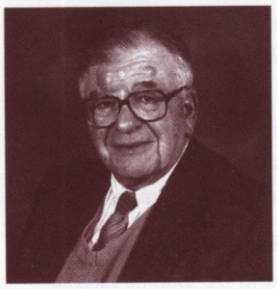
Article

# The reform of civil procedure: isolationism or harmonisation?

by J A Jolowicz



*J A Jolowicz*

The Third Annual Lecture to be presented by the Society for Advanced Legal Studies was given by Professor J A Jolowicz on 8 June 2000. The text of his speech is reproduced below.

Paradoxes are meat and drink to an academic lecturer. They enable him to show off in two or three different ways. First, he can parade his perception by bringing the paradox to the attention of his audience. Secondly, he can demonstrate his learning by showing how the paradox came into being. Thirdly, if he is lucky, he can illustrate his technical skills by resolving the paradox. He might even conclude that his paradox is apparent rather than real. If he does that, his academic credentials are put beyond question: his lecture goes round in a circle and his audience is left at the end exactly where it was at the beginning.

I have a sort of paradox for this lecture, but it is a paradox of a kind that is more likely to arise in the world of politics than in the world of law. We have different groups of people, many of whom are personally known to each other, engaged in reform activities in the same field and at the same time, and none of them pays any attention to what is being done by the others.

This is what is happening today in the reform of civil procedure. Two different kinds of activity have been going on for some time now, each in virtual isolation from the other. On the one hand there is the reform or revision on a large scale of national procedural systems, which I will call 'Woolf-like' reform. On the other there is the effort to reduce the differences between national procedural systems. Today this is usually called 'harmonisation', or sometimes 'approximation'. We have become too experienced to speak any longer of 'unification', though some countries such as France, in the 17th, and Germany in the 19th, century, managed to unify the different systems previously applicable in different parts of the country, and, I understand, Switzerland will manage it in 2002 when a single federal code of civil procedure will replace the separate codes now in force in the various cantons.

So we have Woolf-like reform and attempts at harmonisation being carried on without reference to each other, save that the harmonisers say that the Woolf-like reformers are making things worse by increasing the divergences between their different systems. But that is not all. Each of the numerous Woolf-like national reforms – including those of France, Germany, Italy, Japan, Portugal and Spain, as well as our own – has been carried out as a purely national exercise. I will not say that in none of these countries was any attention paid to what others were doing. It would, indeed, be wrong to suggest that Lord Woolf consulted no lawyers from other jurisdictions before finalising his recommendations, but it is difficult to detect any significant outside influence in the Civil Procedure Rules ('CPR') as they have emerged, save that case management in the common law started in the US. On a broader level, a distinguished Italian expert observed, in 1999, that:

*'the history of procedural law in the 1990s shows a proliferation of reforms of codes of procedure, reforms that, at least in Europe, seem to have been influenced not at all by comparison with the procedural law of other member states.'*

What I want to do in this lecture is to ask the question whether the national reformers, and especially our own, are justified in their isolationist approach. Are they right to believe, as apparently they do, that what is done in other countries cannot usefully influence their views as to what

should be done in their own? The question is important for its own sake, but it is also important because, if the answer is affirmative, then the outlook for harmonisation is bleak. First, however, I should like to say a little more about current and recent attempts at harmonisation, in one of which I was myself engaged.

## HARMONISATION

There has, of course, been some procedural harmonisation within the European Union by, for example, the Brussels Convention on jurisdiction and judgments. I must make it clear, therefore, that in this lecture I use the phrase civil procedure in a restricted sense. I am concerned only with the procedure whereby a case is handled from its inception by the issue of a claim form, or whatever, until judgment. I have nothing to say today about the Brussels or other similar conventions, and I shall not mention the European Convention on Human Rights.

The case for harmonisation of civil procedure in a world of international exchanges at all levels and of the growth of regional organisations such as the European Union is simple enough. First there is the argument – essentially one of equity (small 'e') and transparency – that a citizen involved in an international dispute should not find his dispute dealt with by a different procedure according to the nationality of the court before which it comes. Secondly, there is the argument that any attempt to apply a more or less uniform substantive law in more than one jurisdiction is unlikely to produce uniform results if different jurisdictions deal with similar cases quite differently. Gutteridge pointed out, in 1946, that:

*'similarity of rule in two or more systems of law, in the substantive sense, may easily be nullified by divergences in procedure'.*

He thought it obvious that:

*'no scheme of unification can be regarded as satisfactory if proceedings in one of the participating countries are more dilatory or more expensive than in others, or if the remedies afforded by the uniform law are not the same.'*

These words were written before even the European Coal and Steel Community came into being, and we all know how much substantive harmonisation of civil and commercial law has been attempted since then, both within and outside the European Union. We have directives and conventions by the score, and it is natural that interest in the harmonisation of procedural law has grown and continues to grow. The subject has become a staple for discussion at international congresses, and there is a growing literature.

