stays were sought; but refused by the Court and a second Case Management Conference fixed for 3 July.

After this Conference had been postponed, the claimants’ solicitors wrote to the Court on 1 August that ‘proceedings settled and CMC will not now be necessary’.

Where a Conference takes place, observation of these occasions and data in the files provide substantial empirical evidence that the judges take their responsibility for encouraging settlement, imposed under the Civil Procedure Rules, extremely seriously. They are likely to probe the possibilities of settlement directly (‘Can the present distance between you really justify the substantial additional expense of proceeding to trial?’) as well as to encourage the parties to use available ADR procedures (‘This case cries out for mediation.’). These occasions also provide opportunities for the assembled legal teams to explore settlement by ‘having a chat’ while they are waiting to go in or after the Conference has taken place.

Case Management Conferences undoubtedly offer opportunities for judges to put considerable pressure on the parties to settle, and in doing so to subvert the ideally voluntary character of settlement. However, empirical observation of Conferences at the Mayor’s and City Court indicates that the judges there take great pains to avoid this danger of coercion that ‘informal justice’ has created. Outcomes are left to the parties once the judges are satisfied that they

<sup>14</sup> 6MY02149

appreciate the financial risks of proceeding further, and particularly of incurring costs that are disproportionate to the amount claimed.

Within a Conference, the different rationalities of trial and negotiated settlement are often explicitly articulated as a foundation of oppositional strategies developed by the respective legal teams. This is vividly illustrated through the case history of *Angoscini v Evans*, filed at the Mayor's and City of London Court in 2007:<sup>15</sup>

A man and a woman, living together in a West Country town, decided to make money buying and selling residential property. In 2001 they formed a limited company, incorporated 'to undertake property development projects'. The company had a share capital of £100, of which one [the woman] held 51% and the other [the man] held 49%. The woman acted as Managing Director and the man as Company Secretary. His elderly mother lent the company £60,000 to kick start the enterprise.

Their personal relationship seems to have come to an end sometime in the latter part of 2003 but they continued their business apparently harmoniously until 2006. From an early stage in the enterprise, the man had used the company's credit and debit cards to pay for everyday living expenses. During 2006 relations between the two seriously deteriorated. A symptom of this breakdown was the man's unauthorised use of a company cheque, which the woman had issued for the purchase of property for development, to repay his mother's loan to the company.

When the woman discovered this unauthorised use, she brought an action in the Mayor's and City of London Court, as Managing Director of the company against the man in his capacity as an employee, claiming misappropriation of company funds. The claim specified unauthorised use of credit and debit cards and misappropriation of a cheque. There was a concurrent claim that the claimant was entitled to part ownership of a residential property in the defendant's name, and that the defendant had made personal use of a business opportunity that had come his way as an employee of the company. The defendant counterclaimed for a beneficial interest in another property, held in the name of the claimant, in which the claimant and the defendant had lived.

It was common ground that there had been a personal relationship between the director and the employee—they had lived together—before the relationship broke down. Following filing of Allocation Questionnaires, a Case Management Conference was convened by a District Judge at the request of the defendant's legal representatives.<sup>16</sup>

At the Conference, the judge characterised the dispute in a particular way and outlined a potential trajectory. He began by saying, '...this is a personal as opposed to a corporate issue'. He then drew the attention of the parties to the availability of the Mayor's and City of London Court Mediation Scheme, noting that 'this case cries out for mediation'. When he had spoken, opposed strategies (already apparent in the draft Directions proposed) underpinned the preliminary submissions made by both sides. The claimant's barrister treated the case as a straightforward company dispute, revolving around breaches of fiduciary duty on the part of a servant. These needed

<sup>15</sup> 7MY02895.

