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Article 1

The Impact of Teaching Procedure

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Introduction

THE IMPACT OF TEACHING PROCEDURE

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WHAT DIFFERENCE DOES the teaching of procedure make? How does the way law schools approach the teaching of procedure affect the other subjects taught in the basic curriculum? How does it affect the general understanding of the role of legal education and the way it should be pursued? How does the approach taken to teaching procedure affect legal scholarship, and how does this affect the community of academics specializing in the area and the way they enhance the general understanding the law of procedure? What impact does the teaching of procedure have on the practice of law and the approach to dispute resolution taken by members of the profession? And what role does it play in civil justice reform?

These are the questions considered in this collection of articles. The approach taken to the teaching of procedure in common law countries is a product of a long history—one that has rarely been the subject of reflection, and then only for discrete reasons relating to curriculum reform or reviewing professional qualifications.[1] When this has occurred, these questions have usually been considered from within a legal system in which the fundamental approach to teaching procedure has not been regarded as in need of review. Under these circumstances, it would be difficult for participants to imagine how things could be different in any significant way. It would be difficult, therefore, to appreciate what difference it might make to legal education, legal scholarship, the practice and profession of law, and civil justice reform in each legal system if the existing approach were fundamentally different.

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1. For example, PBH Birks, ed, *Reviewing Legal Education* (Oxford: Oxford University Press, 1994); Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, *Final Report*, (Ottawa: FLSC, 2009) online: <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf> ["FLSC Report"].

However, when these questions are considered in a comparative context, the insights that emerge are quite remarkable. The approach to the teaching of procedure has developed in significantly different ways from one common law system to another. The distinctiveness of the approaches taken in the United States, Canada, Australia, and England and Wales to teaching procedure stand in marked contrast to other features of these legal systems in which the approaches taken are quite similar. By comparing the way in which procedure is taught across these common law systems and then by observing the distinctive features of legal education, legal scholarship, the practice of law and the organization of the profession, and civil justice reform in these legal systems, it is possible to trace a link between the way procedure is taught (or not) and these other aspects of the life of the law.

The fact that the approach to teaching procedure has remained relatively constant in these legal systems over the years, and that only rarely has it been the subject of reflection and critique might suggest that a comparative project such as this is likely to be purely of academic interest. If things have not changed in the past, these musings are likely to serve only to satisfy the idle curiosity of specialists in the field. However, times are changing. Globalization and the increased interaction between lawyers and legal systems is prompting a review of the relationship between legal education and the qualifications required for admission to the profession. Advances in information technology are changing the way in which disputes are resolved and the approach that is taken to questions of access to justice.

There are signs in all four countries that the continuum of legal education, legal scholarship, legal practice, and civil justice reform is changing. There are also signs that important decisions about the nature of the legal community and the role of its members—students, scholars, practitioners, and jurists—are at hand. In the United States, where each of more than two hundred law schools is required to teach a compulsory civil procedure course to every law student, there exists a dynamic community of proceduralists with an impressively broad and diverse academic interest in the subject. By contrast, in Canada, despite a long history of treating procedure as a required subject, the Federation of Law Societies' newly established standards for the common law degree have raised questions about the place of procedure in the prescribed curriculum.[2] In Australia also, at a time when

2. In its submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree, the Law Society of Upper Canada wrote: "In listing these competencies the Law Society … has deleted civil procedure as a required competency. It is important for law students to understand the principles that govern the resolution of

academic interest in civil procedure is growing, there have been informal suggestions that civil procedure should be removed from the core curriculum to make space for emerging areas of legal practice. And in England and Wales, major inquiries into civil justice reform—first, the Woolf Report, and more recently, the Jackson Report—together with major reforms to the profession under the *Legal Services Act*,[3] also raise significant questions about the links between the way procedure is taught and the way in which civil justice reform is conducted.

In addition to the important practical implications of these questions for legal education, legal scholarship, legal practice, and civil justice reform, there are important theoretical insights to be gained by exploring the link between the decision to include a subject in a university program and the advancement and dissemination of knowledge in the area. What makes a subject worth teaching and learning as a distinct and cohesive body of knowledge or series of issues? How does treating a subject such as procedure as a distinct and cohesive academic subject affect the rest of the law school curriculum? How does the approach taken foster or impede the development of a community of scholars specializing in the subject—scholars who may, in turn, become stewards of the field? And more broadly, what difference does the way we approach the teaching of particular subjects make to our understanding of the law as a whole?

