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## Introduction: what is civil justice for?

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access. Lord Diplock in *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp.* [1981] AC 909, HL, p. 976.

The justification of a legal system and procedures must be one of lesser evils, that legal resolution of disputes is preferable to blood feuds, rampant crime and violence. M. Bayles, 'Principles for legal procedure', *Law and Philosophy*, 5:1 (1986), 33–57, 57.

The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities. Eduardo J. Couture, 'The nature of the judicial process', *Tulane Law Review*, 25 (1950), 1–28, 7.

The last fifteen years has been a period of significant change within civil justice systems around the globe and the fundamental reform of English civil justice which was part of that movement is now a decade old. This therefore seems an opportune moment for reflection. In choosing civil justice as

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my topic for the Hamlyn Lectures 2008, I am straying into territory well marked out by experts such as Sir Jack Jacob, Michael Zander, J.A. Jolowicz, Adrian Zuckerman and, of course, in his own time, Jeremy Bentham. But my ambition in these lectures is to offer a somewhat different perspective on civil justice. I am interested in theoretical questions about the social purpose and function of civil justice (in particular in common law systems) and empirical questions about how the civil justice system works in light of those purposes. My perspective on civil justice is shaped by the experience of nearly three decades spent studying how the civil justice system operates in practice. I have sat in people's homes talking about civil justice problems and why they do or don't want to litigate or wish they had or hadn't. I have sat in waiting rooms and at the backs of courts and tribunals talking to litigants before and after their hearings. I have sat in court offices with listing clerks trying to extract information from antiquated computer systems that still glow green. I have ploughed through muddled court files. I have talked to solicitors and barristers and judges and I have watched the professionals at work. My approach is thereby grounded in an empirical understanding of what the English civil justice system does, how it operates and how its work relates to the expectations and needs of the 'common people'.<sup>1</sup>

In his Hamlyn Lectures on civil justice in 1987, Sir Jack Jacob remarked that 'the system of civil justice is of transcendent importance for the people of this country, just as

<sup>1</sup> This phrase is used in describing the objectives of the Hamlyn Lectures as specified in the terms of trust in 1948, see <http://law.exeter.ac.uk/hamlyn/documents/hamlyntrustorder.pdf>

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it is for the people of every country'.<sup>2</sup> He defined the civil justice system as the substantive law, machinery and procedures for vindicating and defending civil claims – in effect, the entire system of the administration of justice in civil matters. Adopting this broad definition, my starting point is that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights.<sup>3</sup> The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept. Under the rule of law, government is accountable for its actions and will be checked if it exceeds its powers. The courts are not the only vehicle for sending these messages, but they contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good.

<sup>2</sup> Sir Jack Jacob, *The Fabric of English Civil Justice* (Sweet & Maxwell, 1987), p. 1.

<sup>3</sup> For a helpful contemporary formulation see Australian Government Productivity Commission, *Report on Government Services 2008*, vol. 1, Part C 'Justice', Preface.

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If the law is the skeleton that supports liberal democracies,<sup>4</sup> then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work.

My objective in this book is to raise some questions about modern trends in civil justice policy in England and around the world, in the context of my own very settled views about the social importance of a well-functioning civil justice system. In particular, I want to focus on the decline of civil justice – the downgrading of the importance of civil justice, the degradation of civil court facilities and the diversion of civil cases to private dispute resolution, accompanied by an anti-litigation/anti-adjudication rhetoric that interprets these developments as socially positive.

Before starting, however, it is necessary to clear some conceptual undergrowth. The fact that Sir Jack, in his 1987 lectures, rather side-stepped the opportunity to say more about the social significance of civil justice might not have been accidental. One of the problems in discussing the social purpose of civil justice is the obstacle of terminology and definition. Or perhaps it really involves quite deep questions about how we conceptualise the civil justice system and whether it is a *system* in any sense.

When I mentioned to colleagues that I was giving the Hamlyn Lectures, after a sharp intake of breath the immediate response was generally ‘What are they on?’ After replying with the broad title of ‘civil justice’, most people would nod and mutter something like ‘Oh that’s nice’. But

<sup>4</sup> Metaphor borrowed from B. Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), ‘Law is the skeleton that holds the liberal system upright and gives it form and stability’, p. 36.

