"Neither Out Far Nor In Deep": The Zuber Commission and the Problems of Civil Justice Reform

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The people along the sand
All turn and look one way.
They turn their back on the land.
They look at the sea all day.

...

They cannot look out far.
They cannot look in deep.
But when was that ever a bar
To any watch they keep?[1]

I

Of the law and its administration, criticism abounds. Fundamental challenges come from widely differing perspectives and at various levels of abstraction. Consider for example the work of philosopher George Grant, who sees in technology the central obstacle to the survival of "English speaking justice." Scientific objectivity, which dominates our way of thought, is incompatible with a vision of the good that must underlie a sense of justice.[2] Or consider historian S.F.C. Milsom who finds in the demise of the civil jury and the growth of administrative law the reasons that courts no longer deal significantly in management of day to day life or in determining what is right and wrong.[3] The law of torts is handed out to the managers of no fault insurance schemes, the law of property to local planning authorities and tenancies boards and the law of contract to departments of consumer affairs. In short, the courts have become irrelevant to the everyday lives of many people.[4] Social anthropologists argue that our

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[1]R. Frost, "Neither Out Far Nor In Deep" in *Complete Poems of Robert Frost* (New York: Henry Holt & Co., 1949) at 394.

[2]G.P. Grant, *English Speaking Justice* (Sackville, N.B.: Mount Allison University Press, 1974) & Grant, *Technology and Justice* (Toronto: House of Anansi Press, 1986).

[3]S.F.C. Milsom, "The Past and Future of Judge-Made Law" (1981) 8 *Monash Univ. L. Rev.* 1.

[4]*Ibid.* See also G. Palmer, "The Growing Irrelevance of the Civil Courts" (1985) 5 *Windsor Yrbk. Access to Justice* 327-51.

legal institutions have become, not only irrelevant, but remote, that a gap has developed between citizens and their law. But at the same time, the centralization and uniformity of law means that increasingly citizens cannot function without reference to law.[5] Critical legal scholars argue that all "legal" reasoning is political, that law is essentially indeterminate and reject as a myth the law's alleged neutrality.[6] Some law and economics devotees attack the adversarial procedures of the courts as not only stunningly defective but as having an insatiable appetite for resources.[7] These are only samples of the challenges at the conceptual level to the law and its administration.

At the operational level, too, there is no shortage of criticism and questioning. It has become fashionable to speak of the "crisis" in the administration of civil justice. The stereotype is of members of a litigious society rushing to overburdened courts where claims are delayed interminably and procedures ruinously expensive. The adversarial nature of the process emphasizes fight rather than right and renders courts unsuitable for much that is placed before them. Activist judges meddle in the heart of the social fabric, lawyers wallow in outrageous fees and litigants depart the law courts uncomprehending and ruined.

These views are not simply the whinings of a few malcontents. The report of a recent poll conducted for the Department of Justice suggests that this sort of dissatisfaction is widespread. A substantial majority of those polled felt that the law favours the rich and that the justice system is too complicated. An "overwhelming majority" said that a strong justice system should be a top government priority regardless of the price.[8] Another recent press report regarding a study of legal aid in Canada stated that there is no equality of access to justice in this country and that access is denied to those who most need it.[9]

People in high places, as well as the person on the street, find the justice system wanting. Ontario's Attorney General frequently lambastes the system, including the profession that toils within it. Ian Scott has spoken of the "increasing public cynicism" about what judges and lawyers do,[10] the increasing "litigiousness" of the citizenry,[11] about the "costly and burdensome" adversarial system,[12] the "major crisis of public

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[5] See, for example, L. Nader, ed., *No Access to Law: Alternatives to the American Judicial Systems* (Orlando, Florida: Academic Press, 1980) at 5; L.M. Friedman, "Access to Justice: Social and Historical Context" in M. Cappelletti & J. Weisner, eds, *Access to Justice: Promising Institutions*, vol. II (Milan: Sijthoff & Noordhoff, 1978-79) 3-36.

[6] It is impossible to sketch the many claims made by critical scholars in a sentence or two. I have chosen simply to mention here some of the most commonly asserted propositions. For an extensive and highly analytical discussion see the work of my colleague R.F. Devlin, *Politics and Reason* (unpublished study for the Law Reform Commission of Canada, 1985) esp. at 253-304. See also D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 84 *Harv. L. R.* 1685.

[7] See, for example, G. Tullock, *Trials on Trial: The Pure Theory of Legal Procedure* (New York: Columbia University Press, 1980).

[8] "Poll shows most Canadians want strong, fair, simpler justice systems" *The [Toronto] Globe and Mail* (10 September 1987) A4.

[9] "Canadians denied equal justice by flaw in legal aid, experts say" *The [Toronto] Globe and Mail* (28 September 1987) A1, A21.

[10] I. Scott, "Speech to Sixth Annual Advocacy Symposium, Toronto, 1-2 May 1987" vol. 14, no.6, *The National* (6 June 1987) 3.