<sup>16</sup> Held on 5 November 2007, observed by Simon Roberts.

to be subject to full-scale discovery, detailed responses and ultimately a multi-track trial. The defendant's counsel suggested that the most appropriate way forward was a meeting between the two sides ['a chat after this hearing'] at which information could be exchanged and an attempt at consensual settlement made. This proposal was made with the explicit objective of reducing costs. The claimant's barrister said he regarded this as a pointless diversion. Following these submissions, the judge stated that he did not want to see 'this case settled at the door of the court after many thousands of pounds have been expended'. But he concluded that settlement attempts should take place after witness statements and an agreed schedule of issues had been prepared. To allow for this, he ordered a tight timetable with a six-week window for mediation also built in.

This dispute underlines the degree to which the rationality of 'settlement' has emerged alongside that of trial and judgment, beginning to replace the latter as the dominant theme in the judicial cosmology. But sediments of the 'old' rationality of trial and judgment still pervade the court process. As this dispute reveals, these divergent rationalities both remain available to found litigant strategies. In this case, the 'old' rationality informs the claimant's presentation, providing a legitimate basis for her legal representative to insist upon pursuing the course towards trial, even in the face of the defendant's settlement oriented response. Yet the 'new' rationality informs the Judge's view as to how the dispute should be dealt with as well as explicitly grounding the defendant's submissions.

### *5. The Mediation Scheme*

As an integral part of its overall case management regime, the Court refers disputes to mediation in pursuance of its goal of sponsoring settlement. Under the Mediation Scheme, which has operated since May 2006, a judge may refer a dispute to mediation at any point following first reading of the file for the purposes of Allocation. Cases for mediation are referred to the City Disputes Panel that administers the Scheme on behalf of the Court. This procedure is designed to establish necessary distance between mediation and the court, as is the arrangement for mediation to take place at the International Dispute Resolution Centre in Fleet Street.

The Mediation Scheme is advertised prominently on the Court's website, on posters in the entrance hall, and directly sponsored by the judges in the context of case management. Reference to mediation under the Scheme is a selective process, taking place at the discretion of a District Judge. Judges have so far been sparing in making referrals; 83 cases were referred in the first three years of the Scheme's operation (see Table 2 on following page). A preliminary examination of the court records suggests that, leaving personal injury cases aside, approximately 30 contract, tort and property cases reach allocation to

**Table 2.** The Mayor's and City of London Court: Mediation Referrals for the First Three Years of the Scheme's Operation

	2006	2007	2008
Referred to mediation	27	21	35 <sup>a</sup>
Settled at mediation	18	9	15
Settled between referral and mediation date	–	–	5
Not settled	4	6	8
Returned to court without mediation	5	6	6

<sup>a</sup>One case was scheduled for mediation on 9th June.

track in an average month;<sup>17</sup> so the cases referred in the first years of the Scheme's operation represent a small proportion of the available reservoir.

A referral may originate in a request from one of the parties, in a suggestion from a Judge made on reading the papers, or at a Case Management Conference; in the great majority of cases the initial suggestion comes from a Judge. The judges treat referral to mediation as voluntary and an order staying proceedings for mediation is only made with the agreement of all parties to the dispute. In some cases the judges use a two stage process, first ordering a stay to enable the parties 'to reflect' on the possibility of mediation and then a subsequent stay to enable mediation to take place.

The following case history reveals a model trajectory for a claim settled at mediation.<sup>18</sup>

A claim was filed on 16 June 2006 in respect of an unpaid invoice relating to the sale of ceramic pots. A defence was entered on 27 June denying agreement to buy the pots in the numbers supplied and counter claiming in respect of poor quality. A District Judge considered the papers on 28 July following return of the Allocation Questionnaires and arranged for a Case Management Conference to be held on the telephone on 22 August. On that occasion, the parties agreed to the judge's suggestion that mediation should be attempted and the claim was stayed until 30 September. A letter of request was sent to the City Disputes Panel on 5 September and mediation arranged for the 26th of the same month. Agreement was reached on that occasion.

A notable feature of the operation of the Scheme so far is that the great majority of referrals to mediation have been made—as in the case just outlined—early in the court process. Nineteen of the twenty-seven cases referred under the Scheme during its first year were referred on allocation to track or within two months of allocation. Four more were referred within six

<sup>17</sup> This estimate is based on a detailed analysis of the trajectory of claims filed in the Mayor's and City Court during one year only, 2005, so the estimate must be regarded with caution.