Purely academic activity apart, there have been at least three major efforts to bring some harmonisation to the rules of civil procedure, one limited to the member states of the European Union, one which it is hoped may be applicable world-wide, and one designed for Latin America.

The first, the European one, began as the almost private venture of an enthusiastic Belgian law professor and practitioner, Marcel Storme, who gathered a group of experts in procedure, one from each of the then twelve member states. The group began work in 1987, and Sir Jack Jacob was the first member from this country; I succeeded him in 1989, by which time Professor Storme had managed to obtain some support from the European Commission. The group submitted its report to the Commission in 1993, and a published version appeared in 1994.

The second is an ongoing project of the American Law Institute. Unlike the European project, which looked to directives or other European legislation to give its proposals legal force in all member states, this project aims to do no more than to produce a set of 'Transnational Rules of Civil Procedure' which could be adopted by any state and which would have the force of law only in so far as a given state has chosen to adopt them. Work on this is quite well advanced but is still in progress.

The third project I wish to mention is actually the oldest. In 1988 the Ibero-American Institute of Procedural Law, an international non-governmental association, produced a model code of civil procedure. This code binds no one and is not even intended necessarily to be adopted as a whole in any country.

The fate of the Storme Group's attempt is not encouraging. In a first flush of enthusiasm the group believed that it could produce a draft code of civil procedure for Europe that would, in due course, be introduced into all the member states. It was not long, however, before everyone realised that this was grossly overambitious. In its final report the group submitted draft rules on a number of specific topics with the recommendation that they should be made the subject of one or more directives, and that, so far as practical consequences are concerned, is pretty well the end of that story. No action on the report has been taken by the European Commission and most Woolf-like reformers seem to be unaware of it.

The fate of the project for the transnational rules will not be known for some time to come, but it is noteworthy that here, too, the original idea proved overambitious. In this case work started with the idea that, subject only to certain specified exceptions, the rules would apply in all civil and commercial matters in which the plaintiff and the defendant were nationals of different states. In the current draft, the scope of the rules is no longer stated as a general proposition subject to exceptions. The rules are now stated to apply only in a number of specified categories of commercial and other financial cases. This change is

largely due to the surviving use of jury trial in so many classes of case in the US. A procedural system that did not allow for jury trial in, say, tort cases, would be unacceptable and probably unconstitutional in the US, but one which did allow jury trial would be unacceptable in civil law countries.

Up to the present, only the third, the Ibero-American, project can claim any actual success. The model code was adopted virtually unchanged as the code of civil procedure in Uruguay and in one state of Argentina, and a number of other countries have adopted some of the principles or particular features of the model. The influence of the model code is also evident in drafts of a new national code for Argentina and in reforms of procedure in the course of preparation and introduction in Brazil and Peru.

## IS ISOLATIONISM JUSTIFIED?

I can now turn to my principal question. Are the Woolf-like reformers justified in adopting a go-it-alone approach?

I begin with Sir Jack Jacob's vehement rejection of the suggestion that the English adversarial system should be replaced by what he called 'the Continental inquisitorial system'. In his words, the suggestion:

*'does not take into account some imponderable intangibles, such as the cultural texture of society, the habits and practices of the legal profession, the needs, values and aspirations of the people, their inarticulate concepts of how civil justice should be administered'.*

Sir Jack's argument contains a salutary warning, but too much should not be made of it. The cultural, political, social, and economic conditions prevailing in the developed countries of the world are not so varied that their procedures for handling civil litigation should be thought to have nothing in common with one another. The Storme Report argues that the differences that exist between the common and the civil law systems of procedure are ultimately of a formal or terminological nature, and a similar argument is advanced in the introduction to the draft transnational rules. There the authors set out what they see as similarities and differences in procedural systems. The differences, they say, are 'important differences, but not worlds of difference', and they find the similarities in matters of broad principle – for example in requirements for a neutral adjudicator, for the defendant to be given notice of proceedings against him, and for the ultimate finality of judgments.

