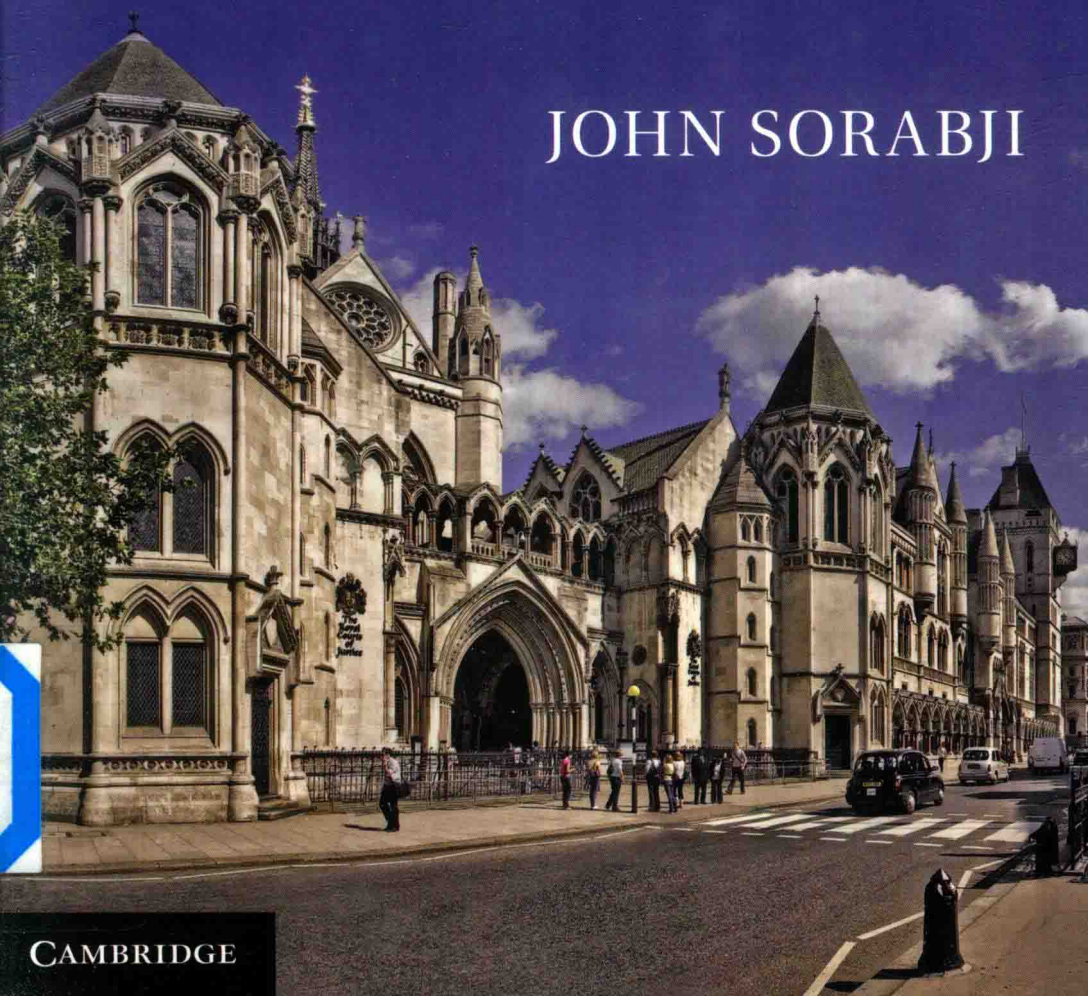
ENGLISH CIVIL JUSTICE

after the Woolf and Jackson Reforms

A Critical Analysis

JOHN SORABJI



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ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS

John Sorabji examines the theoretical underpinnings of the Woolf and Jackson Reforms to the English and Welsh civil justice system. He discusses how the Woolf Reforms attempted, and failed, to effect a revolutionary change to the theory of justice that informed how the system operated. He elucidates the nature of those reforms which, through introducing proportionality via an explicit overriding objective into the Civil Procedure Rules, downgraded the court's historical commitment to achieving substantive justice or justice on the merits. In doing so, Woolf's new theory is compared with one developed by Bentham, while also exploring why a similarly fundamental reform carried out in the 1870s succeeded where Woolf's failed. Finally, he proposes an approach that could be taken by the courts following implementation of the Jackson Reforms to ensure that they succeed in their aim of reducing litigation cost through properly implementing Woolf's new theory of justice.