<sup>18</sup> 6MY02609.

months of allocation following inconclusive stays for settlement. In only one case was referral made following Listing. This pattern reveals the central objective of the judges in trying to push settlement back to an earlier point in the process.

The mediations so far conducted under the Mediation Scheme have, with one or two exceptions, been held in the purpose built mediation suites at the International Dispute Resolution Centre ('IDRC') in Fleet Street. These provide both spacious rooms for plenary sessions and adjacent 'private' space for parties and their legal advisers. Procedure at mediation is not specified by the Court; but is subject to the guidelines and codes of practice operated by the mediation provider proposing the mediator.

The practice of mediators under the Scheme differs as to whether contact is made with the parties prior to the day set for mediation. Mediators who make prior contact use these occasions to explain the procedure and acquire a preliminary understanding of the respective negotiating positions, moving directly into a plenary session when the parties meet at the IDRC. Others have short introductory meetings with each party at the beginning of the session. Mediators observed under the Scheme differ as to whether they communicate primarily with the parties or their legal representatives (if present). Some mediators communicate directly with the parties, placing them immediately on either side of them at the table to underline this priority. Others ask at the beginning who they should communicate with primarily; yet others speak directly to the legal representatives as a matter of course.

In all cases observed, the mediator stressed that his or her role was to facilitate negotiations by helping with communication and the exchange of information rather than advising on or encouraging any particular outcome. However, interventions by the mediator invariably went beyond those of a 'go-between'. All mediators drew the parties' attention at an early stage, and at subsequent moments during the mediation, to the economic consequences of continued litigation. This was done in a variety of ways. One mediator simply asked the respective legal teams to provide him with a 'schedule of costs incurred so far and an estimate of those involved in proceeding to trial'. Another approach was for the mediator to conduct a 'risk assessment' with each party in which the costs and prospects of continued litigation were explicitly examined. Here one strategy was to focus attention on the figures recorded in the Allocation Questionnaire, which appear often to underestimate the true cost of proceeding to trial. One mediator read out to those present a newspaper report of a Court of Appeal case in which the overall costs had very far exceeded the relatively small sum originally claimed.

All the mediators observed used a system of 'shuttle' mediation. After an initial joint session, mediators invariably separated the parties and subsequently conducted the greater part of the process alone with each side, moving backwards and forwards between their respective rooms. Some mediators

moved quickly into a shuttle procedure having explained the process and the ground rules and inviting each side to make a preliminary statement. Others encouraged the parties to remain in joint session and assisted a direct dialogue to develop, separating the parties only when differences were vigorously expressed. Once the parties were separated, the mediator moved backwards and forwards between them until an agreement had been brokered or mediation discontinued. Invariably, mediation concluded with the parties being brought together for a final joint meeting at which any understanding reached was confirmed, formalized and recorded in writing. The following case history illustrates the process:<sup>19</sup>

The claimant contracted with the two defendants to undertake pipe work and plumbing at a warehouse that they were converting into a nightclub and restaurant. The claimant, who had done work for the defendants' families over many years, had taken oral instructions that had been modified and extended on site as the work progressed. Work was completed in February 2005 and invoices to the value of approximately £45,000 had been submitted. The defendants claimed that both materials and labour had been over priced and only £16,000 was paid. A claim was filed for the balance at the Mayor's and City of London Court on 14th November 2006.

Defences to the claim were entered on 8th December and Allocation Questionnaires filed on 21st and 29th December. At a Case Management Conference on 17th January 2007, the claim was stayed until the end of February for mediation to take place. At the mediation on 22nd February the claimant and the two defendants were present, each bringing solicitors with them. The mediator was a barrister with a good deal of mediation experience.

The mediator began the process by visiting the parties separately in their rooms, introducing himself and obtaining confirmation that the parties had 'come to negotiate'.