The Project on Teaching Procedure

In 2010 the Leverhulme Trust sponsored a visiting professorship at Oxford to explore the possibility of introducing procedure as a subject in the legal curriculum of England and Wales. Reflecting on the prospect of introducing a new subject to the curriculum raised a range of fundamental questions. The idea that a well-established academic subject in some common law systems might not exist at all in others is a fascinating question in and of itself. And to meet the challenge of imagining ways in which it might be introduced into the curriculum, it would be necessary to understand how, and why, the subject could thrive in some legal systems and not exist at all in others.

Because procedure would be a new subject, if it were to be introduced in England and Wales, it would require more than simply hiring instructors and

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disputes in the Canadian common law system; it is not essential for them to learn specific practice rules in law school. Students should be exposed to the principles while learning the foundations of common law… ." Law Society of Upper Canada, Proposed Law Society of Upper Canada Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree (November 2008) at 6.

3. *Legal Services Act 2007* (UK), c 29.

ordering course materials as would be the case for a well-established subject for which the instructor in a particular law school had gone on sabbatical or retired. In fact, the prospect of introducing a new subject to the law school curriculum would present, in some ways, a more complex challenge even than staffing and organizing the entire teaching program for a new law school in which the subjects to be taught were well established. After all, who would be qualified to teach the subject? There would be no tradition of discussion and debate on core issues and principles. There would be no corpus of literature and source for teaching materials. There would be no precedents for approaches to subject-specific course structures or teaching methods. And there would be no precedents for methods of evaluation. Moreover, as will be discussed in greater detail in the articles in this collection, if the subject is different from the other, substantive law subjects, it would not be possible simply to adapt by analogy methods and materials developed for those subjects.

In the absence of a strong local tradition of teaching the subject, the possibility of introducing the subject could only be imagined with the support of a community of specialists from other similar legal systems. For the visiting professorship, garnering such support generated a fascinating challenge and opportunity because the scholarly community of proceduralists in the common law world outside the United States is remarkably small. This is in sharp contrast with the civil law world, where annual meetings of national associations of procedural law attract hundreds of participants, publications of every shape and size proliferate, and *festschrifts* to leading figures abound. In England and Wales, a few towering figures[4] have toiled largely alone in the field. In Canada, an effort to secure the involvement of all the available scholars specializing, at least in part, in procedure in the preparation of a national casebook resulted in the participation of less than a dozen co-authors.[5] And in Australia, up until the last decade, there were very few full-time legal academics interested in civil procedure.[6]

Indeed, the struggle in the common law world, at least outside the United States, to sustain engaged communities of procedural scholars is illustrated by the composition of the membership in the International Association of Procedural

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4. Such as Sir Jack Jacob, Dame Hazel Genn, Professor Adrian Zuckerman, and Mr. Neil Andrews.
5. Janet Walker, ed, *The Civil Litigation Process: Cases and Materials*, 7 ed (Toronto: Emond Montgomery, 2010). Many others contributed to this text: Garry D. Watson, QC, Founding Editor; Timothy Pinos, Senior Editor; Jane Bailey, Editor; Barbara Billingsley, Editor; Trevor C.W. Farrow, Editor; Colleen M. Hanycz, Editor; Erik S. Knutsen, Editor; Ronalda Murphy, Editor; Andrew Pirie, Editor; Sean Rehaag, Editor; Lorne Sossin, Editor.
6. Dr. Bernard Cairns has been the doyen of Australian civil procedure academics since the 1980s.

Law (IAPL), the principal international organization in the field. While the IAPL members from the common law legal systems outside the United States represent a far greater proportion of the procedural specialists within their own countries than do the members from the United States and the Civil Law Countries, the IAPL members from the common law systems outside the United States represent only a very small proportion of the membership of the IAPL. In other words, despite the over-representation of common law proceduralists relative to their local communities, they constitute a relatively small proportion of the membership of the IAPL.

Accordingly, the occasion to reflect in a comparative way on the teaching of procedure in common law systems proved to be an ideal opportunity for common lawyers specializing in procedure to exchange ideas and foster collegial engagement among scholars who otherwise often worked in relative isolation. In this way, the Project on Teaching Procedure was formed to foster collaboration among common law proceduralists and to promote discussion of issues of common concern in their field.

