Ius Gentium: Comparative Perspectives on Law and Justice 10

Neil Andrews

The Three Paths of Justice

Court Proceedings, Arbitration, and Mediation in England

Springer

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COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND

by

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THE THREE PATHS OF JUSTICE

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 10

For Liz, Sam, Hannah, and Ruby
and in memory of
Kurt Lipstein
1909–2006
Professor of Comparative Law, University of Cambridge,
Fellow of Clare College,
Bencher of Middle Temple

Foreword

In this book Neil Andrews does non-English lawyers a great service: he gives us an authoritative, digestible and—and at the same time—critical guide to the new civil justice in England and Wales. For a dozen years we have watched—sometimes puzzled—as the queen of common law systems has transformed itself in ways that we have not seen heretofore and to an extent that England has not experienced for a long time. Led by the 'Woolf reforms' of 1999, the metamorphosis has included, in addition to substantial changes in civil procedure, the introduction of the Human Rights Act of 1998 (entered into force 2000), the establishment of a Ministry of Justice (2007) and the abolition of the House of Lords (Judicial) and creation of the Supreme Court of the United Kingdom (began business 2009).

Neil Andrews is one of England's best known proceduralists and author of one of its best known treatises on civil procedure. He, as well as anyone could, guides readers through the thickets and hedges of England's reforms to the essential elements of the reforms. He helps readers learn conveniently what is new and what is old: what is system-shaking and is therefore especially worthy of foreign attention.

Such a guide is particularly needed by American lawyers and law reformers: Americans are accustomed to looking to England for ideas for the American system. Even before the Woolf reforms came into effect, some American observers ascribed a 'Continental Character' to English law distinct from America's common law. We all wonder what the effects of the predominantly civil law European Union will be on its premier common law system.

American lawyers need not fear English abandonment of values their system holds dear. The 'overriding objective' of the Woolf reforms is the enabling of courts 'to deal with cases justly.' Areas they target for reform include putting parties on an equal footing, dealing with cases proportionately to the disputes involved, and handling cases expeditiously and fairly. Neil Andrews, in Chap. 2 of the book, 'Principles of Civil Justice,' lays out four headings under which to consider the fundamental and important principles of civil justice:

a. Regulating Access to Court and to Justice
b. Ensuring the Fairness of the Process: a Shared Responsibility of the Court and the Parties
c. Maintaining a Speedy and Efficient Process
d. Achieving Just Outcomes

These are not alien to American lawyers: they are at the heart of American civil justice. They are the promises that America's founding fathers made in their declarations of rights of 1776.[1] These are, indeed, values shared by civil law systems.

I commend Neil Andrews for his openness. His work is valuable because he is critical. He is not timid. He is not content to recite the hopes of English reformers; he does not finesse hard problems by calling them out of place in a short work. He does not retreat to a student's outline. Instead he sets out the realities of the reforms' implementation. He calls failures when he sees them: through colorful language he imprints them in readers' memories. I give but one example:

> Bill Gates himself, and other modern-day descendant of Croesus, would hesitate to run the risk of engaging in protracted and complicated claims hear by the High Court. The 'Woolf reforms' of 1999 were expected to alleviate the problem of the high costs of litigation. But the situation has not improved. [9.16]

Americans hoping to find in England a panacea for the failures of American civil justice will be disappointed. The ailments of English civil justice—above all lawyer control of proceedings—are largely our own. If we are to overcome them, we must be open to changes that differ from traditional common law approaches.

Baltimore, Maryland James R. Maxeiner

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[1] They were included in what are called 'open courts' clauses. That in Maryland's Declaration of Rights of November 3, 1776 reads:

> 17. That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

Maryland Declaration of Rights of Nov. 3, 1776, *in The Decisive Blow is Struck, A facsimile edition of The Proceedings of the Constitution Convention of 1776 and the First Maryland Constitution* (1977). Similar declarations were made throughout colonial America. J. Maxeiner, G. Lee, and A. Weber, *Failures of American Civil Justice in International Perspective* 3–5 (2011).

Preface

This work is intended to enable lawyers, especially non-English lawyers, to gain an overview of the three main processes now operating in England for the resolution of civil disputes: civil proceedings in the courts, arbitration, and mediation. These three forms of civil justice, and their developing connections, continue to (1) bewilder, frustrate, and impoverish disputants, (2) enrich lawyers, (3) confuse most advisors, and (4) stimulate scholars. It seems to lie beyond the power of Government to respond successfully to (1). As for (2), proposals for changes in the costs rules for court litigation will increase the opportunity for some lawyers to become very rich quickly (contingent fees: 5.20 ff). It is hoped that (3) (confusion) might be reduced and (4) (stimulation) promoted by this short work. It is also hoped that the reader will find pointers for further research not just in the footnotes and bibliography, but in the section entitled 'Leading Contributors to English Civil Justice', which introduces foreign readers to the main players in the subject's modern development and analysis.