He then brought the parties together, explaining the process as a confidential one in which the parties would try to achieve a settlement but were free to leave at any moment if this proved impossible. In this session it quickly became clear that a long and trusting relationship between the parties had completely broken down. The claimant's solicitor spoke first, confirming that the price of the contract was the central issue and that while the gap was a large one he hoped it could be narrowed. The defendants' solicitor responded by saying that the defendants had looked for a negotiated solution from the beginning and still wanted to settle. The mediator then asked whether they should continue in a joint session or break up into two rooms. The defendants' solicitor said it was her understanding that there would be separate sessions.

<sup>19</sup> A mediation observed by Simon Roberts at the International Dispute Resolution Centre, 22 February 2007. Some details of this dispute have been modified to ensure confidentiality.

*Separate Session 1.* Going first to the defendants' room, the mediator began by enquiring whether the costs on their Allocation Questionnaire—£4,000 to date and £12,000 to trial—were realistic. He suggested that solicitor and clients should consider together the real costs 'if this goes forward'; and asked them to think about what they wanted him to explore with the claimant if this was to settle: 'Can you try to reach a figure I can offer them?' Following some detailed discussion of the costs of materials that the defendants regarded as over-priced, the mediator then went across to the claimant's room.

*Separate Session 2.* As with the defendants, the mediator began the discussion by encouraging the claimant to undertake a risk assessment, noting that in his experience the costs of the other side at the conclusion of a trial would be closer to £25,000 than the £12,000 estimated on the Allocation Questionnaire. He warned the claimant that if no agreement could be reached today, the claimant could expect 'a Part 36 offer' from the defendants, triggering a more difficult risk assessment when further costs had accumulated. Telling the claimant that his pricing of the materials was an issue, the mediator concluded this visit by asking the claimant to think about 'his bottom line' and the need to respond to any offer made. The claimant said 'I want to hear their offer; but I am not going to consider anything less than £22,000'—'half now and half in a month's time'.

*Separate Session 3.* Taking this information back to the defendants, the mediator invited them to make an offer. This invitation stimulated further challenges to the claimant's pricing, particularly the copper piping. On the labour costs, the second defendant now said that he did some of the work under the claimant's supervision. The mediator left, asking the defendants to formulate an offer for transmission when he returned.

*Separate Session 4.* The defendants' points were taken back to the claimant who asked for a 'reasoned' response to the offer of £22,000.

*Separate Session 5.* Returning to the defendants, the mediator pointed to the fact that the time set for the mediation would soon be at an end and said that a serious offer needed to be made 'if this matter is to be settled today'. After more talk of the costs of the pipe work, the defendants offered £9,000 'for a quick settlement'.

*Separate Session 6.* The claimant formulated a new proposal that he would accept £18,000, to include a costs component of £3,000, and that the sum could be paid in three instalments: one third now, a third in a month's time and the balance in two months.

*Separate Session 7.* It was 12.30 when the mediator returned to the defendants. He repeated his earlier points about the expense that would be generated if the dispute went to trial. The defendants offered £15,000, payable on the instalment system proposed by the claimant, on the understanding that each side carried its costs to date.

*Separate Session 8.* After some discussion with his solicitor, the claimant reluctantly accepted this offer in settlement.

The mediator brought the parties together and in their presence formulated the agreement in writing as a Consent Order to be submitted to the court. This was signed; but neither side was happy and all three lay parties left shaking their heads. It remained unclear to the observer why what had obviously been a long and trusting commercial relationship had gone so seriously wrong.

This structural arrangement, under which the mediator sooner or later located the parties in separate rooms, thereafter moving between them with information and proposals for settlement, has important consequences for the mediator and for the parties. For mediators, this arrangement makes them do more of the work and gives them greater power. However limited the role that mediators outlined for themselves at the outset of mediation, as the shuttle developed a strong tendency was observed for the role to expand to include active engagement in producing an agreed result. Typically, the later stages involved progressively energetic attempts to narrow the gap between the sum tendered by one and the amount demanded by the other. This model of mediation leads almost inevitably to the mediator conducting a series of parallel negotiations with each of the parties. So the parties are primarily negotiating with the mediator, rather than with each other. The mediator thus comes to take on the identity of a constructor of deals, rather than the facilitator of other people's negotiations.