One early initiative of this informal group was to convene a workshop at Herstmonceux Castel in Sussex, England in the summer of 2010 to explore the teaching of procedure in comparative context. The Herstmonceux Workshop participants included Professor Adrian Zuckerman, Mr. Andrew Higgins, Dr. Carla Crifò, Dr. Shirley Shipman, Dr. Dierdre Dwyer, and Mr. Winky So from England; Dean David Bamford and Professor Camille Cameron from Australia; Professors Tom Rowe and Beth Thornburg from the United States; Professor Michael Karayanni and Dr. Rabeea Assy from Israel; and Professors Garry Watson, Trevor Farrow, Erik Knutsen, and Janet Walker from Canada. As a result of the generous support of the Leverhulme Trust, the Harry Arthurs Collaborative Research Fund of Osgoode Hall Law School, Queen's University Faculty of Law, and Oxford University Faculty of Law, the participants were able to meet and discuss a series of papers that were ultimately developed into this collection of articles.

The workshop participants were confronted with a range of very elementary questions. One such question was: What do we mean by procedure? In discussing the various possible names for the subject, the one thing on which all readily agreed was that no single name adequately captured the precise scope and contours of the subject. Despite this, everyone seemed relatively comfortable with a series of defining features that suggest a common core of topics and interests and a range of cognate subjects that collectively describe the field.

First, the primary focus of the subject was on the process of resolving civil disputes and to a lesser extent on the process of determining criminal matters or matters in specialized administrative tribunals. Some of us also specialize in

these other public law subjects. However, the special rights of accused persons in criminal law matters and the specialized procedures in administrative tribunals distinguish those situations from the resolution of private law matters in ways that were sufficiently fundamental to make civil procedure a separate subject. Therefore, although the term "procedure" is often used without the adjective "civil" in this special issue, it is intended to denote civil procedure unless otherwise specified.

Second, the primary focus is on the pre-trial phase and to a lesser extent on the trial phase of a civil dispute. Again, some of the participants also specialized in trial process and evidence. At least historically, it has been the pre-trial phase (and, in some countries, the pre-action phase) that is in the hands of parties and their lawyers in the common law. While the parties and their lawyers also take an active role in the trial phase, and judges are increasingly becoming involved in the pre-trial phase, the nature of their roles and responsibilities is sufficiently different in these two phases to warrant distinguishing them from one another as different subjects.

Third, the primary focus is on the process of resolving disputes through litigation, and to a lesser extent on other means of resolving civil disputes, such as negotiation, mediation, and arbitration. Some of the participants also specialize in one or more of these other forms of dispute resolution, which were once described as alternative dispute resolution. Today, litigation is rarely used on its own to resolve disputes, and civil disputes are often resolved long before the trial phase is reached by lawyers through these other means.

For some, this shift in emphasis suggests that the study of litigation should be replaced by the study of other forms of civil dispute resolution. The Workshop participants disagreed. The increased prominence of other forms of dispute resolution does not mean that these forms should compete with one another in the curriculum, or that the study of the litigation process has become redundant. On the contrary, the various forms of dispute resolution complement one another. While these other forms of dispute resolution may be rapidly becoming a first resort, they are often described as "bargaining in the shadow of the law."[7] As the traditional means of state-sponsored dispute resolution, civil litigation remains the last resort for aggrieved parties who wish to vindicate their rights. Accordingly, it may be said that a good grounding in the civil litigation process is essential to understanding the rationale and merit of other means of dispute resolution, and when and how they are best pursued.

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7. A phrase originally coined by Mnookin and Kornhauser in Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950.

Fourth, the primary focus is on the legal principles governing the process of civil litigation, or "the law" of dispute resolution, and to a lesser extent the related subjects, such as advocacy, professional responsibility, and the administration of justice, which address the process from a different perspective. These too were additional areas of specialization for some of the Workshop participants. In studying the broader impact of the teaching of procedure in this collection of articles, the authors are engaged in a study that could be said to fall in this broader set of interests, but in speaking of "teaching procedure," we mean the teaching of the legal principles governing the civil litigation process.