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a few of my more penetrating critics would ask, ‘What do you mean by civil justice?’ As I reflected more deeply on the answer to that question and considered literature from around the world on civil justice reform, the purpose of civil justice, adjudication, vanishing trials, settlement and alternative dispute resolution (ADR) – all of which are discussed in this book – I became increasingly aware that issues I have touched on in the past are perhaps even more complicated than I had appreciated.

### **The shape of civil justice**

The work of the civil courts reflects the cumulative choices of citizens and business about whether, when, how and how far to press and defend civil suits. There are many stakeholders in the civil justice system and a wide variety of civil justice problems. One of the difficulties of conceptualising civil justice as compared with criminal justice is its sheer complexity. The civil justice ‘system’ is arguably more varied and complex than the criminal justice system. In criminal justice it is possible to trace a consistent and relatively limited range of processes and decision-making bodies that inexorably leads towards a prosecution, normally involving the State as the prosecutor and an individual accused as the defendant. By contrast with criminal justice, civil cases involve a wide range of potential claimants and defendants with many different party configurations. In civil cases, claimants mobilise the legal system as a matter of choice and generally when other attempts to settle their dispute with a defendant have failed.

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I wrote in my UCL Inaugural Lecture on civil justice more than a decade ago<sup>5</sup> that one of the problems in understanding civil justice is its complexity in terms of range of subject matter and configurations of parties and that this diversity inhibits conceptualisation and theoretical development – so many different types of parties, so many different types of dispute. We know from studies of legal problems around the world during the last decade<sup>6</sup> that potentially justiciable civil disputes involving private citizens represent the stuff and difficulties of everyday life: disputes with neighbours over behaviour or land; problems with landlords; money problems; employment problems; arguments over faulty goods and poor services; claims against insurance companies; social landlords seeking to evict indigent tenants. This variety of rights claims, grievances and quarrels leads to the difficulty of generalising about ‘civil problems’. Within what we think of as the civil

<sup>5</sup> H. Genn, ‘Understanding civil justice’ in M. Freeman (ed.), *Law and Public Opinion in the 20th Century*, Current Legal Problems vol. 50 (Oxford University Press, 1997), pp. 155–87.

<sup>6</sup> H. Genn, *Paths to Justice: What People Think and Do About Going to Law* (Hart, 1999); P. Pleasence, A. Buck, N. Balmer, H. Genn, A. O’Grady and M. Smith, *Causes of Action: Civil Law and Social Justice* (The Stationery Office, 2004). Other examples include: *Consultancy Study on the Demand for and Supply of Legal and Related Services* (Hong Kong Department of Justice, 2008); C. Coumarelos, Z. Wei and A. Zhou, *Justice Made to Measure: NSW legal needs survey in disadvantaged areas* (Law and Justice Foundation of New South Wales, 2006); M. Murayama, ‘Experiences of problems and disputing behaviour in Japan’, *Meiji Law Journal*, 14 (2007), 1–59; B.C.J. Van Velthoven and M.J. ter Voert, *Geschilbeslechtingdelta 2003* (WODC, 2004); M. Gramatikov, ‘Multiple justiciable problems in Bulgaria’ (Tilburg University Legal Studies Working Paper No. 16/2008, 2008).

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justice system, individual citizens may bring actions against other individuals, or against large companies, or against public bodies. Financial institutions and public authorities regularly pursue actions against individual citizens. The dynamics of dispute resolution vary significantly in relation to the distribution of power and resources within litigation. Who can most easily afford the cost of pursuing or defending? Who can most easily afford to wait for a resolution? What an individual claimant suing an insurance company might want from the civil justice system is likely to look very different from what a social tenant seeking to resist possession from his landlord might want.<sup>7</sup>

Economic activity is facilitated by a complex system of legally enforceable rights and obligations, and corporate bodies make heavy use of the civil courts. In the sphere of business disputes there is a wide range of matters over which companies may argue and, again, considerable variation in the configuration of disputing parties: small companies suing each other; large companies suing each other; large companies suing small enterprises and vice versa. In common with disputes involving private citizens, the dynamics of commercial disputes are influenced by the distribution of power and resources.