For the parties, this model of mediation leads in some respects to a restricted and impoverished engagement. Interacting with the mediator, rather than with each other, the 'process benefits' of direct negotiation are lost. Deprived of the opportunity to construct an agreement directly with the other side, improved communication and understanding that could have informed future commercial relations are sacrificed. But, left alone with their legal teams for long periods while the mediator is in the other room, the shuttle provides substantial—and perhaps unexpected—space for reflection and planning. In sharp contrast to the probably brief professional consultations earlier in the process, there is leisure to consider the costs and risks of failure to settle and to plan an appropriate response for transmission when the mediator returns.

## 6. *Re-Conceptualising the Court as an Arena for Structured Negotiation*

How then should we re-conceptualize the court in the light of the new ideological priority attached to 'settlement' in the legislative and judicial cosmologies, and of the emergent patterns of disposal illustrated in this article? Clearly we can hardly cling to an idealized conceptualization of the court as agent of trial and judgment when this is no longer the way in which the judges represent themselves or an accurate reflection of the operational reality on the ground. At first sight, it is tempting to sum up these developments in the English courts

by re-presenting the judge as mediator, the position Shapiro took when reflecting on early stages of the North American transformation in his book *Courts*. But to do so would be to understate party initiative and over play active judicial engagement.

Recapitulating the phases of the litigation process described in this article, we can see that only a very small proportion of claims are effectively concluded through active judicial involvement. Such intervention is primarily visible at two phases in the litigation process: on and closely following Allocation to Track; and during trial. At other points in the life cycle of a dispute, the court does no more than provide an affirming environment and successive procedural markers for bilateral negotiation. This affirmation begins with the endorsement given to ‘negotiation’ in the Pre-Action Protocols. It continues through the cyclical process of information exchange and learning embarked upon with the filing of the claim; it is then formalized with the entry of the defence. The exhortation to negotiate is elaborated in the Allocation Questionnaire: from the start, that document poses persistent questions: ‘Are you negotiating? If not, why not?’ Subsequently, even hardened litigators recognize the period following listing as in most cases devoted to settlement negotiations rather than preparation for trial.

In numerical terms, three quarters of litigated disputes are concluded during the period following filing of a claim without a defence being entered. Of the minority of disputes continuing beyond this point, more than half settle rapidly following entry of a defence. There then follows, with the reading of the files of surviving cases by a District Judge for allocation to track, the only phase of active judicial involvement prior to trial. During this phase in 2008, 46% of surviving claims settled. Judicial intervention, principally in the form of stays, Case Management Conferences and referrals to mediation, undeniably made a major contribution to these settlements. Then, following listing of the remaining claims for trial, a further very substantial reduction is achieved through late, bilateral negotiations between the legal teams. During 2008, of those listed more than 70% were settled in this manner before the trial date.

Overall, it is clear that during the phase of the litigation process when direct efforts by the judges to bring about settlement are principally made—between allocation and listing for trial—only a small number of cases are discontinued when compared with the periods prior to the filing of the Allocation Questionnaire and subsequent to listing. In numerical terms, of 6326 claims settled or otherwise discontinued during 2007, only 296 could claim to be settled through active judicial engagement. So active third-party involvement of *any* kind plays a part in only a very small proportion of claims disposed of at the Mayor’s and City of London Court.

The panorama drawn in above gives an overwhelming impression of the court as a site where settlement takes place. But it at the same time suggests that we should not over estimate the importance of explicit judicial sponsorship

in the settlement process, or the success of judges in combating the culture of late settlement among litigation lawyers using court processes. This detailed evidence from the Mayor's and City of London Court supports the general intuition that we should be extremely cautious in according too much prominence to third party roles in characterizing the court today. Civil litigation in England assumes a shape observable right across the common law world. The stream of claimants is broad at source or point of entry but narrows progressively towards the mouth represented by final judgment. Clearly marked along the stream lie a succession of processual phases, during each of which significant reduction of the surviving caseload takes place. At last, a tiny residue is subjected to trial and judgment. Prior to that, only in the phase following filing of the Allocation Questionnaire does active judicial engagement appear to be a dominant factor in disposal.