Fifth, the primary focus is on procedure in common law systems. Some of the Workshop participants also specialize in comparative procedure, and the study of procedure is undoubtedly enriched by understanding its principles in their historical and comparative contexts across the divide between common law and civil law systems. However, the distinctions between procedure in common law and civil law systems are sufficiently fundamental to warrant limiting comparative analysis in these articles to common law systems.

It is helpful to describe the subject in terms of its primary focus and the range of cognate subjects that are related to it. While it is possible to distinguish the core of the subject from related subjects, if it were taught in isolation from these other subjects, procedure would become arid and technical. In fact, it is difficult to imagine teaching the subject if it were removed entirely from the context that these other subjects provide. Furthermore, while there may be a common core to the subject across common law systems, for reasons explored in the papers in this collection, there are subtle differences in the way that the subject is understood from country to country.

Nevertheless, these variations make settling on a single accurate name for the subject all but impossible. "Civil procedure" is a good name because it clarifies that the issues are those that arise in the resolution of civil rather than criminal proceedings. However, to some it suggests a subject that excludes consideration of forms of dispute resolution other than litigation, and in some places this would not be accurate. Using the terms "dispute resolution" or "civil dispute resolution" would address this concern, but at the expense of the controversy this would create for those who would integrate other cognate subjects but who would not include so-called "alternative" dispute resolution in their version of the subject. "Civil justice" is also a good name because it suggests that civil procedure is set in its broader institutional context, but again, the suggested emphasis on this particular context would come at the expense of the suggested inclusion of another context. Similarly, "the civil litigation process" might suggest to some

the inclusion of the professional context, but perhaps the exclusion of some other cognate subjects.

Although there may be no single accurate name, adopting the simple term "procedure" could prove to be a good solution. While it is a term that is rarely used on its own among common law lawyers, it is well established in the civil law with a significant proportion of legal academics claiming it as their subject. And, for a subject that is robust and well-established in some common law countries, and nascent, marginalized, or very much in flux in others, the simple term "procedure" could serve to encourage those who want to call this subject their own and who would welcome the easy recognition enjoyed by their civilian counterparts upon describing themselves as "proceduralists."

Another preliminary question is what is meant by a "proceduralist." The obvious answer is that it is someone who specializes in procedure, but the question arises because procedure is not always taught by full-time academics, let alone those specializing only in procedure. Also, in some countries there may be so few specialists that it is not possible to identify a community of proceduralists. To the extent that the teaching of procedure by proceduralists and the presence of a community of proceduralists could have an impact on the legal profession and on civil justice reform, it will be helpful to consider the defining features of specialists in procedure or proceduralists.

Someone who teaches procedure and who engages in scholarship in the area, and possibly law reform, is clearly a proceduralist. However, not many of those who teach procedure would meet these criteria. In some places procedure is taught by full-time academics who do not consider themselves specialists in the subject; in other places procedure is taught by practitioners who teach only part-time. In some places it is common for academics teaching law to have an active practice; in others, it is common for many full-time law teachers not to engage regularly in scholarship or graduate supervision. The variations from legal system to legal system, from place to place within a legal system, and even from person to person within a law school, can make it difficult to determine who is a proceduralist merely by noting their pattern of activities.

Accordingly, it could be better to take a functional approach: A proceduralist is a person with a sustained interest in civil procedure and related subjects, who is actively engaged in the development of the subject. Of course this will include those who regularly teach and publish in the field. However, in some cases it will also include those who do not publish, or who do not publish in the field of procedure, but who teach the subject in a way that contributes to its ongoing renewal and revitalization. In other cases, it could also include those who do not

currently teach procedure, but who are active as scholars or who are engaged in law reform in the area. And in some places, the question of who is a proceduralist may be affected by the expectations for law teachers and legal academics more generally, and should be measured against those expectations.

The question of degree of engagement in the field necessary to be considered a specialist may vary even more from one place to another. It may be more difficult to demonstrate significant leadership in the field in a legal system in which the field is active and well developed and equally, it may be more difficult to make a contribution to the development of the field at all where there is little academic engagement and the field is underdeveloped. Both of these challenges suggest that deciding what should count as a contribution sufficient to distinguish someone as a specialist in the field can be highly context-specific.