[11] *Ibid.*

[12] "Use Rooms of High Court to Ease Overcrowding, A-G Urges" *The [Toronto] Globe and Mail* (8 June 1987) A8.

confidence in the justice system"[13] and about the urgent need to exploit alternative methods of resolving disputes.[14] He is not alone. Mr. Justice W.Z. Estey of the Supreme Court of Canada seems to believe there is a glut of litigation in the courts, that the cost of going to court is prohibitive and that increasingly courts are being used "to sell" a point of view.[15] A former Chief Justice of the United States has spoken of the "litigation explosion" and the increasing litigiousness of society.[16] Such talk is considered by many to be the received wisdom.[17]

In response to the perceived crisis, a host of reform strategies has arisen. Increased use of small claims courts has been thought to be an effective way to reduce expense and delay and put justice in the hands of the average person.[18] Administrative regulation has been exploited to overcome the formality and lack of policy-making expertise of courts.[19] Legal aid has attempted to overcome inequality of access to the means of securing justice arising from economic factors.[20] Various procedural reforms have attempted to simplify and expedite traditional litigation[21] while proponents of conciliation and mediation have placed emphasis on diversion of disputes away from those formal processes.[22] Public interest advocacy centres and liberalized rules of standing respond to the need for increased access to the courts in "public interest matters."[23] But all of these developments seem unable to stem the tide. The warnings of crisis and complaints of unequal justice are continuing and persistent.

The problems seem not only intractable but also paradoxical. On one hand, courts should be equally and readily accessible while on the other litigation should be discouraged. Delay and expense arising from an overburdened court system should be minimized, but at the same time the courts should be opened to new types of litigants and claims. We are told that the public is cynical about what judges and lawyers do but

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[13]"Crises of Public Confidence Cited" *The [Toronto] Globe and Mail* (8 January 1987) A9.

[14]*Ibid.*

[15]W.Z. Estey, "The Courts in the Canadian Community of the Twenty-First Century" (1984) 9 *Hearsay* 24; Estey, "Who Needs Courts" (1981) 1 *Windsor Yrbk. Acc. Just.* 263.

[16]W. Burger, "Isn't There a Better Way?" (1982) 68 *A.B.A.J.* 274 at 275.

[17]M. Galanter, "Reading the Landscape of Disputes" (1983) 31 *U.C.L.A. Law Rev.* 4 at 8; see also J.K. Lieberman, *The Litigious Society* (1981) & sources collected in A. Sarat, "The Litigation Explosion, Access to Justice and Court Reform: Examining the Critical Assumptions" (1984) 37 *Rutgers L. Rev.* 319 at 319-29.

[18]See for examples G.D.S. Taylor, "Special Procedures Governing Small Claims in Australia" in M. Cappelletti & J. Weisner, *supra*, note 5 at 595 & G. Appleby, "Small Claims in England and Wales" *ibid.* at 683; T. Ison, "Small Claims" (1972) 35 *Mod. L. Rev.* 18; G.W. Adams, "The Small Claims Court and the Adversary Process, More Problems of Function and Form" (1973) 51 dMDNMJ 583; C.S. Axworthy, "A Small Claims Court for Nova Scotia — The Role of the Lawyer and the Judge" (1977-78) 4 *Dalhousie L.J.* 311.

[19]Milsom, *supra* at note 3.

[20]See, for example, M. Zander, "The First Wave" in M. Cappelletti, ed., *Access to Justice and the Welfare State* (Milan: Sijthoff & Noordhoff, 1981) 27.

[21]See, for example, the revised *Rules of Civil Procedure* in Ontario, which came into force on 1 January 1985.

[22]See R.A. Baruch Bush, "Dispute Resolution Alternatives and the Goals for Civil Justice: Jurisdictional Principles for Process Choice" [1984] *Wis. L. Rev.* 895 at 905-32.

[23]See generally R. Cooper & B. Kastner, "Access to Justice in Canada: The Economic Barriers and Some Promising Solutions" in M. Cappelletti & B. Garth, *Access to Justice: A World Survey*, vol. I (Milan: Sijthoff & Noordhoff, 1978) at 246-344.

also that members of that same public are running to court in record numbers for enforcement of their rights; that cases should be diverted from the courts, but the courts should not be remote and irrelevant. If nothing else, these paradoxical statements reveal a serious superficiality of thought about the civil justice system and its reform. And this has resulted in apparently conflicting ends being addressed by a variety of largely uncoordinated means. As Engel and Steele have rightly observed:

> Numerous reforms have been advocated, and some implemented, varying in nature from small and concise rule changes to major restructuring and large infusions of money and manpower. Some groups have proposed vast expansions of jurisdiction, caseload, and clientele and even the creation of entirely new systems of private or public agencies. Others have advocated drastic contractions of governmental processes and resource commitments and the narrowing of jurisdictions and clientele. Proposals range from elaboration to simplification of procedures, from efforts to assure everyone a lawyer to structural reforms to make *pro se* litigation the practice and thus make lawyers unnecessary. What characterizes these diverse and often conflicting proposals is a profound lack of systemic consideration. Each reform is an *ad hoc* suggestion designed to remedy a specific perceived problem in the administration of civil cases. Few of the reform proposals consider either the perceived problem and its cause or the proposed solution and its impact from the perspective of the entire system of civil justice as it functions in society. Perhaps more important, the failure to consider the civil justice system as a whole obscures from view the models or policy alternatives of what a reformed civil justice system might look like, and only such general models can provide the criteria on which to base evaluation of the present system and to judge proposed reforms. It is time, then, to step back and attempt a broader view.[24]

A more searching approach would need to explain how the system should be more accessible and yet invoked less frequently, receive more business and be less overburdened, assigned central tasks and attract litigants in droves, yet be the subject of public disgust. Some argue that behind these muddles lie a dearth of factual information and an ambiguity of objective concerning the civil justice process. And in the foreground is the apparent inability of very considerable reform activity to solve the perceived problems.