They do not say as much, but they might also have said that the belief of many common lawyers that Continental systems are 'inquisitorial', is misconceived. There are some Continental procedures which are avowedly inquisitorial, such as that used in the French administrative courts, but ordinary civil procedure, though not fully 'adversarial' in the English sense, is not 'inquisitorial' either. Continental civil procedure is usually described as 'accusatorial'. As we shall see, the Continental judge does play a more important role than his English counterpart in the fact-finding process, but he is by no means an inquisitor.

To say this, however, is to say only that the general principles of Continental and common law systems of civil procedure are less different from each other than may sometimes be supposed on this side of the Channel. It is not to say much about the actual feasibility of harmonisation. To go further calls for attention to the detail of particular aspects of procedure in more than one system, to see how far each is, or can be made, compatible with the inarticulate premises and prejudices of the other.

That was the kind of work attempted by the Storme Working Group, whose members met for several days at a time, three or four times a year. Even so, and bearing in mind that they had to study far more topics than the few on which they were finally able to agree, it took them six years. All I can do this evening is to look at one aspect of civil procedure and to do so in two legal systems only. For this purpose I have chosen the use of experts in English and French law.

## EXPERTS

I shall come later to Part 35 of the new rules. For the moment I concentrate on the old system, when we used *expert witnesses* who were really *witnesses* and were called by the parties to help them discharge their burdens of proof. As with any other witness, the expert witness was subject to cross-examination, and where a conflict of expert evidence emerged, the judge had to resolve it for himself. He had no independent expert assistance of his own, except in those rare cases where he sat with an assessor.

This system has often been criticised, and not only for its extravagance in time and money, but something like it was inevitable for so long as jury trial was the norm, and that was long enough for it to be seen generally in this country as the natural way to do things.

Now, whatever may be said against the system of expert witnesses as we knew it, one thing that it did achieve was to secure automatic observance of what, in France, is called the principle of contradiction. This is similar to, but rather broader than, *audi alteram partem* and it insists that the judge may take into account nothing that the parties have not had the opportunity to debate. The principle is taken care of automatically in a traditional adversary system simply because, with a jury, the judge of fact can, in the nature of things, know nothing of the case to be tried until the parties present their evidence at the trial. The same is true for cases tried by judge alone, if the trial judge is isolated from the pre-trial stages of the action. His decision can only be based on the evidence adduced by the parties in open court, and it follows that each party has the

opportunity to challenge – to 'contradict' – the evidence adduced by his opponent. This applies to expert as to all other kinds of evidence.

As is widely known, the system for dealing with experts in France, and indeed in other civil law countries, is different from our own. Experts are not witnesses and they are not designated by the parties. It is the judge who appoints the expert, it is the judge who instructs him, and it is to the judge that the expert reports. It is not without reason that the expert in France is described as *auxiliaire de la justice* and, indeed, as *auxiliaire du juge*.

This is a system in which the principle of contradiction is not automatically taken care of. If left unqualified, it would give no right to the parties to have any say at all on the technical or scientific questions that arise in the case, and, of course, it is not left unqualified. The code itself requires, quite generally, that, in all circumstances, the judge must both ensure observation of the principle of contradiction and observe it himself, and there is important case law applying this principle to the use of experts. For the purposes of comparison, however, the point is not that the principle of contradiction is protected, but that its protection depends on a specific provision in the law: it is not automatic.

If we now place these two systems alongside one another, we see that, under the French system the judge has the power to obtain such information and advice from an independent expert as he considers necessary to enable him to get as near as possible to the truth. Procedural justice has to be safeguarded by a kind of add-on extra. Substantive justice comes first. In the English system, by contrast, the judge must rely on what the parties put before him. Procedural justice comes first, substantive justice second.

It is obviously dangerous to generalise from just one example, and as I have already said, it would be wrong to characterise French civil procedure as inquisitorial. The code insists, for example, that it is for each party to prove the facts on which the success of his claim or defence depends. I have also said, however, that the Continental judge plays a more important role than his English counterpart in the fact-finding process. Part of the explanation of this is that certain procedures, which we would classify as the introduction of evidence or proof, are not regarded as such in French law, and the parties do not control them. The supply of expert information and advice is one example, and there is time for me to mention just one other. The parties to litigation are not competent witnesses and cannot give evidence in the normal way. But the judge may, if he sees fit, summon the parties to appear before him personally and examine them himself. What he learns from this is not 'evidence,' but in modern French law the personal appearance of the parties has become an important procedure. What the judge learns from the answers to his questions, from any refusal to answer, and from a party's demeanour, he will take into account in coming to a decision.

