SUMMARY AND SUPPORTING STATEMENT OF

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Reforming Civil Procedure: the Hardest Path: cultural and historical institutional reasons for the differing outcomes of reform programmes in twentieth century Anglo-American civil procedure.

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ABBREVIATIONS

ARP = American reform project

CPR = Civil Procedure Rules 1998.

ECJS = English Civil Justice system.

ERP = English reform project

FCJS = Federal Civil Justice system.

FRCP = Federal Civil Procedure Rule 1938.

HI = Historical Institutionalism.

RCP = Reforming Civil Procedure: the Hardest Path.

1934 Act = The Rules Enabling Act of 1934.

PART ONE: *REFORMING CIVIL PROCEDURE* AND THIS STATEMENT

1. Introduction.

In *How Institutions Think*, Mary Douglas says that her books should have appeared in reverse order, the actual order of production reflecting her wish to try to understand 'the theoretical and logical anchoring' that she needed.[1] This Statement, too, represents a search for a wider anchoring for the approach taken in my book *Reforming Civil Procedure: The Hardest Path*[2] (Bloomsbury Professional, 2019) (*RCP)*, which forms the basis of my submission for a PhD by published works.

RCP focuses on the English[3] civil procedural reform project (ERP) in the last quarter of the 20th century, widely referred to as the 'Woolf reforms' after their principal architect, Lord Woolf. The term 'reform project' is intended to cover all aspects of the reform process. The centrepiece of the ERP was the new Civil Procedure Rules 1998 (CPR), which were intended to effect a radical departure from previous procedural practices in the interests of access to justice. Yet the implementation of the CPR did not proceed smoothly and by general consensus these procedural reforms are taken to have failed in their purposes (*RCP* chapter 2, chapter 5 IV D). In particular, the attempt to replace the old concept of justice on the merits with a new emphasis on procedural justice was fatally undermined by continued judicial adherence to justice on the merits. [4]

The failure of the reform of civil procedure is a matter of significant practical importance to society, the court system, the parties and users of the court system.

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[1] Mary Douglas, *How Institutions Think*, (Syracuse NY, Syracuse University Press, 1986) at x-xi.
[2] De Saulles, D J, *Reforming Civil Procedure: The Hardest Path,* (Oxford, Hart Publishing, 2019).
[3] Throughout this statement, England/English refers to the jurisdiction of England and Wales.
[4] 'Justice on the merits' was the theory underpinning the Rules of the Supreme Court from 1883 to 1998. It prioritising taking cases to a trial on the merits over preventing cases going to trial where the rules or orders had been breached. The theory was itself a reaction against the formalism that had gone before.

Society needs a functioning court and procedural system, the system in turn has a mission to fulfil. The targets of that mission, the parties, need affordable justice whilst other users of the system also need to be taken into account. This context prompted the exploration of the purposes and functions of civil procedure (chapter 1 of *RCP*). The failure of reform also raises important wider questions concerning how legal institutions, professional legal cultures, lawyers' values, mindsets, and professional interests can impede access to justice, and how change can most effectively be achieved.

The central question addressed in *RCP* and in this statement, therefore, is why the ERP failed. The puzzle was that ideas of reform, of simplification of procedure and pacification of practitioners, which seemed so attractive and obvious in retrospect, should have failed to gain sufficient support to be effective. The subtitle to *RCP*, 'the Hardest Path,' was intended to capture the sense that systemic reform can be troublesome. In retrospect, I can see that the title reflects the differently difficult paths taken by the ERP and by its equivalent American civil procedural reform project (ARP) in the first third of the twentieth century. It reflects, too, the challenge of focusing upon the causes of those difficulties.

This Supporting Statement is divided into two parts. In the first part I provide an outline of the wider project behind *RCP* and of the discussion in *RCP* itself. I have not extensively footnoted this account because all of the relevant referencing is included in *RCP*. I have, instead, provided references to the relevant sections of *RCP* where the sources and evidence for all of the propositions in this Statement can be found. This part concludes with an account of the original contribution to knowledge made by *RCP*, and how that contribution is supplemented by the analysis in the second part of this Statement, which employs the tools of Historical

Institutionalism (HI). In Part Two I provide a brief summary of HI before going on to apply its analytical tools to the case of the ARP, and then, by contrast, to the ERP. The Conclusion identifies what the HI approach adds to my analysis in *RCP* and to our understanding of the failure of the ERP, and also reflects more generally on what legal reformers can learn from HI and what HI can learn from a legal case study.

2. Background to the book

RCP forms part of a larger study which envisages a study of English and American civil procedure in the 19th and 20th centuries. The initial object of the study was to discern the extent to which developments in one country affected developments in the other. The broad trigger thought was that there must be some sort of connection even though, officially at least, the English approach was quite self-contained.

The inspirations for *RCP* and for the larger study were Robert Millar's *Civil Procedure of the Trial Court in Historical Perspective*[5] and Alison Reppy's essay collection entitled *David Dudley Field Centenary Essays*.[6] Each work, coming just after the conclusion of the second world war, exhibits an interest in the transatlantic aspects of civil procedure but very much from the American perspective. There was nothing similar in England and it was not until Jack Jacob's *The Fabric of English Civil Justice*[7] (1987) that English civil procedure began to demonstrate a real interest both in its own shortcomings and in the wider context in which it was operating.

Subsequent developments in the American literature have tended to focus upon the Federal Rules of Civil Procedure 1938 (FRCP) as the American way of doing civil procedure. Much attention has focused upon litigation in courts at the State level. In the same period, the English side has tended either towards the insular or looked toward the European continent for inspiration.[8] Although, here, there has been a declining scholarly interest in the transatlantic aspect, there is a historical thread of connection between the United States and England and beyond that to the wider

[5] Robert Millar, *Civil Procedure of the Trial Court in Historical Perspective,* (New York, Law Centre of New York University, 1952).
[6] Alison Reppy (ed), *David Dudley Field Centenary Essays*, (New York, New York University School of Law, 1949).
[7] Jack Jacob, *The Fabric of English Civil Justice,* (London, Stevens & Son,1987).
[8] Although whether this will remain the case now that Brexit has occurred remains to be seen.

common law world. Post-Brexit what we have in common with America may become more important in the development of English civil procedure.

3. *RCP* on the English Reform Project

3.1 The need for reform. (RCP chapter 2 II E).

In England, by the 1980s, there were widespread concerns that cases were taking too long to reach trial and the costs incurred were disproportionate. The court system was considered to be failing to deliver on its core mission which, in the eyes of the Conservative government, was by then seen as delivering a service to the public. The government's wider New Public Management agenda aimed to make government services more accountable to the public. It was hoped that the accountability would produce flexibility and responsiveness and that this in turn would result in cheaper services and smaller government (see chapter 4 of *RCP*).