With these variations in mind, it was particularly effective to have participants at the Workshop who represented not only a diverse cross-section of the common law systems and their various perspectives on teaching procedure, but also the full spectrum of levels of experience, including those at the peak of the field such as Professors Rowe, Watson and Zuckerman and those just completing their doctoral studies and beginning to establish themselves as specialists in procedural law. Of the many lively debates and discussions on the wide range of issues considered, the participants were unanimous in their view on one point: The opportunity to collaborate across legal systems and generations was critical to the development of a strong tradition of scholarship in the field. The hope is that the Herstmonceux Workshop and this collection of articles will encourage others to join in the work begun by the Project on Teaching Procedure and, in this way, carry on the tradition of the great proceduralists of our time.

Tribute to a Great Proceduralist

The recent retirement of Garry D. Watson from Osgoode Hall Law School brought with it the welcome opportunity to reflect on a truly extraordinary career. Born in Australia, Professor Watson emigrated after completing his first law degree there, pausing en route to Toronto—first, to teach as a legal writing fellow at the University of Pennsylvania Law School, and then, to complete an LL.M. at Yale.

Perhaps as a result of his Australian background and his time at Penn and Yale, Professor Watson arrived in Canada with a broad international outlook ready to foster the very best in the teaching of procedural law. Eschewing artificial distinctions between theory and practice, he built an academic career that shaped the field in Canada and informed the profession of the era. Generations of lawyers developed

a critical approach to the subject through the casebook on civil procedure that he began with Stephen Borins (later Justice Borins of the Ontario Court of Appeal) and Neil Williams in 1973. The casebook is currently in its seventh edition, with a dozen authors from across the country. Thousands of practitioners honed their skills in the Intensive Trial Advocacy Workshop, an annual eight-day program that he founded in 1979; and similar numbers of third-year law students benefitted from the Trial Practice Seminar, a law school course modelled on the Workshop. In the last decade of his career, his pioneering seminar on class actions advanced the understanding of that field, and his series of symposia on class actions at Osgoode Professional Development stimulated new thought among leading figures from the bench, bar, and academy.

Spending his years of sabbatical leave in major Toronto law firms ensured that he could talk the talk and walk the walk. As a result, his writings became a primary source of guidance in civil procedure to countless practitioners over the years. His annually published annotation of the *Rules of Civil Procedure*, *Watson & McGowan*, and his looseleaf commentary, *Holmested & Watson*, are standard reference works. His leading articles continue to be consulted many, many years after their publication. His contributions to the work of the Ontario Law Reform Commission, the Canadian Institute for the Administration of Justice, the rules committees of several provinces, the American Law Institute, and the International Association of Procedural Law are the hallmark of the best that can be achieved by applying the combined insights of the academic and the practitioner to the most challenging questions of civil justice reform.

So much more could be said. As a teacher, a colleague, and a mentor to lawyers of all stages in their careers, Garry Watson became truly larger than life. A model of passionate engagement, his terse interjections have sharpened the debate just as frequently as his hearty laughter has warmed the room. His frank but remarkably astute criticism was unfailingly coupled with genuine admiration for real achievement so that he has merited, and received, the respect and affection of an extraordinary range of the most accomplished members of the legal community.

To those who have known him and worked with him, it is gratifying to know that Professor Watson's extensive contributions to the profession did not go unrecognized. Professor Watson was one of the few full-time academics ever to be named Queen's Counsel. The Law Society Medal (1992) and the David Mundell Medal for outstanding contribution to the law through legal writing by the Ontario Bar Association (2005) are testaments to the high esteem in which he has been held by members of the profession in Ontario. And the Samuel E. Gates Litigation Award (2004), which is given by the American College of Trial Lawyers only in years when a deserving recipient is found,

and which is usually reserved for a judge or a practising lawyer, is a fitting tribute to one of the great proceduralists of our time.

As for his contributions to the legal academy and to Osgoode, a well-deserved teaching award and this special issue of the Osgoode Hall Law Journal are but small tokens of the sincere regard for him felt by those of us who have been his students, colleagues, and friends. In many respects, it is Professor Watson who is to be thanked for the fact that law students and academics in Canada and elsewhere in the common law world enjoy a rich and multi-faceted curriculum and a lively scholarly community animated by discussions and areas of scholarly inquiry that will continue to be inspired by his work for many years to come. It is with this in mind that we offer this volume in tribute to Professor Garry D. Watson.