For reasons such as those I have tried to bring out in speaking of experts, I am myself sceptical about the present possibilities for significant harmonisation of procedure in common and civil law jurisdictions. The underlying differences of theory, such as the inbuilt but unmentioned priority given, or not given, to substantive over procedural justice and the instinctive or knee-jerk reactions to proposed change that those differences are likely to provoke, seem to me too great for that. I respectfully differ from those of my colleagues on the Storme Working Group and from those involved in drafting the transnational rules who see the differences between the common and the civil law as less of an obstacle than I do. It follows that I have come reluctantly to the conclusion, at least for one of the only two common law countries in the European Union, that I cannot condemn the relative isolation from foreign ideas in which the recent reforms of our civil procedure have been prepared.

So much for the present. I want now to engage in a bit of crystal gazing and to suggest that many of the obstacles that I now see to harmonisation of common and civil law procedures, obstacles which justify isolationism, will diminish in the future, and in time, perhaps, disappear altogether. I shall restrict my remarks on this to developments in English civil procedure and what I see as predictable consequences of recent reforms, but there have been parallel developments in civil law countries.

### VIRTUAL ISOLATION

Two different kinds of activity have been going on for some time now, each in virtual isolation from the other. On the one hand there is the reform or revision on a large scale of national procedural systems, which I will call 'Woolf-like' reform. On the other there is the effort to reduce the differences between national procedural systems.

It is important to recall at the outset that few of the recent reforms to English civil procedure would have been possible while the jury was regularly used in our civil courts, but the virtual disappearance of the civil jury is at last beginning to affect not just the content of the rules of procedure, but also the inarticulate premises from which conscious thinking begins. Having already used the procedure for what we still call expert *evidence* as my working example, let me look briefly at the law as it has become under the CPR.

Despite all the criticisms of the old system, Lord Woolf did not propose the introduction of court-appointed and court-instructed experts, and Part 35 of the CPR does not introduce the Continental system. What it has done, for better or for worse, is to introduce a hybrid.

Amongst the most striking features of the new law are the imposition on the expert of a duty to assist the court, a duty that overrides any duty the expert may owe to the person instructing him, and the supporting practice direction which requires the expert to address his report to the court. The idea that the expert witness should give evidence independent of the interests of the party instructing him appeared in the cases before Lord Woolf completed his report, but the new rule makes the point clear beyond argument.

This is enough to show how far we have moved from the idea of an expert witness called to support the case of the party calling him, but there is more. Experts may not be called without the court's permission and even so their evidence should be submitted in writing unless further permission is obtained for them to give oral testimony. The opportunity for cross-examination – essential to our notions of procedural justice – is much reduced. Finally, where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single expert.

On the other side of the coin, there is a good deal left of party control. One example lies in the curious rule that, even where a direction is given for a single expert, it is not for the judge either to designate the expert or to give him his instructions. If the parties are unable to agree upon a single expert, the judge is still not given a free hand and – which is even more curious – whatever the way in which the expert is finally chosen, each party remains free to give his own instructions to the designated expert.

Speaking personally, I see this new system as one which is intended to ensure, so far as possible, that the judge receives a single, uncontradicted, expert report on the technical matters arising in the case without provoking the kind of antagonism and cries of 'inquisitorial' to which open adoption of the Continental system would give rise. But I also believe, with all respect to those who designed the new system, that it does not bridge the gap between what we had before and what is done on the Continent. It falls into it. There is no viable half-way house between a party-driven and a judge-driven system. And even if I am wrong about that, the new system, unlike the old, does not secure the automatic observance of the principle of contradiction, and yet it provides no independent safeguard.

I cannot help thinking, therefore, that, sooner or later, Part 35 is going to need radical change. It can either go back, more or less, to a party-driven system, or it can bite on the bullet and move to a court-appointed and court-instructed expert such as exists on the Continent. If things work out so that Part 35 has to be substantially revised in the relatively near future then my crystal ball shows a shift backwards in the direction of experts as genuine witnesses. On the other hand, if, as I expect, the weaknesses in the structure of Part 35 do not bring about its collapse until today's judges and senior practitioners – who know the old system – have been replaced by today's students – who do not – then I believe that the change will be towards allowing the judge to select and instruct his own expert. Such a change would necessarily be accompanied by appropriate protection of the principle of contradiction, and we should have come, more or less openly, to put substantive ahead of procedural justice in the Continental manner.