JOHN SORABJI is a practising barrister and also the current legal secretary to the Master of the Rolls, to whom he provides advice on a wide range of subjects, and specifically the English civil justice system's development. Since 2012 he has taught University College London's LL.M. course on Principles of Civil Justice.

For
Clare and Helena

FOREWORD

Until the final decades of the last century, civil procedure in this jurisdiction had been almost wholly ignored by legal academics as a serious topic in its own right, and it had been treated by the legal profession as being no more than a boring and unimportant, but unfortunately necessary, adjunct to litigation. Even now, civil procedure is still regarded as very much of an also-ran in the worlds of legal academics and legal practitioners. This is thoroughly unfortunate, because it represents a serious detriment to the legal process, and therefore to the rule of law. On thinking about it, anyone who has practised in the civil courts of this country would acknowledge how vital procedure is to the dispensation of justice – both in itself and taken together with substantive law. Procedural rules and decisions routinely influence, and not infrequently actually determine, the outcome of a dispute; and procedural law can no more be detached from substantive law than style can be divorced from content in a novel.

For that reason alone, a high-quality book on the subject of civil procedure is to be welcomed with enthusiasm by every civil legal academic and practitioner in England and Wales. However, there are other reasons for applauding John Sorabji's book.

First, it is being published at a highly opportune time, when significant alterations in our civil procedure are under way. The Woolf Reforms, introduced some twelve years ago, have had time to bed down, and the Jackson Reforms are about to come on stream. As is explained in this book, although these are generally treated as two separate sets of reforms, they should in fact be treated as closely connected proposals, not least because many of the Jackson Reforms were put forward to cure the shortcomings of the Woolf Reforms. It is invaluable for practitioners and judges to have a book which points out and analyses the deficiencies in the conception and implementation of the Woolf Reforms which, as John Sorabji explains, were 'not an unalloyed success', in that, while they introduced a new theory of justice, they were unable to secure its

implementation. It is especially timely to be publishing this book just as the Jackson Reforms are starting to be implemented.

Secondly, this book contains a very useful and important history of past attempts at reform. Unless we understand the history of an institution or system, we will never properly understand the institution or system itself. Furthermore, the experiences of previous attempts to change the rules of court are instructive, if sometimes in a rather depressing sense, to those seeking to introduce or implement further changes.

Thirdly, this book includes an analysis of the purpose of civil proceedings; in particular, this involves identifying and discussing Jeremy Bentham's utilitarian approach, and the change from what John Sorabji calls substantive justice to what he calls proportionate justice. Such an analysis is again vital to an understanding of the whole topic of civil procedure and any changes being made to the court rules. More particularly, by contrasting the intended change of approach embodied in the Woolf proposals with the effect of recent decisions of the Court of Appeal, this book gives much food for thought for advocates and judges involved in cases on procedural issues in coming years.

Fourthly, for those many judges (including the writer of this foreword) who have been referred on an incalculable number of times to CPR rule 1, there is a valuable, original, critical and considered analysis of the overriding objective, and, in particular, of proportionality, and the implications of those concepts.

Fifthly, the book contains very useful guidance on what the Jackson Reforms are intended to achieve and how they may operate, rightly emphasising the 'heavy duty' on the judiciary 'to implement the reforms properly'. It is an important and difficult time to be a judge in the civil courts of England and Wales. The introduction of the Jackson Reforms certainly render the role more important. While the reforms may make the role more difficult for a period, I believe that they will also make it more interesting and rewarding, and, in the longer run, easier.