The text reflects fast-moving changes within this subject. The sources of this change are internal—constant development of the subject by the English courts and legislature—and external, notably the influence of the European legal authorities. For example, this book contains discussion of: curbing appeals (1.40; 4.01 ff); creation of the United Kingdom Supreme Court (2.06 ff; 4.03 ff); expansion of electronic justice (1.42); attempted reform of costs in England (5.20 ff); judicial abolition of the immunity protecting party-appointed experts against civil liability (3.73); awards of secret injunctions to protect privacy (currently a red-hot issue within England) (3.09); EU law and the limits of legal professional privilege (2.11 ff, and 3.30 ff); European human rights law and the scope of the privilege against self-incrimination (2.15 ff; 7.25); protective relief, namely 'freezing injunctions', in support of foreign proceedings (7.17 ff); the European mediation directive (2008) (9.49); mediation and sanctions (9.32); proposals for automatic referral of court proceedings to mediation (9.19); mediation sceptics (9.21); the long-running debate whether England should expand opportunity for opt-out system of class action

litigation in money actions (8.09; 8.23 ff); the controversy concerning arbitration and the 'anti-suit injunction' within the European Union (10.16 ff; 11.03 ff); problems concerning attempted enforcement of foreign arbitral awards under transnational convention (10.29 ff; 11.17 ff); the transnational trend towards combining the functions of mediators and arbitrators (11.36 ff); links between the courts and the processes of mediation and arbitration (Chapter 11); and perennial and fundamental issues, such as identification of fundamental principles of civil justice, under the American Law Institute/UNIDROIT principles (2.22), or Article 6(1) (2.02 ff) of the European Convention on Human Rights, and generally (Chapter 2, notably the author's four-fold categorisation at 2.35 ff—(i) Regulating Access to Court and to Justice (ii) Ensuring the Fairness of the Process (iii) Maintaining a Speedy and Efficient Process (iv) Achieving Just and Effective Outcomes); and the capacity of courts to engage actively in aspects of the case (1.08, 1.22 ff; 1.28).

I am grateful to my wife, Elizabeth Deyong, and our children, Samuel, Hannah, and Ruby. Their good humour has enabled me to keep the Law fully at arm's length outside normal business hours.

Cambridge, UK Neil Andrews

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Chapter 1
Introduction

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1.1 The New Procedural Code ('CPR 1998') and the Woolf Reforms

1.01 Under the 1998 procedural code, the Civil Procedure Rules ('CPR (1998)'), also known as the 'Woolf Reforms',[1] English judges have been granted wide-ranging powers to manage the development of civil cases, especially in large actions. This was a fundamental change because before 1998 English procedure had generally avoided pre-trial judicial management (although, as explained below, even before the Woolf reforms, case management had emerged as a convenient and necessary technique in, notably, the Commercial Court, part of the High Court).[2] The 1998 code was intended to change the culture of English court-based litigation. English civil procedure has moved from an antagonistic style to a more co-operative

[1] Lord Woolf's two reports are: *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (London, 1996) both available on-line at: http://www.dca.gov.uk/civil/reportfr.htm.

[2] On the CPR system from the perspective of the traditional principle of party control, Neil Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone",' *Civil Justice Quarterly* 19 (2000): 19–38; Neil Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003), 13.12 to 13.41; 14.04 to 14.45; 15.65 to 15.72.

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ethos. Although lawyers have adapted to the judicial expectation that they should no longer pursue their clients' interests in a relentless and aggressive manner, practitioners report[3] that the adversarial nature of the underlying contest remains a daily reality. It is true that correspondence between rival parties, which might be seen by the court in due course, is no longer couched in the aggressive terms which characterised pre-CPR dealings between adversaries. But the softer and sometimes more conciliatory tone of written exchanges under the CPR regime often masks an intensely fought battle.

