

Judging Civil Justice

Notes on Hamlyn Lecture 2008 - Professor Dame Hazel Genn

27th November 2008

Ms Genn lecture looked at 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 starting point this evening 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.ⁱ

'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 re-affirm 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.

'If the law is the skeleton that supports liberal democraciesⁱⁱ, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work.'

Decline of civil justice

Ms Genn focused 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.'

She considered the problems of defining civil justice. 'But in giving civil justice the widest definition, it draws together disputes between citizens, disputes between business and other corporate bodies, and also family disputes. More importantly, it encompasses conflicts between citizens and public bodies including central government agencies.'

She focused on role of the courts in non-family civil disputes, arguing 'that recent policy on the administration of civil justice has disregarded the social importance of a well-functioning civil

justice system, that both external and internal pressures threaten the future of civil justice, and that these threats are visible in jurisdictions around the globe.'

External Threat

The growth of money spent on criminal justice.

'The increasing regulation and criminalisation of social and economic activity, the process demands of Human Rights legislation, and the associated costs of growing incarceration have led to a substantial increase in the amount of public money devoted to criminal justice.'

'With one justice budget, the urgent and politically charged resource-pressure of criminal justice has led to a climate in which the importance of civil justice has become obscured and the functioning of civil justice has been downgraded.'

Internal Threat

Ms Genn looked to the emergence of the 'Alternative Dispute Profession'.

'There is an *internal threat* to civil justice emanating from sections of the judiciary and the emerging "Alternative Dispute Profession" in search of a market for their services. In the process of pursuing necessary and laudable improvements to the administration of civil justice, voluble reformers have trashed its principles and purpose in a 'postmodernist' rhetoric which undermines the value of legal determination, suggests that adjudication is always unpleasant and unnecessary, and finally promotes the conviction that there are no rights that cannot be compromised, and that every conflict represents merely a clash of morally equivalent interests.'

Ms Genn argued that there has been a move to see civil justice as a private matter 'rather than as a public and socially important good'. Her view is that 'the judicial system *serves the public* in a way that transcends private interests.'

Procedure

The civil justice system is about the right of action and machinery to make good that right. She asks, 'what opportunities and machinery do we provide for the public to enforce those rights and obligations or make good their entitlements?'

'The challenge facing any civil justice system is where to find the balance between efficiency and justice. How much procedural justice do you need to achieve an appropriate degree of substantive justice?'

Civil Justice as a public good

'In determining the merits in individual disputes, the judiciary are publicly stating the law, reinforcing norms of social and economic behaviour, identifying the limits of executive power and publicising the values of the society.'

'Adjudication in civil justice has a critical public function in providing the framework or the "shadow" in which settlement of disputes can be achieved.'

Too little access to justice or too much law?

The last decade has seen a global explosion of reviews, analyses and reforms of civil justice systems.

Ms Genn observed, 'But what's intriguing, is the crisis rhetoric and the sense of urgency about change. And what's even more interesting is that in many places the apparent crisis was occurring at a time of declining pressure on the civil courts.'

Ms Genn refers to the work done in the USA by Marc Galanter who argues that the crisis rhetoric is 'primarily a backlash response to fundamental developments in civil justice since the 1930s. Galanter argues that the roots of the decline in trials can be found, paradoxically, in the expansion of legal remedies and protections for ordinary citizens that took place from the 1930s to the 1970s, including the establishment of the welfare state, and enforcement of civil rights.'

Ms Genn adds that there were new format for legal services such as legal services for the poor and public interest law firms as well as a growth of law schools, 'attracting politically active students who saw law as a vehicle for realising their commitment to social justice and social reform'.

'These changes, and the calls in the mid 20th century for more "access to justice", provoked a profound reaction or backlash. Galanter suggests that business, political, and other elites adopted what he terms a "jaundiced" view of the civil justice system, pointing to what was deemed to be a litigation explosion (what in England has been called the compensation culture). The jaundiced view of civil justice conjures up images of "opportunistic claimants, egged on by greedy lawyers, and enabled by activist judges" and biased juries that capriciously award immense sums against blameless businesses and governments".'

Between 1938 and 1990 there was a steep rise in the number of cases being commenced in the Queens Bench and in the country courts. Since the 1990s, England has witnessed a reduction in the number of cases coming to court. 'Although, in England there has always been a high rate of settlement in the "shadow"^{iv} of the law, this trend has accelerated over the last decade.'

Ms Genn quotes Robert Dingwell who argues that this has been a deliberate Government policy. 'He argues that "... successive UK governments have decided that, although civil justice may be a public service, it is not a public good...they see the system as providing only private benefits for individuals rather than collective benefits for the society as a whole...The creation of precedents and the creation of law, through the civil justice system, is not perceived by government as contributing to the general welfare in the same way as state-provided education or health care..." He argues that unlike the US, "civil justice has always been a legitimate object of state policy."^{vi}

This conclusion is supported by the adoption of Public Service Agreements which aim to reduce activity in the civil courts. Ms Genn suggests that, 'one plausible explanation for the downgrading of civil justice is the apparently unstoppable expansion of criminal justice, criminal legal aid, and the cost of the penal system.'