The conclusion must be that it is time to re-conceptualize the court as an arena for structured bilateral negotiations, one in which the dominant mode of interaction is an often protracted conversation between the parties themselves. This is a drama in which both active judicial sponsorship of settlement and the theoretical availability of trial and judgment provide a background structure to the process. But beyond that they play a residual role.

### 7. *The Court within the Changing Configurations of State Power*

The larger story behind one court's shift from a mode of 'command' to one of 'inducement' recorded here might be told in a number of ways. Over a long period, culminating after the middle of the 20th century, government had become progressively differentiated, creating 'public' and 'private' spheres, each characterized by distinctive processes and rationalities. Along this trajectory, the most powerful institutions in the public sphere had evolved as formal institutions. Among these powerful institutions were the courts. With the consolidation of government's involvement in the management of disputes had come a conception of 'public justice', presented as the delivery of authoritative third-party determinations. Then, in the late 1970s, the process showed signs of going into reverse, breaking down the hitherto apparently clear distinction between the 'public' and the 'private', with courts now sponsoring settlement, hitherto a predominantly 'private' sphere mode of resolution.

One way of representing this shift could be in terms of a 'retreat' of government and the resurgence of a private sphere, a portrayal consistent with the general movement suggested by Charles Reich in *The Greening of America*.<sup>20</sup> But at least one early commentator, Richard Abel, argued in *The Politics of Informal Justice* that we should see the shift rather as an *expansion* of state power

<sup>20</sup> Random House, New York, 1970.

as the central mode changes from open coercion to covert manipulation.<sup>21</sup> In general terms we can now view this prediction, made at the beginning of the 1980's, as an uncannily accurate forecast of what was to come. The civil procedure regime today realizes both a reduction in government's ambition to exercise power through 'command', and a growing emphasis upon modes of intervention directed towards state sponsorship of 'settlement'. At the same time, through government's determination to police negotiations—even in the pre-litigation phase—there has been a corresponding increase in the areas across which oversight is claimed. Yet, while Abel's principal concern was with the adverse consequences of informality in areas of disputing that crossed lines of stratification, this article illustrates the changes he forecast being played out in the 'horizontal' context occupied by disputing commercial corporations.

However we view this transformation, it raises questions about the role and future of the court premises themselves. How are we to regard the now frequently empty courtrooms within the Gothic elevations of buildings within which quite different court processes continue to be located? Should we simply see this Victorian site of contemporary settlement processes as no more than the quaint residue of a vanished era? Or can these historic features retain potency and relevance at a symbolic level, providing legitimacy for bilateral negotiation rather than the open processes of trial and judgment for which they were originally constructed?

When we consider generally the ideological representations associated with processes of centralization in the West, it has been argued that these can remain steady across profound changes in the practice of government. Speaking specifically of the evolution of government in Early Modern Europe, Michel Foucault in *La Volonte de Savoir* drew attention to two related features of what he termed the 'juridico-discursive' mode of representing power: first, its extraordinary persistence; second, the fact that this way of talking can survive long after it has ceased to be an accurate way of representing what the world in which it is deployed is actually like. He wrote: 'In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.'<sup>22</sup> He then went on to say: 'We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, as serving as its system of representation.'<sup>23</sup> Of course, Foucault could have generalized both of these points much more broadly. Central authorities very widely seek to represent their claims to power 'in terms of law'. This was as true of Imperial China and of the 19th century Tswana kingdoms in the

<sup>21</sup> 'Delegalization: A Critical Review of its Ideology, Manifestations and Social Consequences', in Erhard Blankenberg and others (eds) *Alternative Rechtsformen und Alternativen zum Recht* (1979) 7 (Paper delivered earlier at the Second National Conference on Critical Legal Studies, Madison, Wisconsin, 1978).

<sup>22</sup> *The History of Sexuality* (Allen Lane, London 1978) 87.