1.02 English civil procedure appears to occupy a mid-position between the distinctively robust American system and the court-orientated systems of the civilian tradition. Thus the English system of disclosure imposes quite strict restrictions upon the scope of documentary disclosure.[4] Each party must now disclose and allow inspection of: documents on which he wishes to rely; or which adversely affect his case or his opponent's case, or which support the latter's case.[5] Furthermore, pre-action disclosure in commercial cases is controlled to prevent arrant forms of 'fishing'.[6] England has yet to countenance USA-style contingency fee agreements in ordinary court litigation (under the American system the attorney's fee is measured as a percentage of the size of the damages award or settlement).[7] As for party-autonomy, and the respective powers of the court and of the parties, English judges must respect the parties' procedural rights to (I) define the issues in dispute; (II) to make private decisions concerning how the claim and defence are to be factually supported, by gathering, refining and presenting witness evidence, and other forms of evidence; (III) if the court gives permission for expert evidence to be used in the case, the parties are free to select the relevant party-appointed experts and so procure their own opinion for use in evidence at trial[8]; (IV) finally, the parties retain the freedom to formulate legal submissions concerning the claim or defence, and to present statutory or case law authority to support those submissions.

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[3] For example, London litigation partner, seminar, Cambridge March 2010.

[4] Especially, CPR 31.3(2), 31.7(2), 31.9(1); generally, Neil Andrews, *The Modern Civil Process* (Tübingen, Germany: Mohr & Siebeck, 2008), Chap. 6.

[5] CPR 31.6; the court can vary the width of disclosure in special situations: CPR 31.5(1),(2).

[6] CPR 31.16 (3) contains a general power to order pre-action disclosure of documents against a 'respondent who is likely to be a party to subsequent proceedings'.

[7] A convenient source of details concerning the USA system is Moorhead and Hurst's study: *Improving Access to Justice: Contingency Fees: A Study of their operation in the United States of America: A Research Paper informing the Review of Costs* (November 2008), edited by Robert Musgrove: www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf.

[8] Under the CPR system the main rule is that no expert evidence can be presented in a case unless the court has granted permission: CPR 35.4(1) to (3).

1.2 Enduring Features of the English Civil Justice System

1.03 In 1997[9] I explained that the pre-CPR system had the following five main characteristics, and these in fact remain cardinal features of the present system, and hence aspects of continuity. First, nearly all first instance English civil trials are adjudicated by professional judges sitting alone, lacking support both from fellow judges and from a civil jury (jury trial in civil matters being now confined to specific tort claims, for defamation, malicious prosecution, or false imprisonment).[10] Secondly, large actions involve a segmented passage through various interim and pre-trial stages and remedies.[11] Thirdly, litigation is conducted under the shadow of the principle that each litigant is at risk of an order to pay the legal costs reasonably incurred by the opponent, if the latter emerges victorious from the fray.[12] This cost-shifting rule operates intensively because English legal costs are high (Sir Rupert Jackson's 'Civil Litigation Costs Review'[13] places the whole topic of costs and funding under scrutiny). Fourthly, the professional division between different types of litigation lawyers has been maintained: overall control of the case resting with solicitors, who delegate specific tasks, such as advocacy or 'advice on law or evidence', to specialists, namely barristers. Fifthly, trial is a rare event because most cases settle, the parties nearly always accommodating themselves to the wisdom of compromise.

1.3 Changes and Challenges Association with the Civil Procedure Rules (1998)

1.04 On 28 March 1994, Lord Mackay LC of Clashfern (Lord Chancellor 1987–1997) appointed Lord Woolf to make recommendations concerning civil procedure, with the following aims[14]: (i) *improving access to justice*

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[9] Neil Andrews, 'Development in English Civil Procedure: How Far Can the English Courts Reform Their Own Procedure?' *Zeitschrift für Zivilprozess International* 2 (1997): 3–29.

[10] Andrews, *English Civil Procedure*, 34-06 ff.

[11] For example, Sir Leonard Hoffmann, 'Changing Perspectives on Civil Litigation,' *Modern Law Review* 56 (1993): 297.

[12] Generally on costs, Andrews, *The Modern Civil Process*, Chap. 9; Andrews, *English Civil Procedure*, Chap's. 35 to 37; M.J. Cook, *Cook on Costs* (annual editions); P. Hurst, *Civil Costs* (4th edn, 2007); A. Zuckerman, *Civil Procedure* (2nd edn, 2006), Chap. 26.

[13] Sir Rupert Jackson, *Review of Civil Litigation Costs* (December, 2009: London, 2010); on which A.A.S. Zuckerman, 'The Jackson Final Report on Costs—Plastering the Cracks to Shore up a Dysfunctional System,' *Civil Justice Quarterly* 29 (2010): 263.

[14] Terms of appointment cited in Lord Woolf, *Access to Justice: Interim Report* (London, 1995), introduction.