The appointment of Lord Woolf was intended to herald a watershed moment.[9] The appointment was made by a Conservative administration[10] but the actual reforms were carried through under a Labour administration. There was therefore a degree of political agreement about the need for reform. Yet despite the ostensible political backing, the reform program went through a difficult process of reception and then implementation. Some of this can be put down to the position of the reformer. Woolf himself was in an unusual position. He was an insider, successful in gaining promotion and therefore, especially before independent selection, a person likely to be acceptable to the judicial elite, yet he also believed that the system which had appointed him needed root and branch reform

The ERP was in line with the prevailing political mood of the era which was that government services should be structured in such a way that consumers could gain access to them and then use them without undue difficulty. This idea underpinned the

[9] In *RCP* I address the difficulties which arise from seeing the 1990s reforms as 'Woolf's' reforms. I now find it more helpful to speak of the ERP rather than the 'Woolf reforms'.
[10] Woolf was appointed on 28th March 1994.

strap-line which the ERP used in an attempt to legitimise the reforms – that of Access to Justice. The citizen should be able to afford to use the courts, be able to understand what was going on and be able to receive an outcome within an acceptable period of time.

3.2 The features of reform

Part of access to justice, Woolf thought, required the simplification of language and of process. The simplification of language would aid understanding and the simplification of process would enable consumers to make use of the system without legal help. That would in turn reduce the need for paid lawyers. The ERP deliberately set out to root out technical legal terminology from the rules - it wanted rules in accessible language. The determination to make the process accessible at the expense of the legal professions can be seen as part of the Thatcherite tendency to open up hitherto reserved areas: on one level the legal professions were just another target of Conservative party ideology. The Labour Party too was no particular friend of entrenched professional interests.

Simplification of procedure was another one of Woolf's key ideas. The ERP had envisaged a straightforward system of "tracks." There were to be three tracks: a small claims track, a fast track and a multi-track. The small claims track was effectively a renaming of the existing small claims/arbitration scheme. The fast track offered an off-the-peg, routinised procedure that was supposed to keep costs low. An early date would be fixed for trial: this was a great step forward and was probably the most successful of all of the CPR's provisions. The multi-track was to cover all cases over the fast track limit both in the County Court and in the High Court. It is here that simplification was least successful. This is because the High Court's work was divided

by Divisions which broadly reflected the work of the old common law and equity courts. Each Division had its own way of doing things. This added more complexity for court users. It also became clear during the drafting process that those judging specialist kinds of work thought that they required their own specialist rules. Thus the number of Parts of the CPR were expanded.

Another aspect of simplification was the ERP's idea that the court structures could be simplified. Woolf produced a simplified draft set of rules (the Civil Proceedings Rules) which he envisaged would initially apply in both the High Court and the County Court. The motivating idea was that having one set of rules might lead to there being one civil procedure court. The wished-for amalgamation never happened. What did happen might look like devolution, but it is also revealing of issues concerning status and stratification. Only the most important cases should be dealt with in the High Court. Much work formerly in the High Court was to be pushed down to the County Court. Of all the work now in the County Court, only the most important cases should be dealt with by Circuit Judges. The balance of the work should be pushed down to the level of the District Judges. They would be trained to move up from small claims work so that their jurisdiction would also cover fast track cases. We can see in this re-organisation a pushing down of work to the lowest possible level together with an increase in responsibility and workload for Circuit Judges and District Judges, sold as an increase in interesting work for the lower levels and receivable as an increase in prestige. This went together with an increased stratification between the High Court bench and the lower judicial levels. The High Court was for the most important work only. The *quid* for transfer down's *quo* was a restoration of the High Court's prestige.

Stratification also featured in the Bowman inspired reforms to the English Court of Appeal[11] (*RCP* chapter 6 II and III). As a result of these reforms, it became necessary for parties to obtain permission to appeal; appeals would change from rehearings to reviews and the Court of Appeal would cease to deal with first appeals from multi-track trials in the County Court which would instead be heard by the High Court. Only first appeals from the High Court would go to the Court of Appeal. Any second appeals from the County Court would have to pass a stringent test. Here an efficiency drive led also to an increase in stratification. The Court of Appeal was to reserve itself for the most important cases, and to be further divorced from ordinary citizens. The High Court bench was to be given further responsibility in dealing with appeals pushed down from the Court of Appeal but was to gain the interest and prestige of doing the work. The Circuit bench was no longer to be routinely answerable to the Court of Appeal and, by implication, no longer needed its direct oversight - itself a matter of prestige.

Woolf looked to the US Federal civil justice system (FCJS) for his biggest idea - judicial case management. There was no doubt that cases were proceeding too slowly and in an inefficient manner. However the ERP never admitted that there was anything wrong with how cases were being processed by the judiciary; all the blame fell upon practitioners who therefore needed to be managed. Yet if we stand back, we can see that the wholesale restructuring of judges' workload cannot simply have been an accidental by-product of reform. I have now concluded that prior to the restructuring, the High Court judges had too much work to do and were in fact too

[11] The Court of Appeal had too much work. Bowman was appointed to overview the appeal system in the Court of Appeal and below. He recommended fewer appeals, an appeals filter and having most appeals dealt with at a lower level within the system.

busy, and that work overload was therefore one of the operative causes of failure to manage cases before the CPR came into force.

The ERP's intention was that management would be active; the judge would look at the case and tell the parties what steps were to be taken. This was something that was broadly new to the ECJS, cutting across established notions of party control and judicial neutrality. English judges did not see it as part of their role to actively intervene in the case. In this sense the RSC's summons for directions did not operate as a general summons which would cover all the directions needed for a case(*RCP* chapter 3 I B). The new procedures would consolidate a great deal more power and responsibility in judicial hands. The ERP wanted to use IT systems to cut the judicial workload and render case management more effective by enabling judges to monitor the progress of cases, but the ECJS did not receive the necessary funding for the promised IT systems.

The imposition of automatic sanctions under the ERP was another problematic area dealt with as a specific example of the impact of procedural development in chapter 5 of *RCP*. The CPR commenced with an integrated approach to sanctions which meant that the sanction would follow straight after breach. It was then up to the party in breach to apply for relief from sanctions. This created a significant tension for judges at first instance as the working of the sanctions undercut their ability to deliver justice on the merits.

Finally, it is notable that the ERP did not try to eradicate the adversarial approach of common law civil procedure in which the whole presentation of a case involves conflict. Rather it advocated encouraging the parties to settle outside the boundaries of the court. It is paradoxical that the ERP was encouraging parties to find

an outside solution.[12] The conclusion must be that the ERP did not think that it would ever be able to deliver an efficient means of settling cases, suggesting conflicted thinking at the heart of the utopian project. If that is right, then the reform would only take the ECJS so far; it would never be other than socially wasteful for most cases to remain within the institution.