II

In the midst of these currents, a judge of the Ontario Court of Appeal, Thomas Zuber, was commissioned in 1986 to enquire into:

> the jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario, and any other matter affecting the accessibility of and the service to the public provided by the courts of Ontario,

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[24]D.M. Engel & E.H. Steele, "Civil Cases and Society: Process and Order in the Civil Justice System" [1979] *A.B.F. Research J.* 295 at 298-99.

> and to make recommendations to the Attorney General concerning the provision of a simpler, more convenient, more expeditious and less costly system of courts for the benefit of the people of Ontario.[25]

The inquiry was given less than a year to complete its report and this deadline along with a relatively small staff combined to make it practically impossible for Mr. Justice Zuber to explore the breadth of his mandate. He makes the structure and management of the courts his main areas of scrutiny, although he also offers a random assortment of comments and suggestions on many other matters including procedure, court accommodation and personnel, media access and court reporting. But almost half of the report is devoted to the two areas of concentration, the structure and management of the courts.

The core recommendations include abolition of the District Court consisting of roughly 150 federally appointed judges, and the reorganization of the existing centralized and Toronto-based High Court of Justice into a regionalized superior court. Appeals would lie from this court to a court of appeal and, with leave, to a new Supreme Court of Ontario. Cases in which the amount in dispute did not exceed $10,000 would be heard in an expanded Provincial Court (Civil Division) staffed by provincially appointed judges. This court would also deal with landlord and tenant matters, assume and spread the jurisdiction of the unified Family Court and replace Surrogate Courts.

It is clear that Mr Justice Zuber accepts much of the received wisdom about what ails the administration of justice, and views increased access to justice as a principal goal of reform. Cost, delay, inefficiency and complexity are surveyed as prime problem areas.[26] Accessibility — physical, geographic, intellectual and economic — is stressed as a key general principle underlying structural and managerial reform.[27] Acceptance of these problems and goals is reflected in various ways in the recommendations. The regionalized structure of the trial courts should bring the administration of justice closer to the people. Expansion of Provincial Court jurisdiction coupled with simple procedures, fill-in-the-blanks pleadings and the release of its judges from the strictures of the adversary process should ensure that it will be "within the capacity of anyone to handle his or her own civil case in the Provincial Court."[28] Abolishing the solicitors' fees component of costs should help economic accessibility. "Signage," pamphlets, ramps and new hours of sittings will address intellectual and physical accessibility.[29]

The other major thrust of the Commission's Report concerns efficient management. The adoption of modern management principles within clarified chains of command is urged. Standards and evaluation processes for judicial performance and productivity should be established, and management information systems put in place. The

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[25]Ontario, *Report of Ontario Courts Inquiry* (Toronto: Toronto Publication Services, 1987) by T.G. Zuber, Ont. O.C. 1438/86, 22 May 1986.

[26]*Ibid.* at 51-65.

[27]*Ibid.* at 69-71.

[28]*Ibid.* at 92.

[29]*Ibid.* at 69-72.

whole process should be constantly evaluated and innovation and experimentation encouraged.[30] Appealing to *In Search of Excellence*, the commission urges a "do it, fix it, try it" approach favouring experimentation rather than analysis and debate.

Even this brief and selective account of the report reveals a number of major difficulties with its approach and recommendations. At a practical level, implementation would require two, or perhaps three, constitutional amendments, as well as abolition of a court now composed of roughly 150 federally-appointed judges, while at the same time increasing the overall complement of federally appointed judges by nearly one hundred per cent. The number of Provincial Court judges needed to staff that court is not estimated, but a figure approaching twice the present 241 judges is probably not out of the range considering that the court would have added to its jurisdiction all family matters, civil matters involving $10,000 or less, surrogate court matters and various duties under miscellaneous provincial statutes. Bearing in mind the need for two or three constitutional amendments and a likely doubling of personnel resources, it is difficult to agree with the Commission's characterization of its approach as "essentially pragmatic and designed to produce solutions that are attainable and workable."[31]

At a more conceptual level, the Report is also problematic. The "problems" for which "solutions" are proposed require more careful definition. If access is a problem, who should be getting in that is not, or is the question really who should be kept out? What are the causes of delay, assuming delay is a problem, and what would be an acceptable period of time within which to process a civil case? Why will the Provincial Court (Civil Division) improve access instead of simply making the task of collection agencies easier? How will the simplification of procedures allow the average person to present his or her own case unless there is also simplification of the law that will be applied? The Commission's report has little or nothing to say about these elementary questions. In general, there is a paucity of evidence that any of its "solutions" will address "the problems" in any significant way. The "do it, fix it, try it" approach assumes that we know what we are trying to accomplish and have a way of measuring whether we have succeeded. Such goals and methods of assessment are mainly lacking in the Zuber Commission Report.

The Zuber Commission's recommendations, like many other proposed or attempted civil justice reforms, founders on some fundamental and difficult problems. The overgenerality of the statement of the issues to be addressed, the failure to recognize the potentially conflicting goals of reform, the unwillingness to assess the impact of change in one area on another, the unavailability of factual information about the system's present operation and reluctance to systematically study the effect of change all contribute to failure. My thesis is that there are several major types of impediments to significant civil justice reform and that little will be achieved until each is recognized and addressed. In short, I propose to take up Engel and Steele's invitation to "step back and take a broader view."