I can think of nobody with better credentials than John Sorabji to write this important book. He not only has, and for some time has had, a foot firmly in both the academic and the practical camps: he works both at University College London and at the Royal Courts of Justice. But, in addition, his work in both places is and has been largely concerned with civil procedure. Unlike most academics, he has much first-hand experience of civil procedure: having qualified as a barrister, he has advised successive Lord Chief Justices and Masters of the Rolls, and other senior

judges on civil procedure (and other legal and constitutional matters), and advised, contributed to, and attended meetings of, the Civil Procedure Rules Committee and the Civil Justice Council, and was one of the main contributors to the *Report on Super-Injunctions* in 2011. As a graduate and fellow at UCL (appropriate for someone who writes about Jeremy Bentham), his experience as a lecturer and teacher in civil procedure, who wrote his doctoral thesis on the topic, John Sorabji also has an academic insight into the topic, a qualification which can be claimed by very few, if any, practitioners.

In short, then, this is a book which I would unhesitatingly recommend to all those concerned with civil litigation, whether as an academic or in practice.

Lord Neuberger of Abbotsbury
September 2013

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Introduction: civil justice in 2013

> Thou shalt not ration justice.[1]
>
> The Woolf Report represented a strong administrative initiative to provide for a rationed and rational system of judicial resolution of disputes.[2]

This book examines reforms to the English and Welsh civil justice system carried out following Lord Woolf's Access to Justice Review (1994–96) (the Woolf Reforms)[3] and Sir Rupert Jackson's Costs Review (2009) (the Jackson Reforms).[4] It specifically examines the way in which they have both attempted to reduce litigation cost and delay so that the courts are better able to carry out their constitutional function of vindicating and enforcing rights and thereby securing the rule of law.[5] It does so because both reforms adopted a novel approach to their task; one that had not been attempted since reforms carried out in the 1870s. Historically, the civil justice system has been committed to, and reformed

[1] L. Hand cited in G. Hazard, 'Rationing Justice' VIII (1965) *The Journal of Law and Economics* 1 at 1.

[2] S. Issacharoff, *Civil Procedure* (3rd edn) (Foundation Press, 2012) at 196.

[3] H. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (hereinafter H. Woolf (1995)) (HMSO, 1995); H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (hereinafter H. Woolf (1996)) (HMSO, 1996); H. Woolf, *Access to Justice: Draft Civil Proceedings Rules* (HMSO, 1996).

[4] R. Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009, Vols. I and II) (hereinafter R. Jackson (May 2009)); R. Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office, December 2009) (hereinafter R. Jackson (December 2009)); A. Clarke, 'The Woolf Reforms: A Singular Event or an Ongoing Process?', in D. Dwyer (ed.), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) at 49: '[The Jackson Review] will be a review that is entirely consistent with the approach Woolf advocated in his two reports. It will be so because it will look for answers to the problems of cost consistent with the new approach to litigation Woolf's reforms introduced. That is to say, whatever conclusions it reaches will be ones that are consistent with the overriding objective and the commitment to proportionality to which it gives expression.'

[5] N. Andrews, *Principles of Civil Procedure* (Sweet & Maxwell, 1994) at 21–34ff.

consistently with, a specific legal philosophy or theory of justice.[6] That philosophy is one that has embodied a single substantive policy aim, which has variously been referred to as the achievement of justice in the individual case; substantial or real justice; complete justice; a correct decision; rectitude of decision; justice on the merits;[7] or substantive justice.[8] Choice of terminology has changed over time. During the nineteenth century, the two common means of capturing the idea were to refer to the court's role as being to arrive at a decision on the merits or to do complete justice. The twentieth century preferred to refer to courts doing substantive justice or justice on the merits. Despite these terminological differences, the idea they expressed was the same: justice was achieved when an individual claim or dispute concluded with a court judgment that was 'substantively accurate'.[9] A substantively accurate decision was one arrived at through the correct application of true fact to right law, such that when properly acted on it vindicated or enforced legal or equitable rights or obligations. In this book, the term substantive justice is used to express this theory of justice, except where the historical context requires a contemporary term to be used.

The revolutionary change that the Woolf and Jackson Reforms brought about was to reject this traditional theory of justice.[10] Rather than maintain a commitment to that historic approach, rights were to be vindicated through the application of a new theory of justice, similar to one developed by Bentham in the nineteenth century, as well as to one developed by Zuckerman over the last twenty years.[11] This new theory is committed to what has been described as proportionate

[6] J. Jolowicz, 'The Woolf Reforms', in Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000) at 387.