The conclusion one must draw from the ERP is that the ECJS, prior to 1998, did not see its role as providing a service that was necessarily of any practical assistance to the parties or to society - the service *was* the benefit.[13] The jurisprudential point was that if the parties engaged with the ECJS, they could only do so on terms set by it. This stance would be justified by resorting to the concept of service of the monarch (or as we might think the state) and not service of the public. In service terms, to borrow Bentham's terminology, the public was a collateral end of the ECJS's existence. This in turn exposed the courts to the complaint that substantive justice was being delivered at the expense of justice as process (*RCP* Chapter 2, II, E).

3.3 Change and judicial culture (*RCP* chapter 4 II B & C)

While opposition to the ERP came from both judges and lawyers, for the sake of brevity I will concentrate here upon the judges. The attack on them was indirect.

Being a judge is part of an individual's identity but individual judges also belong to a group with a history. They will have acquired and internalised values and beliefs and taken on the culture and underlying assumptions of the group. Membership of the judicial group carries with it a high degree of status and power, both over individual

[12] This paradox has become apparent to me in writing this Statement.
[13] A point which has struck me in writing this Statement.

parties and others who are impacted by judicial decisions. It is to be expected, therefore, that the judges will want to retain the privileges of the group; they see the group as a force for good. Further the group would expect them to maintain those privileges.

A particular difficulty arises where an institution is envisaging change. That change is likely to clash with at least some of the ideas and culture of the group of people working within the institution and that, to take an example from the anthropology of business, is likely to influence their reaction to changes which are proposed. Everett M Rogers identifies the factors affecting attitudes to change as being: the advantage offered by the innovation, the compatibility of the existing culture with the innovation, the complexity of implementing the innovation, the capability of having a small scale trial of the innovation, and the degree to which the results of the innovation will be visible to others.[14]

In the case of the ERP, judges were going to be required to take on a different way of working and to sign up to a new theory of justice that demonstrated a shift towards seeing procedural justice as a genuine end in itself. In terms of Rogers' factors table 1 shows the applied analysis.

[14] Everett M Rogers, *Diffusion of Innovations*, 1st edn (1962) 3rd edn (1983), (London, Collier Macmillan Publishers 1983) at pp. 14-16.

Table 1: Application of Rogers' theory.

(a) the *advantage* offered by the innovation was the speedier throughput of cases. This was set against the need for judges to learn a new skill and to take on additional responsibility;

(b) the *compatibility* of the existing culture with the innovation: in fact, much existing procedure was carried forward, but the received message was that existing ways and values were incompatible with the new way of thinking and doing;

(c) the *complexity* of implementing the proposed changes, set against the simplicity of things remaining as before;

(d) the *lack of capacity* to have a small-scale trial of the CPR coupled with the untried nature of the proposals;

(e) the *degree* to which users of the court system would notice having a faster and cheaper outcome, given the amount of effort required to achieve this result.

Given that Woolf characterised the established behaviour of practitioners as deviancy and indirectly challenged both the behaviour of judges and their underlying group of ideas concerning justice, it is unsurprising that judges and practitioners reacted in the way that they did. The ERP adopted the trenchant language of Woolf's coercive aspirational management(*RCP* chapter 5 IV D) yet, perhaps, the watering down of CPR 3.9[15], and the effective softening of the sanctions regime that went with it, is explicable in terms of institutional doubt as to the degree of coercion that truly was required in 1998: again, an instance of divided thinking. Any doubt that had

[15] CPR 3.9 governs when relief from sanctions may be given. The Mark I CPR 3.9 (1998) allowed judges scope to be very merciful. CPR 3.9 Mark II (2013) gave little scope for the exercise of mercy.

existed had clearly vanished by 2013 when Jackson's proposed measured approach to sanctions was overridden in the rewriting of what became CPR 3.9 (mark II).

4. Contribution to Knowledge

Those proposing reform, interpreting the reform's rules, implementing the rules and utilising them on a daily basis, all played a part in the ultimate falling short of the ERP. This was known and had been written about, yet the explanations offered prior to *RCP* were essentially technical and did not account, so it seemed to me, for the socio-cultural aspect of what had happened. I started by looking at the system of sanctions used by the ERP (chapter 5 of *RCP*). I was able to show how the mechanics of this had often proved self-defeating, but also how the introduction of a new and then revised system was reflective of the seriousness of non-compliant behaviour.

Study of the mechanics of procedure and the contemporary ideas informing it led to a sense that the explanation was not to be found within the CPR but rather was to be found in the wider context surrounding it. This sense was reinforced by the literature review in chapter 2 of *RCP*. Most of the literature is practitioner orientated and therefore part of the world it is trying to comment upon. I concluded that in some sense the problem was a one of professional culture and that the culture of civil procedural practice was part of the explanation for the problems of reform. That thought opened up two lines of theoretical enquiry; one socio-legal the other comparative.

4.1 The role of culture

The socio-legal thread led to an examination of the impact of different groups within the culture of practice. *RCP* charted the practitioner and judicial response to the ERP through the cultural practices and mindsets of those in the law. The practitioner response was visible from the outset, and I was able to show how the ERP had rubbed up against cultural barriers. The very mixed judicial response had to be traced through

the case law as it developed over time. That response had a peculiar feature in that it was divided and representative of different views, as John Sorabji has shown (see page 117 of *RCP*). Yet ultimately, I concluded that the reason why the change decreed by the system did not happen, at least as envisaged, was that judicial and practitioner culture had overcome the ERP.

4.2 The comparative study

The comparative limb of the enquiry in *RCP* looked initially to American commentators to see what they made of their own experience of civil procedure in the Federal context (chapter 3 of *RCP*). This raised an initial question about the comparability of the 20th century American and English civil procedure reform projects. The 1938 US Rules have national effect as they cover all of the District Courts of the United States. Yet state litigation is handled in the courts of individual states so the bulk of litigation was conducted outside the scope of the FRCP. The CPR, by contrast, is truly national, there are no rival local courts. Is one therefore not comparing like with like? The difference is smaller than it appears because the FRCP drew much from the New York 1848 Rules which served as a model for civil procedure in many American states. Therefore, the FRCP reflect so much of the American approach as to justify their forming part of the study of civil procedure in a national context. As *RCP* made clear, there were also sufficient procedural similarities for the 1938 rules and the 1998 to be comparable, including statements of purpose (FRCP rule 1, CPR rule 1.1) and the approach to case management.