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[30] *Ibid.*, see generally chapter 7, esp. 129-95.

[31] *Ibid.* at 5.

III

In this section, I put forward four major impediments to significant civil justice reform. These are matters which must be attended to if anything beyond housekeeping and unfocused tinkering is to occur. Reference to the Zuber Commission will be made, where appropriate, but the mandate here is broader than commentary on its Report. The goal is to sketch a different vision of what civil justice reform might take into account and what its parameters might be. My four impediments to significant reform challenge the way that reform should be thought about more than they lead to specific proposals. Each has some obvious practical implications, but outlining them is not the burden of this paper. Here the enterprise is to argue for some ground rules for reform.

I begin with the observation that we tend to ignore the important social impact of procedure and, further, some of the objectives of procedural rules. These two difficulties I group together under the heading "the marginalization of procedure," my first impediment to reform. Just as we ignore the social impact and the objectives of process, we also fail to define accurately the role we expect courts to play in our society. This is my second impediment. For the third, I identify the legal profession itself with its emphasis on technical skills and its concern with precedent. Finally, I argue that factual ignorance about our justice system and its impact on society stands between us and significant reform.

The Marginalization of Procedure

Every practising lawyer understands how important procedure is in determining the outcome of a case. Although the rules of court and statutes conferring jurisdiction are phrased neutrally, it provides no insight for the practitioner to point out that these rules, in fact, favour certain kinds of claims and clients over others. Rules authorizing security for costs or permitting wide-ranging discovery encourage or discourage litigation depending on one's pocket book. Easy access to court and expedited summary procedures for small debt give an advantage to plaintiffs in collection matters. Rules about payment into court place a powerful weapon in the hands of defendants or their insurers. But knowing these things, we rarely think about them or study them systematically. We are either seduced by the appearance of neutral, objective procedures and therefore ignore their effect on the outcome of cases or else our innate professional conservatism prevents us from asking fundamental questions.

In fact, the civil process is, as Giuseppe Chiovenda points out, an important means "of distributing the goals of this life through the application of law" — a "complex institution" which "includes a political and a social side."[32] It should reflect the social, moral and political environment,[33] but too often procedure is seen as the mere mechanics of law application — a device whose maintenance and repair may be safely

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[32]G. Chiovenda, *Principii di diritto processuale civile*, 3rd ed. at 131, cited in P. Calamandrei, *Procedure and Democracy*, trans. J.& H. Adams (1956) at 13.

[33]*Ibid.*; L. Fuller emphasized a similar point when he observed that adjudication is a form of social ordering and, in order to be understood, needs to be studied in relation to other forms of social ordering: "The Forms and Limits of Adjudication" (1978-79) 92 *Harv. L. Rev.* 353 at 357.

left to the "plumber's mate" rather than the research scientist. But important policy questions are at stake in procedural reform. Although rarely acknowledged, procedural reforms further some social goals at the expense of others and encourage or discourage certain kinds of claims. Rarely do we stop to examine these effects or explore the assumptions underlying our reforms let alone make explicit the judgments about who and what should be either the beneficiary or the butt of our innovations.

Perhaps one or two examples will help make the point. Lawrence Friedman, in his penetrating essay, "Access to Justice: Social and Historical Context," describes how the high cost and slow pace of litigation in the 19th century served and supported a healthy market economy by discouraging litigation except as a last resort.[34] Problems with effective debt collection, however, arose as a result of costly and ponderous procedures making life difficult for those who dealt in unsecured credit, mainly the small businessmen and professionals. The creation of the English county courts and the American small claims courts was a response to this demand, and their creation served the middle class debt collectors, not the poor or working class.[35] My point is not that this was a good or bad reform of the civil process, simply that the creation of these new courts served the interests of some over others in ways that were not apparent on the face of the legislation and were rarely made explicit. They were not neutral reforms in terms of social policy although they may have been presented as such.

A second example might be found in our commitment to "individualized" justice in the courts, requiring that each case be "scrutinized on its merits [and]...handled delicately and carefully in its human uniqueness."[36] This approach is deeply embedded in our culture of individual rights, our adversary method of procedure in which self interest is the guarantee of diligence, in the way lawyers practice and even in the way we teach law.[37] The hold of "individualization" is strong. For example, the Ontario Law Reform Commission, in its lengthy *Report on Class Actions*[38] of 1982 proposed an aggregate assessment of damage procedure which would result in damages being assessed according to the likely total loss of the class rather than as a sum of the losses proved individually.[39] One's first reaction to this scheme is that it is unjust because the plaintiffs would not receive compensation for precisely what they lost and that the defendant might have to pay the losses of those who took no steps whatever to enforce their own rights. What assumptions underlie this commitment to individualization and what effects flow from it?

It has been argued that one assumption is of the primacy of "micro-justice" at the expense of "macro-justice"; that is, the achievement of justice in individual cases

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[34] *Supra*, note 5 at 11-13.

[35] *Ibid.* at 12. See also B. Abel-Smith & R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (London: Heinemann Educational Books, 1967).

[36] Friedman, *supra*, note 5 at 22.

[37] See L. Nader & C. Shuggart, "Old Solutions for Old Problems" in L. Nader, ed., *No Access to Law* (Orlando, Florida: Academic Press, 1980) 57-110 at 64.

