Reforming Civil Procedure

The Hardest Path

Dominic De Saulles

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: De Saulles, Dominic, author.

Title: Reforming civil procedure : the hardest path / Dominic De Saulles.

Description: Oxford, UK ; Chicago, Illinois : Hart Publishing, 2019. | Includes bibliographical references and index.

Identifiers: LCCN 2018058558 (print) | LCCN 2018058984 (ebook) | ISBN 9781509925926 (EPub) | ISBN 9781509925902 (hardback)

Subjects: LCSH: Civil procedure—England. | Civil procedure—United States. | Law reform—England. | Law reform—United States. | BISAC: LAW / Civil Procedure.

Classification: LCC K2205 (ebook) | LCC K2205 .D4 2019 (print) | DDC 347.42/05—dc23

LC record available at https://lccn.loc.gov/2018058558

ISBN: HB: 978-1-50992-590-2
ePDF: 978-1-50992-591-9
ePub: 978-1-50992-592-6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

TABLE OF CONTENTS

INTRODUCTION

This book looks at the question of why it has proved to be so difficult to reform civil procedure, using the writings of reformers, judges and academics from both sides of the Atlantic to examine the problem in detail. The period covered is roughly 1905 to 2013, with some reference to developments after that date, including the publication of the second edition of *The Reform of Civil Procedure* by Sir Rupert Jackson and Stephen Clark.

The book starts with a sketch of the genuinely gripping story of how the Federal Civil Procedure Rules came to be written.[1] This is a story that is well known in America but not in England. Put briefly, a long campaign for change was brought to fruition during the Great Depression under the newly elected President Franklin D Roosevelt. The demise of the obstructor of change opened the door in a most unexpected way. A stellar group of lawyers wrote a set of rules that proved remarkably successful. Part of the reason for this was that the group's intellectual driving force, Charles E Clark, had his feet kept firmly on the ground by those more worldly-wise than he. Clark is both antagonist (working for himself) and protagonist (working for the forces of change). Readers who like chronologies and cast lists will find them at the outset of the History.

Chapter 1 looks at the issues civil procedure raises for society, and why it is important that the civil procedure system functions properly. The human context of all this is set out and then related to the big questions posed recently by Adrian Zuckerman, Neil Andrew and John Sorabji. The approach is both social and philosophical, in an applied sense. Chapter 1 closes with an attempt to analyse how the process of rule-writing and rule-making can be broken down so that it may be more easily understood. The categories of intention, action and outcome are set out. Those concerned to avoid theory may safely pass over this chapter, save for section XV.

In chapter 2, the reader is taken through a selection of important thinkers from America and England. The connection between the two jurisdictions is fruitful, for it quickly becomes clear that we have common problems and have tried similar solutions. The American writers illustrate the realist, in a broad sense, pragmatic and managerial tendencies. The selection from England starts with Jack Jacob, the grandfather of modern procedural reform, and moves through the waxing and waning of Woolf, the advent of Jackson and the sorry saga of *Mitchell* and *Denton*.

[1] The fuller story is drawn from a number of American articles and original papers cited in this book.

I admit to considerable sympathy for those judges who loyally tried to follow a decision they thought mistaken and were then blamed by the Court of Appeal for doing so. I have taken the opportunity to introduce key writers in field of procedural studies, because they both illustrate the state of knowledge at any given time and show how our understanding has deepened over time. The chapter closes with a discussion about whether Woolf was clear or consistent in his intentions.

Chapter 3 looks at the question of purpose, or goals or intention. The Federal Rules of Civil Procedure (1938) (FRCP) had no explicit interpretation clause like Rule 1.1 of the Civil Procedure Rules 1998 (CPR). Yet the intention behind FRCP Rule 1 was clear. The focus of this part of the study, then, is the first rules of the FRCP 1938 and the CPR 1998 respectively. Each rule has its own strengths and weaknesses, yet the American rule has lasted, with minor change, whereas CPR 1.1's overriding objective had to have a major overhaul in 2013 to increase the profile of proportionality. Judicial treatment of the two rules has been different. In England the Court of Appeal was first enthusiastic, then cooled off and has now renewed its commitment to CPR 1.1. In America, FRCP 1.1 has not played a large role in the case law, partly because of a heightened sensitivity to the constitutional role of the rule-makers. Justice Scalia of the US Supreme Court looms large in this area.