The relationship between civil and criminal justice: the battle for resources

The problem of criminal legal aid

A central problem for the LCD/DCA/MOJ since the mid-1980s has been the rapidly rising cost of legal aid and, in particular, the cost of legal aid in criminal cases. 'For most of its history, expenditure was not constrained by a fixed budget. The system had always been "demand led" until the (interestingly named) Access to Justice Act 1999, when the Labour Government introduced a fixed budget for legal aid and, with a stroke of the pen, abolished legal aid for most civil cases. In tough times, it is inevitably the civil side that suffers the cut.'

The increase in the legal aid bill, which had been rising steadily throughout the 1980s by the mid-1990s, had started to look uncontrollable. Ms Genn looked at the emphasis given to criminal justice. 'Between 1997 and 2005 expenditure on civil legal aid had fallen by a quarter in real terms whereas spending on criminal matters had increased by 37% in real terms.'

'Despite the social importance of the civil justice system to the economy and social order, in a climate of strained resources it is essentially undefended.' 'Most importantly, the civil justice system has few friends in government, since it is through civil cases that the government is directly challenged.'

M Genn concludes that the crisis rhetoric noted in the USA has been repeated in England.

'I believe that the "*crisis*" in civil justice in the mid-1990s was not some sudden crisis of access to civil justice, but a response to an accelerating crisis in the justice budget, propelled principally by a growth in criminal justice and criminal legal aid. The solution was to squeeze civil justice and civil legal aid.'

The decline of the civil courts

While criminal justice is paid for by the taxpayer through the Treasury, the civil justice system after 1992 was to pay for itself 'with the entire cost, including the cost of the judges to be met from court fees.' Ms Genn comments that this move was neither debated nor approved by Parliament.

Once a justice system is packaged as a public service it can claim resources. 'But the social benefit of the civil justice system is difficult to quantify in terms comprehensible by the Treasury.' Ms Genn refers to other jurisdictions such as Australia which supports civil justice as a public good. She quotes Sir Henry Brooke who recently argued, 'the "glory" of the civil justice system as a place offering access to the weak had ended as a result of the criminal legal aid overspend.'

Ms Genn comments on the fabric of the country courts - the lack of resources.

And the question then is: Does this matter?

The contribution of civil justice reviews to declining civil justice

Ms Genn returns to focus on 'the rash of civil justice crises and reviews over the past decade' and absence of empirical evidence base on which to formulate proposals for change.

She looked at Lord Woolf's 1995 Interim Report 'Access to Justice' and two competing stories about civil justice - too little access, too much litigation. 'The problems of civil justice are said to be cost, complexity and delay and blame for these problems is laid principally at the feet of lawyers.'

'The clear message of the report is that litigation and adjudication are bad and disagreeable, while settlement and, in particular, mediation is attractive and in everyone's best interests.'

'The judiciary were to become case managers responsible for rationing procedure, guided by principles of efficiency, equality of arms, and expedition. For those litigants who insisted on issuing proceedings in court, judges would have the power to divert cases to ADR^{vi} and penalties could be imposed on unruly litigants who insisted on going to trial rather than trying ADR.'

'By raising the small claims limit, a large proportion of county court business was pushed down into the informal, non-public procedure operated by District Judges in chambers.'

As a result, 'the reforms have succeeded in removing cases from the justice system. Although the number of people attempting ADR has not been particularly significant, the rate of issue has gone down in both the county court and the High Court and the number of trials has reduced.'

Policy-making in the dark.

Ms Genn comments that, 'an interesting feature of the civil justice reviews around the world, was that they were in all cases conducted and concluded in the absence of any research or understanding of the dynamics of civil justice, or even a convincing description of the work of the courts and the magnitude of cost and delay.'

Common solutions

The common solutions that emerged from the reviews were the wholesale introduction of ADR; cost control; stripping down of procedure; and active case management by the judiciary to save costs to the justice system and the parties.

Ms Genn adds, 'With the notable exception of the most recent review in Victoria, there is little sense conveyed that any important social purpose is served by the civil justice system or of any public good to be protected in civil justice.'

The role of the judiciary in diverting cases

The crisis in civil justice and the shift away from trials and adjudication has been supported by some sections of the judiciary. Ms Genn asks 'How have judges been co-opted by the government to assist in downgrading civil justice?' She quotes Judith Resnik who suggests,

"...judges may press for settlement because they themselves doubt their own capacities to find information sufficient to call "fact" and are painfully aware of the plasticity of "law". Federal

judges act as if they believe that stories dissolve in endless variations, none of which justify the imposition of state power."^{viii}

Or, Ms Genn asks do sections of the judiciary feel themselves to be under increasing pressure?