[38] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Min. of Attorney-General, 1982).

[39] *Ibid.* at 531-33.

which go to court at the expense of overall justice on a broader scale.[40] The effect is to favour potential defendants, given that access to the means of justice is costly. The commitment to individualization arises from a concern about unjust decisions, but tends to ignore the injustice when a valid claim is not pressed as a result of the high cost of litigation. This high cost is created, in large part, by our commitment to the search for individual case-by-case justice.[41] Once again, my burden is not to show that individualization is wrong-headed, but simply that we rarely pause to consider the assumptions underlying or the effects of this commitment when assessing the civil justice process and its reform.

One implication of this view is that civil justice reform needs to be more broadly conceived as touching on some fundamental social policies and societal values. Thus conceived, it cannot go on unenlightened by other disciplines. It is appropriate here to refer to some remarks of Sir Jack Jacob, long time Senior Master of the Supreme Court, editor of the Whitebook in England, Professor of Law and certainly no impractical dreamer:

> In any endeavour to reform civil procedure law, it would be wise, if not also necessary, to consult experts in...[sociology, economics, statistics, social and judicial administration, and others] in order to obtain a comprehensive social perspective of the relevant problems, to examine the necessary organization and administrative changes which ought to be made, and to fashion the instruments and tools of the legal procedural rules and practices so as to simplify and speed, and reduce the cost of the legal process.[42]

The Zuber Report is more concerned with structures than procedures, more with management than social goals. It fails to benefit from much that was readily available in a good law library, let alone seeking out the insights of other disciplines. Under its recommendations, those who have the resources to litigate should find the courts more readily accessible. But it is doubtful that fill-in-the-blank pleadings and simplified procedures will have much impact on making the law more intellectually accessible to laypeople. Those with resources to pursue a case to the top will have another level of appeal, if leave can be obtained to appeal to the new supreme court of Ontario. Moreover, that court, by virtue of its leave requirement, will be able to exert more control over which Ontario cases reach the Supreme Court of Canada. The new management systems ought to make the courts more efficient, but the demands for management personnel and the increase in the number of judges will doubtless make the system considerably more expensive. In short, those who now benefit from the civil process will benefit more, but there is little fundamental change.

The process of civil justice is marginalized by failure to examine its underlying assumptions and to consider its impact on society. The same thing happens when the process is treated as though its only objective is the expeditious and accurate

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[40]Nader & Shuggart, *supra*, note 37 at 64.

[41]*Ibid.* at 84.

[42]Sir J.I.H. Jacob, "The Reform of Civil Procedural Law" in *The Reform of Civil Procedural law and Other Essays in Civil Procedures* (Andover, Hampshire, UK: Sweet & Maxwell, 1982) 1,4.

application of the substantive law. There is, in fact, considerably more to the objectives of the process than that. Process may serve ends of rationality, humaneness, preservation of human dignity and personal privacy in addition to seeking quick and accurate outcomes. These other ends beyond immediate outcomes have been dubbed "process values" by Robert Summers, and his principal point is simply that in the evaluation of legal procedure we must attend not only to its capacity to produce good outcomes but also to its tendency to serve process values such as participatory governance, legitimacy, humaneness and respect of dignity, privacy, fairness and so on.[43] Phrases such as "justice must be done and be seen to be done" and "the ends do not necessarily justify the means" capture this point that *how* we administer justice is important even apart from the question of the sort of substantive justice we administer. Failure to recognize this leads to the error of treating procedure as a purely technical and utilitarian subject. Reform of the process must take account of all of the ends it serves.

The Zuber Commission was not much concerned with procedure, but it does speak about departing from the strictures of the adversary system in unspecified ways,[44] dealing with motions by telephone conference[45] and abolition of the traditional costs rules in the Provincial Court. There is little or no attempt to evaluate these changes against any criteria other than convenience and economy.[46]

The Role of Courts

It seems elementary to say that in reforming the judicial process it is essential to have a clear idea of what it is the courts are supposed to do. The Zuber Commission articulates the role of courts to be the resolution of disputes and the vindication of rights. But as a statement that will guide reform, this leaves much unsaid. Courts do not exist to resolve all disputes or to vindicate all rights. It is necessary to be more specific about which disputes and whose rights we are talking about. Moreover, the two roles may be performed simultaneously in many cases, but may one be performed in absence of the other? When these questions are probed, it becomes clear that stating the role of the court is not the simple matter it seems to be in the Zuber Commission's report.

Disputes and Rights

One of the basic questions is whether the dispute-resolving or right-vindicating role of courts should be given primacy. Kenneth Scott has shown that quite different answers to questions about judicial reform might be given depending on which role was thought more important. If the courts exist mainly to vindicate rights, one would have a different attitude toward expanded class action procedures, liberalized standing and access to appellate procedures than if courts were thought to exist primarily for the

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[43] R.S. Summers, "Evaluating and Improving Legal Processes — A Plea for Process Values" (1974) 60 *Cornell L. Rev.* 1, esp. 1-4; 20-27; See also M. Bayles, "Principles for Legal Procedure" (1986) 5 *Law and Philosophy* 33 at 45-56.

[44] *Supra*, note 25, recommendation 122 at 290.

[45] *Ibid.*, recommendation 128.

[46] *Ibid.*, recommendation 24.

orderly resolution of disputes.[47] The emphasis on one role over the other would also be relevant to decisions about which kinds of cases should get priority of access to the courts and how they should be treated when they get there.