A detailed examination of the literature established that there was a widely held view that the reforms leading to and introduced by the FRCP had been a success. In relation to the respective statements of purpose, I found that the more modest

American formula had not been used to shape or control the FRCP as a whole. The emphasis had been less doctrinal than practical; the Federal rules committee had gone as far as referring to the purpose statement as the 'bunk'.[16] The official tone of the ERP, on the other hand, had been that doctrine had deformed the English procedural system so a new doctrine was required save it. The ERP had introduced a new doctrine (or philosophy) in the overriding objective and that doctrine was worked through into the very corners of the new CPR. That same doctrine marked a radical departure from the old one but I argued that it was undermined, blocked or just plain misunderstood by thinking that had been formed by the old doctrine.

Study of the American commentators and doctrine highlighted significant differences in approach between the English and American reform projects leading one to think that, perhaps, further study of the American side might shed further light on the fundamental question relating to the English side. My study of the American reform project (ARP) (History: America to 1938 in *RCP*) surprised me by leading away from the cultural realm and into the realm of politics and political policy. The link between politics and law in American procedure was obvious. The opening section of *RCP* traces the history and development of the ARP and shows how differently and contingently the reform had developed through a reform movement, passing through senatorial opposition, financial and political upheaval before becoming secure in law. Legal establishment led to personal manoeuvring which resulted in the drafting of rules that became the FRCP. Judicial reception of the rules was favourable. The ARP was ultimately a success.

[16] Meaning something like 'humbug' in English parlance.

4.3 Historical institutionalism

In retrospect, one can see that *RCP* stopped short, a fact which it is the purpose of the second part of this Statement to remedy. It was clear to me that, in addition to the established legal-doctrinal theories of change and *RCP*'s socio-cultural approach, at least one piece of the jigsaw was still missing: the explanation for how the ERP failed to reach fruition when it was being introduced by and into a highly disciplined organisation. *RCP* did not attempt to explain how and why the failure of the ERP was possible in the context of the workings of the ECJS, a command and control institution.[17] It is here that the use of the tools of Historical Institutionalism (HI) offers further insight which is applicable to both sets of rules covered by *RCP.*

Part Two of this Statement undertakes an initial study into the application of the methods of HI in the field of Anglo-American civil procedure, showing in particular how consideration of the concepts of punctuated equilibrium, critical junctures, path dependence, reactive sequence and critical antecedents opens up the chronology of events to show why change did or did not occur from the perspective of civil justice systems taken as an institution.

In brief, the ARP benefitted from a severe external shock; it had widespread support with historical roots and a credible figure steering reform. Further, the ARP benefitted from increasing returns on its pathway. The ERP, by contrast, had lacked the severe external shock that pushed the ARP into its final, successful phase. There was no Wall Street Crash, no Presidential election, and no New Deal. There was just a sense that attempts at change had withered and died. Woolf was quietly chosen to lead the reforms; there was no external crisis of which he was the beneficiary.

[17] As the CPR were law, one might have expected the judges to have implemented it notwithstanding any private views which they might have had. That this did not happen (*RCP* chapter 4 C iv) raises the question of 'why?'

The ARP was no seven-day wonder, it had been decades in the making and undergone a combination of being ignored or actively resisted. The ERP had no such hinterland. Here reform came from above and not below, from outside and not from the professions; change was presented quickly and imposed with speed. In England, reform had withered on the vine before and would do so again. Further the ERP lacked a significant external figure who could provide it with internal and external credibility; a figure that the ARP found in former Attorney-General Mitchell. This might seem a paradoxical statement to make of Lord Woolf (Mitchell's equivalent), yet the ERP always struggled to gain acceptance of its ideas and part of the reason for that has to be down to the radical nature of the ideas he was advancing. In the case of the ARP, Mitchell was not the idea-generator, he did not risk his political capital that way – that was down to Clark, the first-drafter, and others and, fusion aside, the ideas put forward by the ARP were not in any event new. Essentially one could trace the ideas back to 1848 in America and the 1870s in England.

Last, the pathway followed by the ARP, from the date of legal establishment, benefitted from increasing returns. From the instituting Act of 1934, through the choice of the drafting committee by the Supreme Court, to the widespread consultation; each successive step built upon and reinforced that which had gone before. The pathway followed by the ERP received no such favours. It was first diverted and then stopped up by a 'counter-revolution' from on high and a pattern of non-compliance from below, in the professions (Chapter 4 of *RCP*).

4.4 Summary

In summary, the reform of civil procedure in England has been beset with difficulties and commentators have tended to settle upon internal technical procedural

explanations. *RCP* makes a significant contribution to knowledge because it presents an explanation for part of the difficulty in the implementation of the ERP – namely that cultural factors were and are at work; showing the impact this had especially in relation to the treatment of Woolf's new philosophy and the reception of Woolf's new rules. In addition, *RCP* and this Statement offer a comparative view of 20th century developments in civil procedure, making extensive use of American academic commentary on the purposes of civil procedure. As well as following the development of the body of contemporary English commentary as it tracked the unfolding of events on the ground in England, I have expanded the scope of the field by including American events, theories and rules. Finally, this Statement draws on the insights of HI to add a further dimension to the analysis and a more complete answer to the research question, which also has implications for theories of legal change more generally.

PART TWO: HISTORICAL INSTITUTIONALISM

5. Historical Institutionalism and its analytical tools.

The action which *RCP* studied took place in an 'environment', in this case the ECJS. Because of the number of bodies functioning within the ECJS, for simplicity's sake I have treated the ECJS as being an institution in its own right. I have taken the same approach to the FCJS. Generally, we can say that an institution structures opportunity for actors. It also influences their beliefs and desires about the institution. In a change situation, this may work in favour of existing practice because unless beliefs and desires are changed, the institution will not change. Institutions distribute power and offer opportunities for power to be contested.[18] So, in an institution there will be struggle, conflict and negotiation. As a result, it matters who holds the balance of power.[19]

According to Sven Steinmo, HI is 'an approach to studying politics'[20] which focuses on institutions and their effect on the political world. Other features include its empirical basis and its focus upon history, time and causation.[21] It offers accounts of

[18]James Mahoney and Karen Thelen 'A Theory of Gradual Institutional Change ' in James Mahoney, and Karen Thelen, (eds) *Explaining Institutional Change: Ambiguity, Agency and Power* (Cambridge, Cambridge University Press, 2010).

[19] John L Campbell, 'Institutional Reproduction and Change' in Glenn Morgan, John L Campbell, Colin Crouch, Ove K Pedersen, and Richard Whitley, (eds) *The Oxford Handbook of Comparative Institutional Analysis* (Oxford, Oxford University Press, 2010).

[20] Sven Steinmo 'What is Historical Institutionalism?' in Donatella Della Porta and Michael Keating (eds) *Approaches in the Social Sciences* (Cambridge: Cambridge University Press, 2008) p. 150; see also Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, 'Historical Institutionalism in Political Science' in Orfeo Fioretos Tulia G Falleti and Adam Sheingate, (eds) *The Oxford Handbook of Historical Institutionalism*, (Oxford, Oxford University Press, 2016). at pp. 3-4.

