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978-1-107-05166-9 - 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.

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## 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

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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

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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