I have already acknowledged the dangers of generalising from a single example, but in a single lecture such dangers have to be faced. I believe that it will not only be in dealing with experts that future generations of English lawyers will be more willing than is the present generation to put substantive ahead of procedural justice. The introduction of case management and many of the reforms that preceded the Woolf Report have brought an end to the old idea that the best trial judge is the judge who knows next to nothing of the case he is to try until the trial begins. We still have a trial, but in most cases an immense amount of the evidence is available to the judge in documentary form before the trial begins, and he is encouraged to pre-read it.

This move away from the trial judge to whom a case has to be 'opened' also presages another shift towards Continental ways of thinking. There, there is no trial as we know it and the purpose of the procedures that precede the stage at which a case is put to the court for final decision is rightly seen as preparation for *decision*. Here the old idea about pre-trial procedures was, of course, that the primary purpose is preparation for *trial*. Given the extent to which our modern 'pre-trial' procedures operate to bring into court a great deal of information about the evidence on which the decision will be based, how long will it be before we too attribute to those procedures the primary role of preparation for decision rather than for trial?

In bringing this ramble to an end, I want to speculate a step further about the predictable effects of making available to the court so much of the evidence before the trial begins. If the adversary system is as we were told it is by the House of Lords in the *Air Canada* case in 1982, that is, a system in which the court is not entitled, let alone obliged, to look for an independent truth, and in which the court's duty is to decide only in accordance with the evidence provided by the parties, then the adversary system cannot, in my view, long survive. The days in which the only purpose of a system of civil justice was to provide a non-violent alternative to self-help are long since over, and the notion that the court has no duty to the truth is unpalatable. Indeed, it runs counter to ordinary ideas of what justice is about.

In the past, when the judge could know nothing about the case before the trial began, it was impossible for him even to be aware that, say, the evidence before him was incomplete, until all the evidence had been heard, and by

then it was too late for him to do anything about it. Now, however, the judge – or at least the procedural judge – knows, and must know, a great deal about the parties' evidence and Part 32 of the CPR actually gives him power to control the evidence. For how long will he be able to hold, and for how long will he wish to hold, the unattractive line of denying that he has a duty to the truth?

I have suggested that today's generation of lawyers, who were brought up under the old system and are bound to see the post-Woolf law as to some extent a departure from the norm, will continue to find obstacles to harmonisation – real or imagined. They may even be right, if they focus on topics outside civil procedure as I have defined it for this lecture and which it has not been possible for me to mention, such as the differences between the Continental and the English judiciary and legal professions.

But I believe that in time – when the new Civil Procedure Rules have become the system in which all but the most ancient of lawyers were brought up – then it will be realised that our law is not, in its modes of thought and in its underlying, unstated, assumptions, any longer so different from the Continental.

I believe, therefore, that the proposition of Professor Storme and of the authors of the transnational rules, with which I earlier expressed disagreement, was premature rather than wrong for all time. If that is right, and if it is right that there is already an important and growing degree of unconscious harmonisation – convergence, to use a word now fashionable in economics – then the idea that deliberate harmonisation has a realistic prospect of success will cease to seem far-fetched. Isolationist approaches to the reform of civil procedure will cease to be sustainable, and what was not, after all, a paradox, will actually become one, unless we pay greater attention to the procedural systems of other countries and their reform. I hardly need say that the same goes for those others as well.

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# The labyrinth of major fraud

## by George Staple QC

The author, a partner in Clifford Chance and a former Director of the Serious Fraud Office, addresses the issue of overlap between different investigations and proceedings in major fraud cases and offers some suggestions for harmonisation.

It must be counted a blessing of the English legal system that when a major financial scandal breaks there is available a range of different processes, each one specially designed to respond to a different facet of the case.

But anyone who has been involved with one of the major fraud cases of recent years (whether as investigator, regulator, prosecutor, victim or defendant) cannot help but ask whether a system with so much overlap between different investigations and proceedings cannot be made to work more efficiently.

Our system involves enormous expense and delay, and there is now real concern about the impact on such delay of the European Convention on Human Rights (ECHR). In a recent case before the Court of Human Rights in which directors' disqualification proceedings had been stayed until the end of the criminal trial, the court found unacceptable delay, which was contrary to the right to a fair trial under art. 6 of the convention. So the problem has become urgent.

### THE RANGE OF PROCEEDINGS

Let us just pause a moment to consider the range and nature of all these different processes.

- Criminal proceedings may be brought by the Serious Fraud Office, CPS or other prosecuting authorities, e.g. HM Customs & Excise or the Inland Revenue. The criminal process is, of course, concerned with the attribution of blame to a particular individual or group of individuals.