My point here is not to attempt to define the precise proportions of emphasis these different roles ought to receive. It is simply that the answer to that question would influence decisions about court structures and processes. The Zuber Report is silent on this issue and its recommended reforms appear designed to allow courts to do more of whatever they now do without attempting to be specific about what that is or why it should be so.

Which Disputes?

One way of viewing the court system is as a state-subsidized dispute resolution service available at minimal cost to the parties.[48] On this view, a central question for reformers is which disputes ought to receive the benefit of this subsidized but scarce resource. Who is receiving it now is far from clear. A significant body of literature tries to place litigation in the broader context of disputes generally.[49] Formal adjudication is only one method of dispute resolution. Other methods may involve resort to third parties such as arbitration or mediation, or involve only the parties. In this second category are negotiation, avoidance (i.e., withdrawing from the relationship so as to avoid similar disputes) and "lumping it" (i.e., failing to press the complaint).[50] The formal litigation process has traditionally encouraged negotiation and "lumping it" by leaving the formal process unattractive and, more recently, by devices such as court-annexed mediation services, pre-trial conferences and attaching adverse cost consequences to an unreasonable failure to settle. Negotiation and "lumping it" are the most frequent ways in which disputes are resolved[51] and, that even of those disputes for which the formal adjudication process is invoked, only a very small proportion — probably less than ten per cent — go all the way to judgement after trial. It seems clear, then, that the direct beneficiaries of the formal process constitute a small proportion of all disputants.

In light of these insights, thinking of courts as institutions to resolve disputes is grossly oversimple. Rather, they are institutions to which a very small proportion of disputes is taken and of which a further very small proportion is resolved by the court's formal processes. It is hard to give an exhaustive list of the matters which bear on the decision to take a dispute to law and then to pursue it all the way through the formal process, but undoubtedly one of those factors is the ease of access to the process.

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[47]K.E. Scott, "Two Models of the Civil Process" (1974-75) 27 *Stan. L. Rev.* 937 at 940-42. See also B.H. Wildsmith, "An American Enforcement Model of Civil Process in a Canadian Landscape" (1980) 6 *Dalhousie L.J.* 71 at 74-78.

[48]K. Scott, "Standing in the Supreme Court — A Functional Analysis" (1973) 86 *Harv. L. Rev.* 645.

[49]See, for example, L. Nader & H. Todd, *The Disputing Process* (New York: Columbia University Press, 1978); H.M. Kritzer, "Studying Disputes: Learning from the C.L.R.P. Experience" (1980-81) 15 Law and Society 503; R.E. Millar & A. Sarat, "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1980-81) 15 *Law and Society* 525; M. Gallanter, "Reading the Landscape of Disputes; What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *U.C.L.A. Law Rev.* 4.

[50]Nader & Todd, *supra*, note 49 at 9-10.

[51]*Ibid.*

Assuming that we wish to keep formal adjudication as a means for resolving only a small proportion of disputes, the challenge for reformers is to open the courts to the disputes which ought to have more ready access without simply encouraging litigation of disputes which might otherwise have been resolved through negotiation or "lumping it." Presumably, one of the goals is to prevent access barriers forcing disputants to accept improvident settlements or to "lump it." Simply asserting, as the Zuber Commission does, that the courts should generally be more accessible misses the fundamental point that we do not wish to take away incentives to negotiation or even "lumping it," but only to prevent unfair advantages created by access barriers.

Uncertainty about the role of the civil courts makes it difficult to decide which matters can or should be diverted from the formal process. There is a current fascination with alternatives to the courts for resolution of disputes ("A.D.R." as this is often called). The assumption underlying A.D.R. is that many disputes should not be in court and therefore mechanisms that get them out of court are good things. Such mechanisms incidentally relieve the workload pressures on the courts, may reduce costs and save the parties from some of the trauma of adversary litigation. But which disputes are best suited to these alternative approaches?

The Zuber Commission devotes several pages to alternative dispute resolution, and favours things such as mediation, pre-trial conferences and court-annexed arbitration. It is emphasized, though, that alternative dispute resolution must be viewed as simply one of the "total package of services offered by the justice system"[52] and that the courts remain as the last resort when other methods have been tried and have failed.[53] The commission's vision of the civil justice process is a pluralistic one, consisting of, as it says, a "whole package" of services which includes but is not limited to the formal processes of the courts. There is support in the literature for this pluralistic approach.[54] But the problem is that the pluralistic response, such as that of the commission, arises from confusion about what the courts should be doing rather than from the desire to assign particular types of disputes to a process of resolution thought most appropriate for them. In the result, the selection of disputes for alternative methods of resolution is either *ad hoc* or based on anecdotal evidence and there is no guarantee that the alternative is serving, or indeed that it is not undermining, important goals of the civil justice system.[55] It is difficult and probably impossible to make decisions about alternatives to the courts without a clear understanding of the roles that courts ought to perform. Absent such understanding, success is more a product of coincidence than design.

"The Shadow" of the Civil Process

A third problem in defining the roles of the civil process is that the definition varies at different degrees of proximity to the particular dispute and the parties to it. The

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[52] *Supra*, note 25 at 201.

[53] *Ibid.* at 202.

[54] See, for example, L. Nader & H. Todd, *supra*, note 49 at 30-40.