[21] Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, 'Historical Institutionalism in Political Science' in Orfeo Fioretos Tulia G Falleti and Adam Sheingate, (eds) *The Oxford Handbook of Historical Institutionalism*, (Oxford, Oxford University Press, 2016). at pp. 3-4, and James Mahoney, Khairunnisa Mohamedall and Christoph Nguyen, C, 'Causality and Time in Historical Institutionalism' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford, Oxford University Press, 2016) at 71.

change in which 'sequence and temporal structure matter'.[22] In explaining change, the HI approach highlights the impact and consequence of choice, and emphasises the influence of the institution upon the actors.[23] In particular it understands the impact of the past on moulding actors' expectations of the future.[24]

Steinmo identifies two broad intellectual currents within *HI* which offer different explanations as to why change happens. The first seeks a deeper understanding of 'the mechanisms of institutional change' that enable change to occur. The second seeks 'to comprehend the role of ideas in politics and history'.[25] This study primarily focuses upon the mechanisms of institutional change as a means of shifting the focus away from procedural rules to the organisation which sets the rules. This strand of HI has developed a model of institutional change which centres on the concept of 'punctuated equilibrium'. A period of equilibrium may include 'critical antecedents', but change will only be precipitated by a 'critical juncture'. The process of change may then follow 'path dependence' or may be disrupted by 'reactive sequences' until a new equilibrium is established. I briefly explain and illustrate each of these concepts before going on to apply them to the ARP and then the ERP.

5.1 Punctuated equilibrium.

Sven Steinmo sees punctuated equilibrium as having been the significant explanation within HI. He describes 'punctuated equilibrium' as follows: 'institutions remain

[22] James Mahoney, Khairunnisa Mohamedall and Christoph Nguyen, 'Causality and Time in Historical Institutionalism' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford, Oxford University Press, 2016) at p. 71.
[23] Sven Steinmo, Kathleen Thelen and Frank Longstreth,(eds), *Structuring Politics : Historical Institutionalism in Comparative Perspective*, (New York, Cambridge University Press (1992) p.9.
[24] Sven Steinmo, 'What is Historical Institutionalism?' in Donatella Della Porta and Michael Keating , (eds) *Approaches in the Social Sciences* (Cambridge: Cambridge University Press, 2008) pp. 164-165.
[25] Ibid.at p. 167.

essentially stable (at equilibrium) until they are faced with an external (exogenous) shock.'[26] The institution then moves back into equilibrium. Steinmo points to the danger of the actors being given 'no agency'. It is as if 'political and institutional change is purely a product of fate.'[27] In *RCP*, I argued that the actors do matter, they can choose to support, oppose or remain neutral to change and this makes a difference. HI derived insights mean that I can now say that this choice is not immune from outside factors.

I think that the term 'equilibrium' is unfortunate in implying that it is a positive or good state in which everything is in balance. Not all situations come from or go into a period of equilibrium in this sense. The pre-1998 position of the ECJS could be better described as 'stuck', as could the situation in America prior to 1929. Likewise, post 2002 the ECJS is better described as 'dysfunctional' although it can be said that the FCJS, post 1938, did move into equilibrium. I have stuck with HI's terminology for the purpose of highlighting the temporal stage of the process but often 'status quo' would be a more adequate term.

5.2 Critical antecedents.

We might ask whether any of the conditions from the equilibrium period could be classed as 'critical antecedents' to change.[28] A critical antecedent is a condition arising before the critical juncture which acts as a filter so as to influence events after the critical juncture. The term is used to cover conditions rather than people. In terms of

[26] Ibid. at p. 168.
[27] Ibid. at p.168.
[28] Dan Slater and Erica Simmons, 'Informative Regress: Critical Antecedents in Comparative Politics', *Comparative Political Studies* 43,(7): 886-917 (2010) at p. 887.

the ECJS one could point to the dominant pre-1998 philosophy of justice and to the incorporation of established practices into legal culture.

With my focus also upon actors I wish to say that there was at least one critical antecedent to the ARP which was the long-standing Republican support for reform. This support was also a critical antecedent condition for former AG Mitchell taking on the role of 'honest broker'. More widely one can point to different kinds of continuity between the actors of the equilibrium and the actors that followed: personal continuity (in the case of former AG Mitchell) , ideological continuity (in that Mitchell was able to pick up Howard Taft's baton of reform[29]) and political continuity (both Mitchell and Chief Justice Hughes being Republicans who were in place under the pre-1932 political arrangements). This continuity mattered from the institutional perspective because Mitchell was able to make possible outcomes that otherwise would either not have occurred or would have taken a different form.

5.3 Critical junctures.

Giovanni Cappocia describes critical junctures as 'events and developments in the distant past, generally concentrated in a relatively short period, that have a crucial impact on outcomes later in time.'[30] I am not sure that 'distant' here adds anything. I wanted to focus on past events concentrated in a short period having a crucial impact on later outcomes. As will be seen in relation to the ARP, the events of 1929 to 1934 were succeeded by the passing of the FRCP 1934. Without the former, it is my

[29] Taft being the exemplary figure of the reform movement rather than its founder or ideologue. I am not uncritical of Taft. He was a significant figure in closing down opportunities for federal employment for people of colour.

[30] Giovanni Cappocia, 'Critical Junctures' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford, Oxford University Press, 2016) at p. 89.

argument that the rules would not have come into place in the form in which they did – indeed the moment for them might not have come again.[31] The question is what counts as a 'short period.' Compared to the length of the equilibrium which preceded the birth of the rules, I would argue that 1929 to 1934 counts as a short period.

Outcomes following a critical juncture may be characterised as enduring, extended, or opening/closing. 'Enduring' outcomes can be discerned by comparing the brevity of the period of criticality when compared to the length of time it takes for the consequent causal process to come to fruition.[32] 'Extended' outcomes involve a brief period of criticality which triggers a series of successive steps which unfold over time leading to an outcome of, perhaps, short duration.[33] Lastly, opening/closing outcomes occur when the critical juncture acts like the opening and closing of a window upon the range of available options.[34] In other words, the critical juncture itself creates opportunities upon which actors and chance can then have their effect. The ending of the critical juncture marks the closing of the window of opportunity against further, fresh, possibilities.