Chapter 4 looks at the delicate question of why Woolf failed (at least in part) and why Jackson has made progress that Woolf did not. This chapter moves Sorabji's argument one step on. The topic is viewed through the categories set out in an important article written by the sociologist Robert K Merton. The article is a contemporary of the making of the FRCP (1938). The chapter then looks at how culture and mind-sets both played a significant role in what happened. The conclusion of the chapter is that Woolf seriously underestimated the human factor, and that the human factor was also the driving force behind why Woolf partly failed. Jackson has been more cautious, yet he too has had to grapple with the rule-drafters and rule-interpreters going off in unexpected directions.

In chapter 5 there is a close focus on the question of what sanctions are and why enforcing them has proved so problematic under the Woolf and Jackson schemes. Here the root of the problems can be traced to a mixture of diverging intentions and too much laxity and harshness in turn. The chapter considers the system's role in all this and why the Jackson reforms were the sign of a serious rot that had to be cut out. There had been an historic unwillingness to say 'no' to those who wanted a second, third or fourth chance.

Chapter 6 ends the book with a look at the appeals system, with some help from Jack Jacob and the Bowman Report in England, and Roscoe Pound and other later American academics. Particular attention is paid to the question of process costs and error costs. The chapter concludes that reducing the number of appeals and rerouting cases of lesser importance was a wise move. For the recent reforms to succeed, judges will have to get used to saying 'no', just as they have had to do under CPR 3.8 and 3.9.

Material relating to David Dudley Field, Jeremy Bentham, Adam Smith, the Codification debate and the Victorian reform of English Civil Procedure has not made it into this book for reasons of space. Another volume on the travails of nineteenth-century civil procedure is projected.

The experienced reader will recognise how I have drawn upon those who have gone before. In particular Zuckerman, Andrews and Sorabji have all contributed to the intellectual foundations of this work, but the direction is my own and I accept the responsibility for that. My principal regret is that I have not found more space for Stuart Sime's work. I draw on him every day that I teach.

Sir Rupert Jackson is a big part of this story. I was lucky enough to be his host for the day when he came to Cardiff as part of his roadshow tour. He looked rather like the 'boy stood on the burning deck'. He has now taken a well-earned retirement. His book, now in a second edition, is required reading. Chapter 28 of it deals directly with the human dimension of the work of the reformers.

Hazel Genn makes the point that there is a danger of 'adopting the agenda and rhetoric of policy-makers, and for conducting research only with the limited objective of discovering how the system could be made to work better within its own terms'.[2] The study of civil justice is a field in its own right: it analyses and critiques civil procedure and the procedural justice it seeks to deliver, creating knowledge that encompasses but goes wider than doctrinal understanding. However, Clifford Geertz[3] offers a warning that it can be difficult to be truly distant from what one is studying for: in some types of study, one has to stay 'rather closer to the ground' than is required for science. Civil justice is such a field of study. There are good reasons for this. We study the rules together with the decisions of judges, which are made in real time in cases concerning real people. I have found that looking at the social world of those working within the civil justice system has helped me to see the process of change more clearly. To approach the subject from this direction is not to say that the work already done in this field is to be devalued – far from it. The challenge is how to question what is already very well known. Just as Woolf was prepared to view ideas from outside the civil justice system as having utility, so I hope that this book may help those within the field to understand its social setting better and, as a consequence, to be able to comment on the planning and implementation of change more effectively.

[2] H Genn, 'Understanding Civil Justice' in M Freeman (ed), *Law and Public Opinion in the 20th Century, Current Legal Problems*, vol 50 (Oxford, Oxford University Press, 1997) 155, 158, fn 3.

[3] C Geertz, *The Interpretation of Cultures* (New York, Basic Books, 1973) 24–25. Geertz is speaking of anthropology, but the study of civil procedure also requires the 'close' approach.