[7] See for instance, *Knight* v. *Knight* (1734) 3 P. WMS 331, 334; *Alderson* v. *Temple* (1785) 4 Burr. 2235, 2239; 98 ER 165, 167; *Smith* v. *Baker* (1864) 2 H & M 498; 71 ER 557; *Bruff* v. *Cobbold* (1871–72) LR 7 Ch. App. 217, 219; *Indyka* v. *Indyka* [1967] 1 AC 33 at 66; *Davis* v. *Eli Lilly & Co* [1987] 1 All ER 801 at 804; 149. J. Bentham, 'Rationale of Judicial Evidence', in *The Works of Jeremy Bentham* (ed. Bowring) (Edinburgh, 1843) Vol. VI at 203–4; A. Zuckerman, 'Dismissal for Delay – The Emergence of a New Philosophy of Procedure' 17 *CJQ* (1998) 223, 225; J. Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' 52 (2003) *International Comparative Law Quarterly* 281, 286.

[8] H. Woolf (1995) at 114; H. Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 14–16.

[9] M. Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986) at 148; L. Solum, 'Procedural Justice' 78 (2004) *Southern California Law Review* 181, 184–5.

[10] J. Sorabji, 'The Road to New Street Station: fact, fiction and the overriding objective' [2012] *EBLR* 1–77.

[11] See Chapter 2.

justice.[12] Within it, substantive justice is no longer the substantive policy aim. It is one aim amongst others, those being the pursuit of economy, efficiency, expedition, equality and proportionality. Each of these policy aims is intended to support the achievement of a wider public policy aim: the need to ensure that the limited resource allocation by the State to the justice system could be distributed fairly amongst all those who need to call on the State to vindicate and secure the effective enforcement of their rights.[13] Rather than focus on securing individualised justice as the historical approach had, the new theory focused on securing a form of distributive justice.[14] The ultimate consequence of this is that, in contrast to the position that prevailed prior to 1999 when the Woolf Reforms took effect, individuals who seek rights-vindication do so through a 'a rationed and rational system of judicial resolution of disputes'.[15] A limit is now placed on the amount of resources individuals and the State can properly expend on securing substantive justice in any particular case. The limit operates in two ways. In some cases it requires the court to refuse to allow a claim to proceed to judgment. It thus denies substantive justice in its entirety. In other cases – the majority – it restricts the amount of time and money that is spent on litigation. As such, it reduces the court's ability to achieve substantive justice. By limiting, for instance, the nature and extent of evidence placed before the court, the quality of decision-making is necessarily reduced. In both cases, rather than to secure substantive justice, the system is only able to secure proportionate justice.

[12] A. Clarke, *The Future of the CPR* (District Judges' Annual Conference, Warwick, 25 June 2009) at [15], 'The CPR simply provide a formal means by which the court as part of its case management role can encourage and facilitate proper settlement. Secondly, by encouraging the greater use of ADR court resources are released to other cases. It increases access to justice for those whose cases cannot settle through assisting those who wish to settle to do so. In this it is entirely consistent with the aim of achieving proportionate justice for all.' Available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-dcj-conference-25062009.pdf>; Sorabji, 'The Road to New Street Station' at 89.

[13] H. Woolf (1996) at 24, to 'preserve access to justice for all users of the system it is necessary to ensure that individual users do not use more of the system's resources than their case requires. This means that the court must consider the effect of their choice on other users of the system', as explained by D. Neuberger, 'A New Approach to Justice: From Woolf to Jackson', in G. Meggitt (ed.), *Civil Justice Reform – What has it achieved?* (Sweet & Maxwell, 2010); Sorabji, 'The Road to New Street Station' at 88; J. Dyson, *The Application of the Amendments to the Civil Procedure Rules* (18th Lecture in the Implementation Programme) (22 March 2013) at [18]: 'We have a managed system. That system must be managed for the needs of all litigants.'

[14] S. Fleischacker, *A Short History of Distributive Justice* (Harvard University Press, 2005).

