Squaring the cycle of reform

Judges have a vital role in reform, but should they be the final arbiter? David Greene reviews the evidence

Lord Justice Jackson retires this week with some unfinished business. His contribution to civil justice has been immense and *NLJ* columnist Professor Dominic Regan described some of this in *NLJ* last week (see 'Jackson LJ: a lasting legacy', *NLJ*, 2 March 2018, p7). I am sure Jackson would have preferred to remain in place to see all his reforms completed but the conscripted retirement age for the judiciary has seen him leave the bench at the height of his career.

On 5 March, he gave a lecture to the Cambridge Law Faculty bearing the retrospective title, 'Was it all worth it?'. He confirms that there is, to him, much unfinished business, but the question he raises would need examination at length to do it justice. The question asked here is: does Jackson's retirement mark the end of the policy making judge like Jackson and indeed Woolf and Briggs? In a recent speech given by Sir Ernest Ryder, Senior President of Tribunals, he suggested it does ('Securing open justice', 1 Feb 2018, *www.judiciary.gov.uk*). Many stakeholders have taken an active part in judicial inquiries into civil procedure over the past 25 years but ultimately final decisions on reform have lain with the judicial chair of the reform committees. It is their name that has become synonymous with the consequent reforms but is this where the judiciary should reside in a reform process. Ryder thinks not. He put it thus: 'We are now in a world where such an approach is, quite simply, no longer acceptable. Reform based on the views of a single judge or group of judges, based on anecdote or impression, or even on a certain amount of evidence drawn from willing parties can no longer be the way we approach the matter. Judges while adept at researching the law, are not by and large trained in the skills of empirical, scientific research. They are not well-versed in dispute systems design. They do not necessarily understand or appreciate the connections, or potential connections between the courts, the legal profession, Ombuds schemes and so on. They are not necessarily at home in the digital world, in terms of design and implementation. Sir Michael Briggs, whose excellent report is ushering in the digitisation of our civil courts, is perhaps the last judge who will be in a position to carry out a detailed review of the historic type.'

The judicial work in this area has not been without criticism. Reforms to civil procedure have significant effect on the delivery of justice and access to it. Further, reforms can be caught up in wider access to justice issues such as the availability of legal aid. Both Woolf and Jackson became unwitting victims of wider policy issues that saw coincidental cuts in legal aid being imposed on the back of their own work on civil procedure.

Further civil justice procedural reform is an endless cycle; Sir Ernest Ryder reminds us of the words of Professor Resnik: 'The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms,' (J Resnik, 'Precluding Appeals', (1985) 70 Cornell L.R. 603 at 624).

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With all respect to the judiciary who take these roles, they naturally bring their own biases and politics to the table. Lord Neuberger talked of unconscious bias of the judiciary borne of their life experience. He was talking of judges acting in the judicial process. When the judiciary enter into the policy field the problem may be accentuated. In delivering a judgment following an adversarial fact finding process a judge is not called upon to defend his judgment. The judgment is given and that is the end of the matter. Policy formation is entirely different and it naturally puts the judge in the frame in which they must justify their conclusion.

We are familiar with judicial inquiries. These are intended to be fact finding in the main. Judges are trained to search out the truth in an adversarial process and to act with neutrality between the parties. Whether that skill readily switches over to an inquisitorial process is a matter of debate. But even the traditional judicial inquiry can have significant political and policy consequences making the judge a political pawn. We have seen that recently in the Grenfell Inquiry.

Civil justice might be seen as the regular fodder for the judiciary. They deal with it every day. They have a particular viewpoint gained from their experience. They come to the inquiry already loaded with that mindset. The inquiry process is intended to collect facts from stakeholders to allow the inquiry judge to come to a conclusion. The approach of judges to the decision making process is well researched. The views of Lord Neuberger on unconscious bias are embedded in the attitudinal model which holds that judges decide based upon their individual ideologies set against the facts of a specific case. That judges have a vital role in reform cannot be doubted but is it right they should be the final arbiter? Ryder suggests not.

Civil justice reform has consequences far beyond the procedure in front of the court. It clearly has consequences on access to justice but more widely it affects how the courts operate, what resources they have and need, how legal services can be delivered, the business of law, and, at its extreme, the survival of firms. Further, as noted, the results do not take effect in a policy vacuum. The Access to Justice Act 1999 enacting the Woolf reforms contained much else to change the face of civil justice. The Jackson reforms were a small part of LASPO, a contentious piece of legislation, now under review.

So we bid adieu to Rupert Jackson and we wish him well. His reforms have had a substantial effect and his legacy lives on. Practitioners have had differing views on many of the issues which he has sought to reform but he enjoys all our respect for his rigour and the huge amount of work he put into managing that poisoned chalice. With much of his work we may or may not agree and in other areas we wait to see its long term effect. I do not seek to answer his own question 'Was it all worth it?' which raises all sorts of objective, subjective and existentialist questions but I am sure he will accept that, as predicted by Professor Resnik, in the great circle of things, another committee will look again at his work and restart the process soon enough. **NLJ**

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