5.4 Path dependence.

Path dependence offers a way of thinking about how a chain of events pushes an institution towards a particular outcome. There are two different approaches which

[31] Although one can perhaps think that the Civil Rights controversies might have provided another catalyst if the local administration of Federal justice had been seen to be defective. Johnson's election of 3rd November 1964 gave the Democrats had a two thirds majority in the House of Representatives as well as the Senate.
[32] Giovanni Cappocia and R Daniel Keleman, 'The Study of Critical Junctures: Theory, Narrative and Counterfactuals in Institutional Analysis', *World Politics*, 59 (3) 341-369 (2007).at pp. 350-351.
[33] James Mahoney, Khairunnisa Mohamedall and Christoph Nguyen, C, 'Causality and Time in Historical Institutionalism' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford, Oxford University Press, 2016) p. 77.
[34] Hillel David Soifer, 'The Causal Logic of Critical Junctures.' *Comparative Political Studies*, 45(12): 1572-97 (2012) at p. 1573.

may be followed. T.J. Pempel speaks of 'Path-dependent equilibrium' as explaining how the past affects the present.[35] The other approach, which I take, is to use the term to describe a cumulative process making it more likely that a particular destination will be reached. The process works by increasing returns upon each step. 'With increasing returns, an institutional pattern - once adopted - delivers increasing benefits with its continued adoption, and thus over time it becomes more and more difficult to transform the pattern or select previously available options, even if these alternative options would have been more "efficient"'.[36]

5.5 Reactive sequences.

If path dependent (self-reinforcing) sequences take effect by the squeezing out of alternatives, reactive sequences work by squeezing out the intended reform. Reactive sequences have, say Mahoney *et al*, three aspects: their speed, their being driven by a reaction to the forces of change and their ability to reverse steps in the pathway such that the pathway ends up in the 'wrong' place.[37] To go back to *RCP*, we can note my argument that the Court of Appeal took a 'counter-revolutionary' role,[38] and see how this generated a reactive sequence against the reform project.

Theories of path dependency and reactive sequence can be difficult to apply in a complex multi-actor scenario. By 'difficult' I mean that sometimes one theory and

[35] T. J .Pempel, *Regime Shift: Comparative Dynamics of the Japanese Political Economy*, (Ithaca, NY: Cornell University Press, 1998) at p. 3. The difficulty comes in telling how significant the change is. Perhaps we might ask, 'have things really changed at all?'

[36] James Mahoney, 'Path Dependence in Historical Sociology', *Theory and Society*, 29(4): 507-548 at p. 508.

[37] James Mahoney, Khairunnisa Mohamedall and Christoph Nguyen, 'Causality and Time in Historical Institutionalism' in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate, (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford, Oxford University Press, 2016) at p. 84.

[38] That is not to suggest malign intent on the part of those who thought that the old theory either had not been displaced or could not be displaced by the overriding objective.

sometimes the other theory might seem to be a better analytical fit. Either one has to choose the theory with the best fit or mix the use of theories in a way that can lead to confusion. In relation to the ARP and ERP, however, the choice of theory appears relatively clear. The story of the ARP seems to fit well with path dependency. By comparison, I think it is more helpful to speak of reactive sequences in the ERP culminating in a fixed path going in the ‘wrong’ direction. In terms of the undermining of Woolf’s new theory of procedural justice it is more accurate to speak of a series of events which, taken together as separate and not accruing events, led to the continuing hold of justice on the merits.

6. Application of Hl's analytical tools to the American reform project.

The ARP can be analysed in terms of a long period of equilibrium punctuated by a series of three external shocks starting with the Wall Street Crash of 1929. Events reached their critical juncture during the period from 1929 to the passing of the 1934 Act.[39] After this, the FRCP were developed and passed into law by a process of path dependency.

6.1 The period of equilibrium 1872-1929.

The initial period of equilibrium started in 1872. In that year, the Federal Conformity Act 1872 required Federal District Courts ('FDCs') to act in conformity with local common law rules. The effect was to require an FDC to adopt the procedure of the US State in which that court was based.

We can start with the beginning of the serious reform movement in 1906 when Roscoe Pound called for change to the way that civil justice was administered. As the call was not taken up, the initial period of equilibrium continued. The period of equilibrium carried on through 1939 despite the following significant events.

In 1911 the American Bar Association ('ABA') called for a uniform system of procedure in FDCs. This would have meant moving away from localised practice at the state level. The ABA could see the advantage of the same procedure being followed on any of the Federal District Circuits. Here we can see endogenous change within the different practitioner groups forming the ABA. The endogenous change did not extend to the judicial world and therefore that element of support for reform was

[39] Note however that the effects of the crash continued to be felt in society. The drawing of a line at the 1934 Act applies only to the FCJS.

still missing. Howard Taft (Rep) was still US President and not Chief Justice of the US Supreme Court. The equilibrium continued but the reform project had made the first significant step towards success.

It was in 1912 that the first exogenous reform attempt foundered. A bill proposed in the US House of Representatives by Congressman Henry Clayton (Dem) was defeated. This defeat demonstrates the resilience of the congressional hold over the FCJS. This exogenous hold was to be strengthened in 1915 by the arrival of Senator Thomas Walsh (Dem). The result was a successful defence of the status quo until 1934 and even as late as 1938 part of the Senate was mounting a rear-guard action. The second exogenous reform attempt came in 1916-17. A Senate Bill proposed by Senator Howard Sutherland (Rep) was rejected. This Congress marked the point at which the veto point of Walsh became a significant factor. The reform project had found a personal opponent and Congress' exogenous hold over the FCJS demonstrated its resilience against change. As a result, the equilibrium continued. 1923 brought the failure of the third exogenous reform attempt. Senator Albert Cummins (Rep) put forward a Bill in the Senate. It was defeated, the veto point of Walsh continued.

By 1929, a storm was brewing in the outside world. It was to pass from Wall Street via Main Street to the White House. The period of equilibrium was at an end. The period of shocks had begun.

6.2 Critical juncture: 1929-1934

We can now point to three significant exogenous shocks which built up successive pressure and created the conditions where change might become possible. 1929

brought the Wall Street Crash, the first exogenous shock. This was followed by the Great Depression, the second exogenous shock. If the Wall Street Crash had ramifications in the financial markets, the social after-effects were felt throughout the US during the Great Depression. The sense of fragility engendered gave Franklin Delano Roosevelt (Dem) ('FDR') the opportunity to win the presidency (the third exogenous shock) in November 1932, and gave the necessary support in the legislature to bring about change, including the changes to the FCJS.

From March 1933 there was a period where events went first one way then the other: those events were to lay out the boundaries within which future change could take place, without determining what kind of change would in fact take place. My argument is that the path to the FRCP did not truly open until the end of this period i.e. after the Rules Enabling Act of 1934 had been passed into law.

FDR had won the 1932 election but does not seem to have been intending to change the FCJS. He nominated Thomas Walsh, the personification of opposition to change, as the Attorney General (AG). FDR and Walsh were in a position to veto change. Yet, there was then a sequence of three pivotal moments which changed everything. The first pivotal moment came on 2nd March 1933 when Walsh died. This ended his veto point and caused FDR to look elsewhere for an AG. The impact of the event for the FCJS was high - the long-term opponent of change was removed. One can reasonably think that the counter-factual consequences would have been severe. Had Walsh lived to continue in post, there is no reason to think that he would have dropped his long-standing opposition to breaking the link between local state procedure and the FDCs.