'From the perspective of strained resources, growing caseloads, reducing levels of administrative support, increasing numbers of litigants in person who can't afford legal representation and can't get legal aid, the anti-litigation/anti-adjudication/pro-ADR story starts to look attractive.'

More access less justice or simply less justice?

Ms Genn says that 'it is hard not to draw the conclusion that the main thrust of modern civil justice reform is neither about more access nor more justice. It is simply about diversion - about less law and the downgrading of the civil justice system.'

She has two concerns about ADR.

Firstly, 'while it is an important supplement to courts that should be made available to anyone contemplating litigation, it cannot supplant the machinery of civil justice precisely because, in civil cases, the background threat of litigation is necessary to bring people to the table.'

Secondly, 'and more destructively, the case for ADR is routinely made not so much on the strength of its own special benefits, but by setting it up in opposition to adjudication and promoting it through anti-adjudication and anti-law discourse.'

Access to justice - Minding the justice gap

Ms Genn refers to the rise of 'legal needs' studies including *Paths to Justice*. 'Most importantly, for the earlier discussion of litigation explosions, is that across vastly different cultures there is no evidence of any "rush to law".'

'Most people only involve themselves in a legal action because there is a significant issue at stake that threatens their well-being or that of their family. But there is also a lack of knowledge about civil justice and concern about the dangers of becoming involved in its procedures, because of its presumed unpleasantness, expense and unpredictability. To that extent, the jaundiced view of civil justice has been fully internalised by the public, whether or not they have ever had cause to use it. And this is corrosive, since the sense of exclusion from state dispute resolution processes may lead to frustration, alienation and a sense that the rights and entitlements endowed by the state are an empty promise.'

In summary

'Government policy over the last decade (in England and other jurisdictions) has led to increased expenditure on criminal justice and created pressure on the justice budget. The response has been to look for savings in civil justice.'

'This has been achieved through a civil reform programme involving diversion of cases away from public courts and into private dispute resolution; stripping down court procedure; and making litigants pay for court buildings, judges, and the administration, through full cost fee-recovery.'

'There is no plan other than to encourage as much as possible out of the courts.'

'Contemporary civil justice policy raises concern about access to justice for individuals, but also the fundamental question of how much and what form of civil justice we need to achieve the purposes of the system in supporting economic activity, civil society and good governance.' Ms Genn cites Professor Jolowicz who argues, 'where the law is well developed, most people for most of the time simply accept it, complying with their legal obligations and respecting the rights of others and that the effectiveness of law depends on the messages that come from the courts.'

Ms Genn says, 'we need public adjudication to ground normative statements and to make them sufficiently clear that citizens and business can abide by the rules and avoid legal risk.'

'Where there is uncertainty there is fertile ground for disputes to escalate. *"Trials reduce disputes and it is a profound mistake to view a trial as a failure of the civil justice system."*

'Resort to litigation is not necessarily negative.' 'If participation in community activities is an important barometer of national health, then the opportunity to participate in a public, legally binding dispute resolution process is an important measure of the health of our democracy.'

'The challenge is in understanding that, in civil justice at least, there is an interdependency between the courts as publicisers of rules and values backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion disputing parties cannot be brought to the negotiating table. Mediation without the credible threat of judicial determination is the sound of one hand clapping.'

'Instead of indiscriminately driving cases away, we should be asking what cases should be facilitated into court and how should they be facilitated?'

'Perhaps the question we should be debating is *how many trials* and in *what kinds of cases* do we need to ensure that civil justice performs its social and economic functions.'

'The question is, how much formal justice do we need to ensure that the common law can be refreshed, that legal risk can be minimized, and that disputes can be rapidly resolved when they arise. Or, to put it another way, how much justice can we afford to forego?'

In conclusion, Ms Genn said, 'we need a positive understanding of the role and value of the civil justice system. We need a strategy for the cases that we want to encourage into the system and those that we would prefer to discourage and we need to articulate our reasons for both of these choices. Our judgment about the quality of our civil justice system should not be measured simply in terms of speed and cheapness, or by how many cases we can persuade to go elsewhere.'

Finally, we need to **re-establish civil justice as a public good, recognising that it has a significant social purpose** that is as important to the health of society as criminal justice.'

ⁱ For a helpful contemporary formulation see Australian Government Productivity Commission, Report on Government Services 2008, Volume 1, Part C “Justice”

<http://www.pc.gov.au/gsp/reports/rogs/2008/justice>

ⁱⁱ Metaphor borrowed from ?

ⁱⁱⁱ There is a particular concern in the US about overly “activist” judges. It is a pejorative term describing judges who too readily overturn decisions of the executive, who are guided principally by their own policy preferences rather than a proper attention to legal principle. This is discussed in Lecture 3.

^{iv} Mnookin

^v Dingwall 2006 J Disp Res p10

^{vi} CPR 26.4

^{vii} See Resnik 2007 for this suggestion and explanation.