[15] Issacharoff, ibid., at 196.

This limit is necessary because it is the means by which the justice system can properly vindicate rights for the majority of citizens. Rationing does not undermine the provision of justice. It is a necessary condition for it to be effected properly by the State.

In order to explore the nature and effect of this revolutionary change, this book is divided into three substantive parts. Part I explores historical and theoretical issues. Chapter 1 examines the nature and purpose of the civil justice system, the manner in which reform has been attempted in the past and the Woolf and Jackson Reforms' revolutionary nature. Chapter 2 looks at a previous, and eventually successful set of revolutionary reforms, those that took place in the nineteenth century. It does so in order to tease out three important points: that the theory of justice that governed the system's operation from the 1870s was itself the contingent product of revolutionary reform; that it took over fifty years for reform to succeed; and that the theory the reforms implemented sowed the seeds for the problem the Woolf Reforms identified as lying at the heart of excess litigation cost and delay: the subversion of the rules of court from their aim of achieving substantive justice. Chapter 3 is concerned with an examination of Bentham's theory of justice, which is an applied aspect of his broader utilitarian philosophy. This theory was never put into practice. It is examined because the theory the Woolf and Jackson Reforms introduced in many ways is a variation of it. Part II explores the revolutionary nature of the Woolf and Jackson Reforms. It examines how they go beyond the traditional nineteenth-century theory of justice discussed in Chapter 2 and how it adopts the same structure as Bentham's theory. It does so by discussing the centrepiece of the new theory of justice, the introduction of an overarching purposive provision – an explicit overriding objective – into the rules of court. Chapter 4 examines how this provision has been misinterpreted as no more than an expression of the traditional theory of justice. Chapters 5 and 6 provide an exegesis of its proper interpretation. The final part of the book turns to the question of implementation. It is one thing to articulate a new theory of justice; it is another to ensure that it is put into effect. In the nineteenth century it took over fifty years to effect a reform of a similar kind to that which the Woolf Reforms have attempted. Successful implementation takes considerable time and effort. It requires the courts to explain the nature of the new theory, to do so consistently, and to give practical guidance in respect of how it is to operate in practice. If they do not, change does not take place. Following the Woolf Reforms implementation in 1999, the courts failed to take this approach.

If the new theory is to be implemented properly following the introduction of the Jackson Reforms in 2013, the nineteenth-century approach to implementation will need to be adopted. If not, the rationed system of justice the new theory was, and is, intended to introduce will not operate effectively, and the problems that the Woolf Reforms identified, and the Jackson Reforms also sought to remedy, will remain unabated.

Before turning to these issues, two caveats need to be made. This book concentrates on justice in the English and Welsh High Court and Court of Appeal. Justice in the County Courts is not considered. This is for no reason other than that the exposition of the nineteenth-century theory of justice took place within the pre-1873 superior courts of record and then post-1873 through the operation of the Rules of the Supreme Court. It is not suggested that justice in the County Courts was not carried out consistently with the traditional theory of justice. It undoubtedly was. The second caveat concerns the specific procedural reforms recommended by, and then introduced as a consequence of the Woolf and Jackson Reforms. These reforms, such as the reform of discovery, the introduction of case and then costs management and docketing, are considered only in so far as they relate to the operation of the new theory of justice. The book does not provide a detailed critique of individual procedural reforms. It focuses instead on the theory that informed those reforms and how they are to be applied in practice. The Woolf and Jackson Reforms' ultimate success will hinge on the courts' ability to apply case and costs management effectively. That in turn will only be possible if the courts, lawyers and litigants properly understand the purpose for which such management is to be carried out. It is one thing to introduce a managed, a rationed system of justice. The real question is how it is to be managed, how justice is to be rationed and to what purpose. As such, it is 'necessary to start by identifying the enterprise that litigation management involves and what it aims to achieve'.[16] By examining the new theory of justice this book seeks to identify the nature of that enterprise.

[16] A. Zuckerman, 'The Challenge of Effective Civil Justice Reform: Effective Court Management of Litigation' 1(1) (2009) *City University of Hong Kong Law Review* 49 at 53.