[55] See on this subject R.A. Baruch Bush, *supra*, note 22 at 905-32.

fundamental significance of this point becomes clear if we consider a landmark case such as *Donoghue* v. *Stevenson*.[56] At one level, the case decided simply that the pursuer's pleading disclosed a cause of action so that the case could go to trial. But to so characterize the importance of that case would be ridiculous. The decision is fundamental to our current understanding of the law of negligence. It had a profound impact on other litigation pending at the time it was decided and on many subsequent cases. It also affected and continues to affect the way in which disputes about one "neighbour's" injury of another are resolved out of court and indeed upon the way neighbours and potential neighbours conduct themselves. At the various distances from the immediate parties and their dispute, the decision has different effects and performs different roles. As Marc Galanter put it:

> The contribution of courts to resolving disputes cannot be equated with their resolution of those disputes that are fully adjudicated. The principal contribution of courts to dispute resolution is the provision of a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute but also possible remedies and estimates of the difficulty, certainty and costs of securing particular outcomes.[57]

On this view, the impact of the civil process is pervasive and often quite indirect, and thus in assessing the roles of the formal process these wide-ranging and important effects should not be ignored. This is precisely what we do when we limit our study of the civil process to examining the matters with which it deals directly. It is at least as important, and perhaps more, to know why a potential dispute did *not* arise or why it did *not* end up in court as it is to know how a dispute was processed when it did result in litigation. This is the point of Galanter's "centrifugal" vision of the activities of courts, that the outward flow of signals from the courts is much more significant than the resolution of the particular dispute under litigation.[58] If this is so, two important matters deserve the attention of reformers. First, changes in the formal processes may have unintended effects upon the wider world and second, more effective communication of the courts' messages and reinforcement of them in other ways may ultimately reduce the demands upon the courts while leaving their processes largely unchanged.

The Profession's Resistance to Change

A third impediment to significant reform of the civil process arises from the resistance of the legal profession to such change. This impediment is reinforced by the assumption that civil process reform, as one writer put it, "lies within the peculiar domain and

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[56][1932] A.C. 562 (H.L.)

[57]M. Gallanter, "The Radiating Effects of Courts" in K.O. Boyum & L. Mather, eds., *Empirical Theories About Courts* (1983) 117-142 at 121.

[58]See M. Galanter, "Justice in Many Rooms" in M. Cappelletti, ed., *Access to Justice and the Welfare State*, *supra*, note 20, 147-181 esp. at 169-71.

responsibility of lawyers."[59] I propose to make a few comments with respect to each of these components of this impediment to reform.

As for the notion that reform is the peculiar domain of lawyers — this view is both true and false. It is true insofar as reform requires technical expertise and practical experience. The drafting of rules of court is not a job for a psychologist; a sociologist should not be the prime source of information about the interpretation those rules are likely to receive in court. However, much that is required in significant civil justice reform transcends the technical expertise and practical experience of lawyers. There are concerns of the impact of legal processes on the world and to assess this, detailed observation and measurement are clearly preferable to an exchange of "war stories." There are fundamental social policy decisions to be made on which lawyers may have opinions, but no special claim to expertise. The profession has an important contribution to make, but significant reform should not be viewed as uniquely within its province.

Second, the resistance of the profession to significant change — history provides a stinging indictment here. From early times, the legal profession tended to place a higher value on technical mastery than process efficacy. If we study the English example, the profession allowed the administration of justice to reach a crisis position.[60] It is telling that the last major thrust for significant reform did not come from the legal profession but from outside it.[61] In 1850 the *London Times* thundered:

> If the minds of legal men are to be forever perversely directed to the past, if they will not divest themselves of old prejudices, and accept new views and ideas suited to the exigencies of the present times, the public must be content with the attempts made by laymen to impose a system which cannot longer be permitted to remain in its old and mischievous condition.... The patience of society is at length exhausted.[62]

Jeremy Bentham was even more scathing:

> Hence, it is, that from beginning to end, an English book of procedure (*book of practice* is the name of such a book among English lawyers) presents no other object than a system of absurdity directed to no imaginable good end....It is a maxim with a certain class of reformists, not to give existence or support to any plan of reform, without the consent and guidance of those to whose particular and sinister interest it is in the strongest degree adverse; not to do away or to diminish any evil, but by the consent, and under the guidance of those by whom, for their own advantage, it has been created and preserved.

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[59] Jacob, *supra*, note 42 at 4.

[60] See generally S.F.C. Milson, *The Historical Foundations of the Common Law*, 2nd ed. (Toronto: Butterworth, 1981).

[61] See, for example, R.W. Millar, *Civil Procedure of the Trial Court in Historical Perspective* (Princeton, N.J.: Oceanic Press, 1952) & E.R. Sunderland, "The English Struggle for Procedural Reform" (1925-26) 39 *Harv. L. Rev.* 725.

[62] *London Times* (24 December 1850), referred to in Sunderland, *supra*, note 61 at 734.