FDR was quick to replace Walsh. The second pivotal moment came on 4th March 1933 when FDR nominated Homer Cummings to be the new AG. Cummings

was a significant FDR supporter with experience of the government side of law at the State level. Within a year, the 1934 Act had been passed. Cummings was heavily involved in the process of getting the legislation onto the statute book. [40]The 1934 Act allowed for (but did not prescribe) the fusion of law and equity and gave the Supreme Court the power to make its own District Court rules, subject to Congressional approval. Thus, by June 1934, change was there for the taking if the Supreme Court desired it.

The 19th June 1934 was pivotal moment three, bringing the 1934 Act into law. Reform had passed the Congressional veto point. Although Congress had a reserved veto, the power now lay with the Supreme Court. The reform project reached fruition at the fourth attempt. That there would be some change was no longer in doubt, the extent of it was now a matter for discussion. Had the Act not passed in 1934 then later attempts at change would have been caught up in the 'court packing' controversy caused by the Judicial Procedures Reform Bill of 1937. It seems unlikely that a Supreme Court at loggerheads with FDR's administration would then have welcomed change at the FDC level. Subsequent events show that Cummings, unknowingly, had only a small space for action.

Where does the line fall to be drawn in terms of the ending of this period of critical juncture? The answer depends on whether its outcomes can be classified as 'enduring', 'extended' or 'opening/closing'. In this case, the outcome of the critical juncture cannot be said to be enduring unless one closes the period in 1935 with the setting up of the Supreme Court's drafting committee. Second, the outcome can be said to be extended if one closes with the 1935 appointments but then the time to the

[40] Given that a confrontation with the Supreme Court was expected one conjectures that the Democrats thought that a tactical benefit would accrue to them as a result of the proposed changes.

passage of the FRCP was still several years, so the facts do not fit the model. Third, the outcome can be said to be opening/closing if it contains the possibilities for action. Here the model fits but only if the critical juncture closes with the passage of the 1934 Act. That Act allowed for both the fusion of procedural administration and the drafting of the rules. The possibilities were all present and could not be increased after that point. The actors were not all fully on stage nor were the contingencies all obvious to the actors but the critical juncture contained all the seeds of possibility for what was to follow. I conclude, therefore, that the critical juncture can be said to have begun in 1929 and ended in 1934.

6.3 Path dependence.

The path began with the passage of the Rules Enabling Act 1934. The 'occupation' of the path was to become shared and the direction of the path was to change with a degree of diversion. The path diversion came about like this.

AG Cummings wanted change, but it appears he had not warmed to the idea of the fusion of law and equity. So, Cummings appointed his own committee which was not to consider fusion and was to deal with rule drafting only.

Charles Clark, Dean of Harvard Law School, who now made his appearance, could see two things that Cummings could not: that fusion was an important part of the reforms and, being generous to Clark,[41] that there was a need to bridge a political gap, the Supreme Court being dominated by Republican appointments. Leaving aside Clark's own wish for glory,[42] his resort to the former Republican AG Mitchell achieved

[41] One might say that Clark's alighting upon Mitchell was a serendipitous act. It seems more likely that the choice by Clark, the arch plotter, was anything but haphazard.
[42] First Tolman then Sunderland were pushed aside.

two things. First, it offered Clark's reasoning via an establishment voice that might well have appealed to Cummings. Second, Mitchell's involvement gave the rule-making project a bi-partisan flavour. This is especially noteworthy because, prior to 1929, reform of the FCJS had principally been a Republican project.

In order to divert the path, Clark had to achieve a number of things: he had to find a significant political patron for the project who would take it out of the sphere of direct political confrontation; then it was necessary for Cummings to be persuaded to change his mind about fusion, then the drafting project had to be removed from Cummings' sphere of influence whilst still retaining Cummings' support, and, finally, Clark had to gain a significant post on the drafting committee. Each of these latter steps would amount to path diversion with increasing returns. It was to Mitchell that Clark turned, it was an inspired choice.

Clark's success was dependent upon Mitchell's being willing to associate with the reform project. Mitchell offered a good political link to the Supreme Court; he had been involved in Hughes' nomination as Chief Justice. Mitchell, having held the AG's office, would have been seen as a safe pair of hands by FDR's administration; he had a reputation to lose. Hughes was willing to appoint the reliable Mitchell to the chair of the drafting committee.

The first path diversion came when Mitchell persuaded AG Cummings to take the road to fusion. This brought the reform project closer to realisation and evaded Cummings' veto point. Cummings must have seen that Mitchell was well placed to steer the reform project as a whole. Once it had succeeded, the Democrats could claim the reform as a success. It is from this point that occupation of the path can be seen to be shared in the political sense. The path became increasingly politically stable.

The second path diversion came when the Supreme Court decided to appoint its own committee. Mitchell agreed to head it. Hughes CJ could be confident that the drafting project would be pursued on the court's terms (in line with its own distinct institutional priorities) rather than on the AG's terms. With the Democrats having weighty majorities in both houses, Hughes would have felt that the probability of post-drafting pushback from Congress must have been small. Given the long-term support of the ABA for the project, Hughes must also have felt that the project would find widespread support at the implementation level. Occupation of the path was now shared politically and also shared between the executive and judiciary. In path reinforcement terms, this was a very significant step, one that carried with it increasing returns. Unless something went wrong with the drafting process, it would be much harder for any opponent to attack the new rules given the broad political and judicial support which they had acquired in advance of the drafting process. Once Mitchell was on board with the project, the appointment of the court's own committee simply reinforced CJ Hughes' hand. Cummings was willing to support Hughes taking this route. The new committee marks the point where the project's change process became largely endogenous.

The third path diversion was the appointment of Clark as the drafting committee's reporter. This was perhaps the least important of the diversions, for it was Mitchell who had the important role of steering the drafting project to the point of producing an acceptable set of rules. Clark could produce first drafts but, thereafter, he had to operate in a team with other experienced draftsmen or significant practitioners. This third diversion amounted to a further increasing return which reinforced the reform project's passage along its final pathway. Fusion was to be

pursued, the Supreme Court's committee would oversee the process and Clark was there to lend it a hand.

I do not wish to underemphasise Clark's importance. To be involved in the production of a draft set of rules is a very significant thing but it is something that his rival Sunderland had done before, and could have done again, if Clark had not defenestrated him. It was Clark's involvement of Mitchell that was his most significant contribution to the reform project.