But the analytical problem is more complicated than simply recognising the variety of disputes with their diverse dynamics. Sir Jack Jacob argued that the term 'civil justice' describes the entire system of the administration of justice in civil matters. In his view, the ambit of civil justice 'is wide and

<sup>7</sup> For a discussion of this variety see H. Genn, *Solving Civil Justice Problems: What might be best?*, Scottish Consumer Council Seminar on Civil Justice, 19 January 2005, [www.ucl.ac.uk/laws/academics/profiles/docs/genn\\_05\\_civil\\_justice\\_problems.pdf](http://www.ucl.ac.uk/laws/academics/profiles/docs/genn_05_civil_justice_problems.pdf)

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far-reaching and its bounds have not yet been fully chartered; it encompasses the whole area of what is comprised in civil procedural law.<sup>8</sup> Michael Zander, in his Hamlyn Lectures in 1999, adopted a similar approach by arguing that ‘civil justice concerns the handling of disputes between citizens arising out of civil as opposed to criminal, law. The phrase is normally used to signify all stages of civil disputes by courts, including the issue of proceedings, settlement, trial and post-trial appeals.’<sup>9</sup> But in drawing civil justice so widely, these definitions bring together disputes between citizens, disputes between business and other corporate bodies, and also family disputes. More importantly, they draw in conflicts between citizens and public bodies including central government agencies. Sometimes when people speak of civil justice they are thinking of it as somewhat separate from family and administrative justice. On other occasions they are referring to civil justice as everything that isn’t criminal. It is important to be clear because there are conceptual, constitutional and practical differences between disputes involving the individual and the state, disputes following family breakdown, and civil and commercial disputes. The distinctions matter because there are different views about the theoretical purpose of the role of the public courts within those sub-fields or divisions of civil justice and because, to some extent, there are variations in justice policy in relation to those sub-divisions.

When we consider personal injury litigation, consumer disputes or debt cases we are dealing with dissimilar subject matter but within a common framework – that of disputes about

<sup>8</sup> Jacob, *The Fabric of English Civil Justice*, p. 2.

<sup>9</sup> M. Zander, *The State of Justice*, 51st Hamlyn Lectures (Sweet & Maxwell, 2000), p. 27.



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compensation for injuries, breach of contract, negligent performance of obligations, etc. In each of these cases the dispute will come to court as a result of a difference of view about a factual situation where the law and the courts offer a remedy. The difference of view cannot be resolved between the parties. If it could, it would not be a dispute. In most cases the claimant wants money to compensate for their loss. The defendant will not or cannot pay the compensation. Will not – because he genuinely believes he has done nothing wrong – or cannot because he is impecunious. The coercive power of the court is mobilised by the claimant in order to achieve what he or she believes is a right and which the claimant has been unable to achieve by force of negotiation and argument. The action of bringing suit in the courts confirms the belief of the claimant in his right to a remedy and underlines the social function of the court in that it is prepared to hear and decide the claim on behalf of the claimant.

When we consider relationship breakdown and contact with children, we are once more thinking about disputes, but outside of the realm of contract or tort and instead in the context of the pain of family conflict. Again there are differences of view about factual situations. What is a fair division of family property? Who is best placed to care for the children?

However, when we speak about judicial review of decisions by government, we are in rather different territory. Here the role of the courts is less about dispute resolution and the promulgation of norms and standards in relation to the behaviour of citizens or in the conduct of business, and more about the exercise of a constitutional responsibility to ensure that the executive governs according to law. In effect, these cases are about the rule of law in action.

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One of the questions raised in this book is what importance we should attach to judicial determination in civil justice as compared with private settlement. But it is evident that ideas about the importance of adjudication and the role of the judiciary will differ depending not only on the position of the judge in the hierarchy of English courts and tribunals but also on whether the judge is being called upon to adjudicate in disputes between citizens, between family members, between businesses, or between a government and its citizens. Because all of these justiciable matters are swept up together in the administration of civil justice, it is difficult when considering influences on government civil justice policy to limit discussion to one particular sub-division of civil justice. Thus, although much of my focus in this book is on the role of the courts in non-family civil disputes, rather than family or administrative justice, I want to make clear that the developments I trace in civil justice discourse and policy are both influenced by and will have an impact on the work of the courts in relation to family and administrative justice.

### **What is the civil justice *system*?**

The definitions of civil justice offered by Sir Jack Jacob and Michael Zander include not only the substantive law affecting civil rights and duties but the machinery provided by the state and the judiciary for the resolution of civil justice disputes and grievances. The administration of civil justice includes the institutional architecture, the procedures and apparatus for processing and adjudicating civil claims and disputes. The system – if it is a system – is crafted partly by the government through the provision of buildings, resources,