> From this maxim, if consistently acted upon, some practical results, not unworthy of observation, would follow:
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> For settling the terms of a code having for its object the prevention of smuggling in all its branches, — sole proper referees, a committee, or bench of twelve smugglers.
>
> For a nocturnal-housebreaking-preventive code, — a committee of twelve nocturnal housebreakers.[63]

While those remarks may seem somewhat harsh, the impeding hand of the profession is still felt. Consider the course of the "new" rules of civil procedure in the Province of Ontario. A committee of lawyers was formed in 1975 and reported in 1980. That report was handed over to a subcommittee of the Ontario Rules Committee for redrafting of the rules, which ultimately came into force on 1 January 1985.[64] The rules could hardly be considered radical change, yet they were ten years in the making. Certainly the mechanism of reform, by relying on judges and lawyers with many other commitments, did not encourage expedition. But one also senses that, as Bentham said of Brougham, "the wisdom of the reformer could not overcome the craft of the lawyer"[65] Reform of the civil process could be greatly assisted if it ceased to be viewed as the special domain of the legal profession and if the profession itself could be induced to overcome the strong hold of tradition and practice when donning its reformer's hat.

On this front, the Zuber Commission took some steps in the right direction. It solicited briefs from the public and received them from groups as diverse as the Advocate's Society and the Advocacy Resource Centre for the Handicapped, the Consumer Association and the Associated Credit Bureau of Ontario, the Ontario Public Service Employees Union and the Ontario Medical Association. And the report emphasizes that courts exist to serve the public and should do more to cater to their convenience.[66] But even with these worthy suggestions, the report, with its emphasis on structure and management adheres to a professional view of and approach to civil justice reform.

Ascertaining the Facts

A final impediment to significant civil justice reform is our factual ignorance about the justice system's operation. The Zuber Commission acknowledges the need for better factual information about the process, not simply for the purpose of effective management but also for assessing the effect of reform.[67] Here the commission is on firm

[63] J. Bowring, ed., *The Works of Jeremy Bentham — Principles of Judicial Procedure*, vol II (London: Simpkin, Marshall & Co., 1843) at 13.

[64] See B.J. MacKinnon, "Statement of the Chairman of the Rules Committee" in *Ontario Rules of Civil Procedure* (Toronto: Ministry of the Attorney General, 1984) at *(i)*.

[65] Referred to in Millar, *supra*, note 62 at 43-44.

[66] *Supra*, note 25 at 67-72.

[67] Ibid. at 188.

ground. The need for careful data collection and assessment is clear when we consider as an example the impact of discovery reform. It was at one time an article of faith that many advantages would flow if pre-trial discovery were more readily available. A major theme of civil justice reform in the last 50 years has been the liberalization of pre-trial discovery and it is manifested in the rules of several jurisdictions that permit wide-ranging oral discovery of parties and non-parties constrained mainly by the principle of relevance. More discovery, it was asserted, would shorten trials, encourage settlement and improve the quality of justice.

Studies that have attempted to determine the effects of broadened discovery rights tend to tell a different tale than that found in the optimistic assertions of the reformers. Discovery may well lengthen cases and increase significantly the cost of litigation. It eclipses the pleadings as a source of useful information and puts the onus on the adversary to ferret out the truth if possible.[68] The point is not that these studies are definitive or that increased discovery was a good or a bad reform. It is that the changes to the discovery rules had measurable impact upon the system as a whole and, perhaps, beyond it and this impact did not accord with the reformers' predictions.

In planning, implementing and assessing reforms, we need to know what the impact is likely to be and, after the fact, what it has been. Our current approach is to devise schemes that seem attractive, put them in place and forget them. Several jurisdictions in Canada have adopted new civil procedure rules in the last fifteen years. How many of them are monitoring their implementation in any systematic way or are trying to compare litigation under the new with litigation under the old? I believe the answer is none. Significant civil justice reform demands more of us than that.

The Zuber Commission provides some examples of how better factual information would make for more informed reform. The section on the need for an intermediate court of appeal is a case in point. The case for the intermediate court rests on the unmanageable workload of the present Court of Appeal and its inability to adequately develop the jurisprudence in the province. The factual assumptions underlying both are questionable. The caseload of the court has, we are told, increased by roughly 67 per cent.[69] But during roughly the same period, the number of judges has increased by 80% so that, in fact, the number of cases *per* judge has dropped since 1968. In light of this, the Commission adds that "the increase in caseload...does not reflect the real increase in the workload in the Court of Appeal because the cases which are heard are increasingly longer and more difficult."[70] Of this last "fact," no evidence is offered and presumably none is available. We are also told that "a measure of inconsistency has crept into the judgments of the court."[71] Once again, this "fact" is to be taken as an article of faith, with no evidence referred to nor, so far as I know, available. The result is a "problem" that is "diagnosed" on the basis of anecdotal evidence and a "solution"

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[68]See, for example, W. A. Glaser, *Pretrial Discovery and the Adversary Systems* (New York: Russell Sage Foundation, 1968); J. Ebersole & P. Burke, *Discovery Problems in Civil Cases (1980).*

[69]*Supra*, note 25 at 116.

[70]*Ibid.*

[71]*Ibid.* at 117.

whose effect is a matter of surmise, all the result of inadequate or non-existent factual information, a good deal of which could be generated if it were thought important. Before another penny of public money is spent on specific justice reforms, a more compelling case must be built in fact, not in conjecture.

IV

That ends my sketch of the major impediments to significant civil justice reform. Our present stance is captured by the lines from Frost which appear at the opening of this essay. We are as the people on the sand who share a fascination with what is going on "out there." But we tend to look only one way and to see neither out far nor in deep. Before significant and successful civil justice reform is likely to occur we must overcome the singularity of our lawyerly way of looking at things and extend and deepen our view, both conceptually and factually. Then our watching may lead to insight and our reforms to improvement, not simply to change.