From the selection of the drafting committee, one can trace the rules through the drafting process, each draft reinforcing the path further. The widespread consultation on the draft rules was another significant step of reinforcement. The profession sank time into thinking about and commenting upon the rules. This further raised the bar for rejection of the draft rules. From consultation, the rules proceeded to formal tabling in the Supreme Court – Cummings did that. Hughes was still in post, the rules had been produced by his committee. The storm between FDR's administration and the Supreme Court over the 'court packing plan' in the Judicial Procedures Reform Bill of 1937 might have derailed the rules project but the Cummings-Mitchell and Mitchell-Hughes links held secure. The Supreme Court accepted the draft rules, another point of reinforcement.

The final loose end was the formal approval of Congress required by the 1934 Act. There was a hearing in April 1938 over whether the commencement date for the rules should be postponed. Cummings and Mitchell were in attendance. Mitchell made the point that the fundamental question had been settled in 1934.The consequence of the arrangement provided for under the Act was to hand the drafting work to a body which had the time to do the drafting work with care. He said, 'I think we have started

on this trail, and we should let the courts to take the responsibility.'[43] Here in non-technical language is Mitchell's recognition that the Act of 1934 marked the beginning of the path. Every step thereafter consolidated the path to the FRCP.

[43] Hearing before a subcommittee of the Committee of the Judiciary, United States Senate, Seventy Fifth Congress, Third Session on S.J Res 281 at pp. 5 and 7. Reprinted in Hammond, E, *Legislative History of the Rules of Civil Procedure of the District Courts of the US* (Chicago IL, American Bar Association, 1938) vol 1 (no pagination).

7. Application of Hl's analytical tools to the English reform project.

Looking at the ARP one can construct an ideal type – a pattern which underlies success in civil procedural reform, when viewed from the institutional perspective. Details of the ideal type are set out in table 2.

Table 2 Change Project

The successful change project would:

(a) be driven from outside the institution (exogenous pressure/change);

(b) made with support from inside the institution (endogenous change);

(c) have a long period of gestation so that problems could be ironed out in advance;

(d) make clear where a complete re-orientation was required;

(e) have a clear rationale which was both widely understood and accepted;

(f) be cohesive so that all of the parts of the institutional process were working towards the same goal;

(g) be realistic in terms of the institution's capacity for change given the resources available to it;

(h) be capable of being implemented at the practical level;

(i) be attractive in the sense of offering advantages or at least understood as being necessary;

(j) offer as close a cultural fit as possible with the institution undergoing change;

(k) be supported by a cautious approach to the changed rules of operation;

(l) pose only problems which were capable of resolution after implementation.

At pretty well every stage of the change process, the ARP approximated closely to the ideal type of change to the justice system. The initial shock was exogenous

coming from the political, financial and social worlds. This shock was creative because of long term political support at the highest levels and because of short term bi-partisan political support. The endogenous response was supported by long-standing campaigning by legal professionals and by key judicial figures. The endogenous support was also backed up by cautious and careful work done in formulating proposals that would be widely acceptable. Further, the motivating ideas behind the changes were essentially pragmatic rather than utopian.

We might also note that, there were two points where blockages on the road were cleared, first in the death of AG Walsh, the reform's would-be nemesis, and second in FDR's decision to appoint a replacement who was open to reform. Also to be taken into account is the unexpected but important reinforcing moment when former AG Mitchell gave support to a bi-partisan move, support which, coupled with energetic support from the new AG, gave the reform the backing that it needed to proceed all the way through.

On the other hand with the ERP we can see that we are some way distant from the ideal type. There was no initial external shock, just a long lead-in period of growing concern. Woolf was appointed by one administration and supported by its replacement. This ought to have ensured success; however the proposed reforms were both more endogenous than exogenous in origin, and lacked sufficiently widespread endogenous support. The ERP's proposed reforms amounted to an attack on widely held values as to what amounted to justice. The ERP's proposals were so 'spun'[44] as being essentially new, that they were seen as troublesome to some of the actors within the ECJS.

[44] A vogue word of that age.

There were further difficulties, for many of the motivating ideas behind the changes were utopian rather than pragmatic. The reforms were all to be implemented together, this was too ambitious and created unnecessary problems. The rule-makers and the rule-takers were not in agreement about what the reform proposals meant. As a result, contrary to what was intended, the reforms were not treated by key rule-takers as amounting to a displacement of the old values and ideas. Last, we can note that the rules were drafted at speed and subjected both to watering down (e.g. CPR 3.9) and to multiple additions.

Finally, the ERP ran into reactive sequences. The reception of the rules by the courts and legal professionals might be described in terms of reaction, backlash and reversal culminating in the CPR's winter which can be dated from about 2002 to the arrival of Jackson. The ERP's strong start of 1999 increasingly ran out of steam, suffering a reversal of the intended path and the beginning of justice on the merits' dominance over Woolf's new theory.

8. Conclusion.

Using the tools of HI has enabled me to develop theories of the ARP and ERP which link culture and the institution. The success of the ARP had, primarily, an institutionalist explanation. There had been no pre-existing uniform civil procedure around which a culture could form. The FRCP arose out of a period of external shock which was followed by a critical juncture in which three pivotal moments resulted in the passing of the 1934 Act from which we can date the beginning of the path. The path was diverted by consent and path dependence creating an increasingly strong position for the reform project. The final Congressional attempt at delaying the reform was defeated by the logic of path dependence. On the other hand, the failure of the ECJS to design, receive or implement the CPR successfully had, amongst other things, a cultural *and* an institutional explanation. The RSC and the CCR, taken together, had offered a broadly similar civil procedure around which practitioner and judicial culture formed. Changing that culture was resisted. Further, the CPR did not arise out of an external shock, was essentially endogenous in origin and ran into a reactive sequence which blunted the effect of the reforms.

I argue that the tools of HI offer a way of unlocking further understanding of how and why the ECJS and the FCJS reacted in different ways; ways that resulted in sub-optimal outcomes for the ERP and optimal, if time limited, outcomes for the ARP. The HI approach offers up the possibility of revisiting the study of the ECJS in a way that will allow me to take a fresh look at the procedural reforms that led to the RSC of 1883. Further, the reforms which led to the New York Code of Civil Procedure 1848 would also benefit from the same methodological approach. One might therefore look to the nineteenth century for institutional explanations for the shape of modern civil procedure in in England and America.

Such a dialogue between HI and civil procedure offers up fresh opportunities for testing HI tools and considering whether the specific events on the ground warrant modification of the overall tools used. In particular there is some difficulty in specifying the boundaries of critical junctures.

Overall, then, I argue that this PhD submission advances our knowledge of twentieth century Anglo-American civil procedure because it identifies both socio-legal and historical institutionalist explanations for the outcomes of the ARP and the ERP. One the one hand, professional culture has an impact on how legal professionals, including judges, react to changes in the legal environment. On the other hand, an external shock can drive significant institutional change even where there is opposition. Procedural rules may be drafted and have the force of law, but professional culture and legal institutions play a very significant role in how those rules are received and implemented.

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