<sup>23</sup> *Ibid* 89.

Kalahari as it was of mediaeval and early modern Europe. It can be plausibly argued that an ideology of legalism is a general concomitant of centralization.

Foucault's second observation highlights an extremely important feature of ideological productions generally: that their endurance is not dependent on their propositional content. This is certainly the case with legal ideology—it cannot be taken as providing a description of how power relations work at a given moment in the polity concerned. Foucault was perhaps a bit misleading on this point insofar as he implied that there *was* once a moment in mediaeval Europe when the 'juridico-discursive' representation of power provided a picture of the world as it actually was. But there is no difficulty in one set of ideological representations remaining in place even when the role of an institution is profoundly changed. So, the 'rule of law', long associated with trial and judgment, may now provide legitimacy for a quite different process as the courts move to sponsorship of settlement. Lord Woolf has made this point explicitly in claiming that 'justice' may now be achieved through settlement.<sup>24</sup>

The points made by Foucault are equally important when we come to consider ritual and symbolic representations, among the main bearers of ideology. Long ago, in his seminal paper 'Symbols, Song and Dance', Maurice Bloch re-emphasized the role of ritual in justifying and concealing hierarchy.<sup>25</sup> At the same time, he argued persuasively that ritual works through illocutionary, rather than propositional force; so there is no point in looking for 'rational' links between ritual productions and the political forms they support.<sup>26</sup> This suggests that we must take issue with the argument advanced by Martin Loughlin in his book, *Sword and Scales*. There he suggests that these once potent ideological symbols 'no longer appear to serve as adequate images of political power and legal justice' and so need to be replaced by more modern ones.<sup>27</sup> That is not how ideology works. We should not be distracted by the enormous claims which law makes for its strong rational, propositional content into thinking about legal ritual in those terms.

The Gothic elevations of the 19th century building occupied by the Mayor's and City of London Court have already long provided symbolic cover for more than trial and judgment. Well before the procedural reforms introduced at the end of the 20th century, it was widely acknowledged that 'most civil cases settle'. But with the officially sanctioned move of courts to constitute primarily

<sup>24</sup> In his Interim Report, *Access to Justice* (HMSO, London 1995), in prescribing 'case management', Lord Woolf identified its overall purpose as 'to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration' [II, 5, 16].

<sup>25</sup> 'Symbols, Song, Dance and Features of Articulation' (1974) 15 *Eur J Soc* 55–81.

<sup>26</sup> Bloch (*ibid*) does, however, seem to set up too strong an opposition to Durkheim's position in *Les Formes Elementaires* (1912) when he suggests (at 79) that ritual is a strategy of traditional authority, exclusively found in the context of hierarchy. Surely, we must hold back from thinking about ritual only in terms of 'domination', and allow it a place in supporting the cosmologies of the acephalous world? Bloch's position is also contested in that, adopting Weber's typology of authority, he confines ritual to the 'traditional form'. Surely it retains a role—arguably a central one—in the context of 'rational-legal' forms in modernity?

<sup>27</sup> *Sword and Scales* (Hart Publishing, Oxford 2001) 234.

arenas for bilateral negotiation, the dislocation between form and substance increases. The courts—buildings with now often empty courtrooms—take on an increasingly symbolic character, just as the judges now appear as ‘exemplary’, ceremonial figures, legitimating other peoples’ decision-making. Arguably, with this decline in the importance of command, the decay of an operational/practical role, the ceremonial, ritual dimension *increases* in importance. As with the ‘exemplary’ kingship of 19th century Bali that Clifford Geertz describes in *Negara*,<sup>28</sup> the symbolism and ritual *is* what the court provides. No longer required to mask and justify the power exercised through the court’s own commands, they now legitimize the decision-making of the parties themselves. This transformation has a particular resonance for the principal commercial court in the City of London, located in the corner of Guildhall Yard.

<sup>28</sup> Clifford Geertz, *Negara: The Theatre State in Nineteenth Century Bali* (Princeton University Press, Princeton 1980).